Republic of South Africa
In the High Court of South Africa
(Western Cape Division, Cape Town)

[REPORTABLE]

Case No: 2474/16

In the matter between:

CONGRESS OF TRADITIONAL LEADERS OF SOUTH AFRICA	Applicant
and	
SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA	Second Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Respondent
MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Fourth Respondent
NATIONAL PROSECUTING AUTHORITY	Fifth Respondent

Matter Heard on: 17 and 18 August 2016
Judgment delivered on: 23 November 2016

JUDGMENT

MANTAME, J

A INTRODUCTION

[1] Applicant brought an application seeking numerous prayers before this Court in the following; an interdict against the fourth respondent or any relevant executive authority under the Constitution of the Republic of South Africa Act 108 of 1996, ("*the Constitution*"), from taking steps under Section 10 of the Traditional Leadership and Governance Framework Act 41 of 2003 to cause the removal of His Majesty King Dalindyebo ("*the King*") of the AbaThembu nation; declaring that the Parliament of the Republic of South Africa has failed in its constitutional duty in terms of section 212(2) of the of the Constitution to "deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law" in that it has not passed legislation dealing with the status and powers of traditional authorities and their jurisdiction over traditional courts; declaring that the Parliament of the Republic of South Africa has violated the constitutional rights of the traditional leaders guaranteed in terms of section 9(1) of the Constitution and the equal protection and benefit of the law, in that they do not enjoy judicial immunity from criminal and civil liability arising from their decisions in the traditional courts; declaring that the Parliament of the Republic of South Africa has violated the constitutional rights of the traditional communities guaranteed in terms of section 34 of the Constitution to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a traditional court, in accordance with customary law.

[2] In addition a declaration is sought that the decision of the National Director of Public Prosecutions to prosecute His Majesty, King Buyelekhaya Dalindyebo for exercising his civil and criminal jurisdiction, violated section 211(1) of the Constitution in that it violated the principle of judicial immunity extended to traditional leaders when they exercise their judicial power; declaring that the decision of the National Director of Public Prosecutions to prosecute His Majesty, King Buyelekhaya Dalindyebo violated section 10 of the Constitution which guarantees the right to dignity. Applicant also seeks to review and set the decision of the National Director of Public Prosecutions to prosecute His Majesty, King Buyelekhaya Dalindyebo on the ground that the actions of the King were not offences in terms of the Criminal Procedure Act, read together with the Transkei Penal Code and directing the Parliament of the Republic of South Africa to pass appropriate legislation in terms of

section 212(2) of the Constitution dealing with the status of traditional courts and the criminal jurisdiction of traditional leaders, within a period of thirty six (36) months from the date of the order of this Court.

[3] Mr Masuku and Ms Long appeared for the applicant, Mr Bokaba SC and Ms Mangcu-Lockwood appeared for first and second respondents and Mr Arendse SC, Ms Mayosi and Ms Mbangeni appeared for third, fourth and fifth respondents.

B BACKGROUND

[4] Applicant, the Congress of Traditional Leaders of South Africa ("*Contralesa*") was formed in 1987 by some traditional leaders of the erstwhile homeland of Kwa Ndebele under the auspices of the United Democratic Movement ("*UDM*") with the material and political support of the African Nation Congress ("*ANC*"). The purpose of its formation was to resist the apartheid programme of homeland – style independence. Since it was part of the mass democratic movement, it continued its relationship with the ANC, up until after the unbanning of political organisations. Their relations deteriorated when the ANC failed to support the participation of traditional leaders, or Contralesa, in CODESA. After some negotiations, the traditional leaders participated in the drafting of the Interim Constitution and to some extent the Final Constitution ("*The Constitution of the Republic of South Africa Act, 108 of 1996*") – See www.contralesa.org. It appears that the objective of applicant has broadened, as currently, amongst others, it now operates as a voluntary organisation which aims to protect, reinstate and promote the institution of traditional leadership, its traditional status and bonding function in the communities and the nation.

C SUMMARY OF FACTS

[5] Applicant contends that it was authorised to bring these proceedings before this Court by its National Executive Committee on 27 January 2016. As its aim is to re-instate, protect, organise and promote the institution of traditional leaders, a number of traditional leaders belonging to the applicant support this application.

[6] The main trigger for Contralesa to bring these proceedings before this Court is the fear and anxiety caused to traditional leaders of South Africa and their communities by the arrest, criminal charges, trial, conviction and sentencing of His Majesty, King Dalindyebo of the AbaThembu nation. In the eyes of traditional leaders, the whole criminal trial resulting in the conviction and sentence of the King meant that traditional leaders do not enjoy immunity from civil and criminal liability for applying customary law in the traditional courts. When the High Court in Mthatha convicted the King, it did not address the matter in the context of sections 211 and 212 of the Constitution more particularly section 211(3) of the Constitution that makes it mandatory for the Courts to apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law. Further, the High Court did not deal with the question of immunity. Furthermore, the failure of Parliament to pass appropriate legislation in accordance with sections 211 and 212 of the Constitution has undermined their constitutional rights, as a consequence of which traditional leaders are not able to discharge their judicial functions without fear, favour and prejudice. This issue, without doubt, appeared central to these proceedings.

[7] In addition to the claim for judicial immunity, Controlesa seeks to vindicate its constitutional rights, that is, section 9, the right to equality; section 10, the right to dignity; Section 30, the right to use the language and to participate in the cultural life of their choice (this relief was never sought in the applicants notice of motion); and Section 34, the right to have any dispute that can be resolved by the application of law and decided in a fair public hearing before Court.

[8] According to applicant, the King was charged with having committed certain criminal offences in 1995. On 21 October 2009, the King was convicted on charges of culpable homicide; three counts of arson; three counts of assault with intent to do grievous bodily harm; defeating the ends of justice and kidnapping. He was sentenced to fifteen (15) years direct imprisonment. The matter was taken on appeal, whereafter the Supreme Court of Appeal set aside some of the convictions and sentences and his term of imprisonment was reduced to twelve (12) years. A further appeal to the Constitutional Court was then dismissed.

[9] Traditional leaders, now take issue with the fact that they may face criminal charges pursuant to the execution of their judicial duties. They claim this happened to the King. Their heightened fear is that their rights to have disputes resolved in traditional Courts in accordance with customary law has been subverted by the criminalization of the King's actions. In dispensing justice in traditional courts on a daily basis, the traditional leaders never felt that the system is criminally deficient. The fact that traditional leaders can be criminally or civilly charged for decisions taken at traditional courts is inconsistent with the principle that recognizes the status, role and functions of traditional leaders.

[10] According to applicant, the Constitution requires that Parliament specifically grant protection to traditional leaders in legislation, so as to ensure the independence of traditional leaders and their courts. The principle of judicial immunity that applies to other members of the judiciary, i.e. magistrates and judges, must apply with equal force and effect to members of the judiciary presiding in traditional courts. The prosecution and conviction of the King for carrying out his traditional leadership role simply means that traditional leaders do not enjoy the same judicial immunity that magistrates and judges enjoy. This is unfair discrimination and a violation of section 9(1) of the Constitution.

D ARGUMENTS PRESENTED BY THE PARTIES IN COURT

[11] Central to applicant's submissions was that Parliament has failed to comply with its obligations in terms of section 212(2) of the Constitution by not granting traditional leaders judicial immunity from criminal and civil liability for the decisions taken during their performance of judicial functions in traditional courts. Parliament has violated their constitutional rights in terms of sections 9, 10 and 30 and 34 of the Constitution. As a result, traditional leaders do not enjoy the same judicial immunity as magistrates and judges. In order for this situation to be remedied, Parliament must "*pass appropriate legislation in terms of section 212(2) of the Constitution dealing with the status of traditional Courts and the Criminal jurisdiction of traditional leaders*." Further, that legislation should grant them immunity when they commit misconduct in the performance of their judicial functions.

[12] It was argued in no uncertain terms that the spark of these proceedings is the conviction and sentence of the King, which caused fear or distress amongst other traditional leaders.

[13] First and second respondent opposed the granting of the relief sought by applicant on the basis that applicant seeks to undo and reverse the findings of the High Court, Mthatha, Supreme Court of Appeal and the Constitutional Court on the conviction and sentencing of the King. It was pointed out that, ***first***, there is no obligation imposed on Parliament by section 212 of the Constitution to pass legislation as contended by applicant; ***second***, pursuant to the provision of section 212 of the Constitution, Parliament has enacted the Traditional Leadership and Governance Framework Act 41 of 2003 ("*the Traditional Leadership Act*") which provides for the institution, status and role of traditional leadership in accordance with customary law. For this reason, Parliament cannot be said to have failed to discharge its obligation in terms of section 212 of the Constitution; ***third***, to the extent that Parliament may not have fulfilled its obligations as contended by applicant and in accordance with the principle of subsidiarity, the applicant must challenge the constitutionality of the Traditional Leadership Act and not seek to compel Parliament to legislate in the manner preferred by the applicants; ***fourth***, the relief sought by the applicant would amount to interference with the principle of separation of powers, and ***last***, the claims of discrimination made by the applicant are not only unsubstantiated but are unfounded both on the facts and in law.

[14] First and second respondents submitted that in order for this Court to conclude that there is a *lacuna* in the law dealing with the status, role and function of traditional leaders, proper interpretation of sections 211 and 212 of the Constitution must be employed.

[15] Mr Bokaba SC for first and second respondent argued that the institution, status and role of traditional leadership according to customary law are dealt with under sections 211 and 212 of the Constitution. On a proper reading and construction of these provisions, there is no obligation imposed on Parliament to pass the particular legislation so advocated by applicant. The language of section 212(1) is framed in permissive, and not in obligatory, terms. Our Courts have made

a clear distinction between provisions that impose an obligation and others that do not do so. Section 212(1) merely enables Parliament to enact legislation that provides a role for traditional leadership as an institution. Any such legislation is subject to the Constitution. The absence of legislation dealing or seeking to grant judicial immunity to traditional leaders for conduct not countenanced by the Constitution, as pleaded by the applicant, cannot amount to failure by Parliament to discharge any obligation in terms of section 212(1).

[16] It was first and second respondents' submission that even on a generous or widest meaning; section 212 does not require Parliament to pass legislation granting immunity to traditional leaders or to pass legislation dealing with the status of traditional leaders when they exercise judicial functions. The only legislation specified under section 212, and which Parliament is permitted, as opposed to obliged, to pass is legislation that provides for a role for traditional leadership as an institution and nothing more than that - See *My Vote Countes NPC v Speaker of the National Assembly and Others 2016(1) SA 132 (CC) at para [28] and [30].*

[17] First and Second respondents further contended that it is both factually and legally incorrect for the applicant to claim that Parliament has failed to pass any legislation pursuant to the provisions of section 212 of the Constitution. For instance, the roles and functions of traditional leadership are dealt with in Chapter 5 of the Traditional Leadership Act, and thus giving effect to section 212 of the Constitution.

[18] Much emphasis was made to the effect that it is only in the absence of legislation that applicant may rely on section 212 not in the instant case – See *My Vote Counts* (*supra*) at para [160] –

> "***Circumstances in which the principle of subsidiarity applies and the need for it***
>
> [160] *Contrary to the suggestion in the minority judgment that our insistence on compliance with the principle puts form ahead of substance, this principle plays an important role. The minority judgment correctly identifies the*

> *'interrelated reasons from which the notion of subsidiarity springs'. First, allowing a litigant to rely directly on a fundamental right contained in the Constitution, rather than on legislation enacted in terms of the Constitution to give effect to that right, would defeat the purpose of the Constitution in requiring the right to be given effect by means of national legislation. Second, comity between the arms of government enjoins courts to respect the efforts of other arms of government in fulfilling constitutional rights. Third, 'allowing reliance directly on constitutional rights, in defiance of their statutory embodiment, would encourage the development of two parallel systems of law."*

[19] It was also contented that applicant is not seeking relief to increase the slow pace of the conclusion of the Traditional Courts Bill ("*the Bill*") that is before Parliament; it only registered its complaint on the delay in its processing. Perhaps applicant was well advised in not seeking relief on the Bill, as the foundation of this application is the conviction and sentencing of the King. In any event, that Bill does not address the issues applicant sought relief on.

[20] It was argued further that applicant has failed to challenge the legislation giving effect to section 212(1) of the Constitution, because it recognized that Parliament has enacted the Traditional Leadership Act. Applicant only pointed out the legislative deficiencies, either in the Traditional Leadership Act, or at all in that there is no mechanism for dealing with judicial misconduct involving traditional leaders especially when they exercise judicial authority. According to first and second respondent, this assertion cannot be correct, as the Courts have recognized in the clearest of terms that the Traditional Leadership Act is the legislation that was enacted in pursuance of the imperative contained in section 212(1) of the Constitution and that the Traditional Leadership Act provides the necessary framework envisaged in section 212(1) – See *Matiwane v President of the Republic of South Africa and Others [2014] 2 All SA 419 (ECM), at paras [6] to [8]; Mmuthi Kgosietsile Pilane & Another v Nyalala Pilane and Another Case No. CCT 46/12 [2013] ZA CC 3, at para [33]; Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims 2015 (3) BCLR 268 (CC), at para [15].*

[21] In light of the fact that applicant has identified a deficiency in the legislation that was enacted to give effect to section 212(1), can it be said that Parliament has failed to discharge its obligation in terms of section 212(1) of the Constitution, and demand that Parliament enact a different piece of legislation? It was Parliament's submission that when Parliament has passed legislation pursuant to a particular provision of the Constitution, a party is not permitted to rely directly on an obligation imposed on Parliament to pass legislation pursuant to that provision. A party must challenge the validity of the legislation enacted pursuant to that particular provision of the Constitution. In *My Vote Counts* (*supra*), the subsidiarity principle dictates that:-

> "[53] …*a litigant cannot directly invoke the Constitution to extract a right he or she seeks to enforce without first relying on or attacking the constitutionality of, legislation enacted to give effect to that right. This is the form of constitutional subsidiarity Parliament invokes here. Once legislation to fulfil a constitutional right exists, the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role.*"

[22] If the charge and complaint by applicant is that there is a deficiency or inadequacy in the Traditional Leadership Act to deal with misconduct matters involving traditional leaders when exercising judicial authority, it follows that the proper recourse is to challenge the constitutional validity of this piece of legislation enacted to give effect to section 212(1) of the Constitution. Since there is no constitutional challenge to the Traditional Leadership Act which gives effect to Section 212(1), applicant cannot rely directly, on or invoke section 212(1).

[23] Again, it was submitted that by not passing legislation and granting immunity to traditional leaders when they exercise judicial functions, Parliament has unfairly discriminated against traditional leaders, and that this constitutes a violation in terms of section 9(1) of the Constitution. First and second respondents contended that this claim only serves to highlight the disjointed nature of this application. This claim is terse, veiled, vague and unsubstantiated. Thus applicant has not pointed out any

specific legislation that it claims gives magistrates and judges immunity for which it seeks, equality with magistrates or judges, and or the passing of such appropriate legislation giving immunity to traditional leaders. The claim for the infringement of constitutional rights of traditional leaders ought to be clear and forthright, not only clearly identifying the alleged offending conduct or provisions and the constitutional rights that have been infringed by Parliament, but also demonstrating, in the clearest possible language the nature and extent of the alleged infringement – See *Phillips and Others v National Director of Public Prosecutions 2006 (1) SA 505 (CC) at para [43]; Minister of Safety and Security v Sekhoto 2011 (5) SA 367 (SCA) at para [49]*. A complainant who invokes the equality clause to attack a legislative provision or executive conduct on the ground that it differentiates between people or categories of people in a manner that amounts to unequal treatment or unfair discrimination must establish the following:- *first*, whether the respondents' legislation or policy differentiates between people or categories of people – See *Mbana v Shepstone & Wylie 2015 (6) BCLR 693 (CC) at paras [26], [27], [35] and [36]; Harksen Lane No and Others 1998 (1) SA 300 (CC) at para [54]*, *second*, whether that differentiation is unfair, *last*, the complainant bears the onus of proving that conduct complained of is not rational, it amounts to discrimination and that discrimination is unfair. First and second responded submitted that applicant's claim of discrimination hopelessly fails this test.

[24] It was applicant's contention that their claim for judicial immunity is based on common law and not upon a particular provision in a particular legislation passed by Parliament. So in their own words, there is no legislation passed by Parliament granting judicial immunity to magistrates and judges that effectively excludes traditional leaders. If that is so it can never be said that there is a differentiation by Parliament between judges and magistrates on the one hand, and the traditional leaders on the other.

[25] Regarding the Traditional Courts Bill, first and second respondents argued that there is no connection between matters covered in the Bill and the complaints raised and the relief sought by the applicant. The Bill does not address the issue of judicial immunity for traditional leaders who exercise judicial functions, nor does the Bill seek to legitimize the unconstitutional conduct of traditional leaders who exercise

judicial functions such as King Dalindyebo for which he was charged, convicted and sentenced. In any event, it was conceded by applicant that no piece of legislation, including the Bill will countenance the type of conduct for which King Dalindyebo was convicted of and sentenced. Besides, the complaint raised by the applicant that the processing of the Bill has been delayed tremendously cannot be determined by this Court. The power to determine what process ought to be followed falls within the constitutional domain of the national assembly, and it is not for the Court to dictate to the National Assembly how it should go about regulating its own business – See *Oriani-Ambrosini v Sisulu, Speaker of National Assembly 2012(6) SA 588 (CC) at paras [54] and [84]* – See also *My Vote Counts* (*supra*) at para [156] –

> "[156] *Despite its protestation to the contrary, what the applicant wants is but a thinly veiled attempt at prescribing to Parliament to legislate in a particular manner. By what dint of right can the applicant do so? None, in the present circumstances. That attempt impermissibly trenches on Parliament's terrain; and that is proscribed by the doctrine of separation of powers.*"

[26] It was pointed out by first and second respondents that applicant's ultimate quest in this application is nothing other than to have the conviction and sentence of the King on charges of unconstitutional conduct set aside. In essence, applicant seeks to bypass the Traditional Leadership Act which is the legislation that was enacted to give effect to section 212 of the Constitution, and to order Parliament to enact the specific legislation sought by the applicant, and that will trench upon the doctrine of separation of powers. Applicant may not prescribe to Parliament to enact a particular legislation that is not contemplated by the Constitution. The relief sought by the applicant is impermissible. According to Parliament, it has fulfilled all its obligations in terms of section 212 of the Constitution. It therefore follows that this application should be dismissed with costs, including costs of two counsel.

[27] Mr Arendse SC informed the Court that he received a notification from Mr Masuku for the applicant on the eve of the hearing that applicant is no longer proceeding with the interdictory relief that was sought against the fourth respondent. No reasons were put forward for such withdrawal. For the reason that such withdrawal came at such a late stage, it was Mr Arendse SC's submission that a cost

order should be awarded to respondents in respect of the first relief. When this Court requested clarity from Mr Masuku as to which other prayers was the applicant abandoning as no submissions were made by him on all prayers. Mr Masuku responded that applicant was not abandoning any prayers, and that his instructions were to proceed with all prayers in the notice of motion.

[28] No relief is sought against third respondent. Be that as it may, third respondent felt obliged to make submissions before this Court, as the Department led by the third respondent is responsible for, and involved in the research and promotion of legislation, including the legislation complained about by the applicant, that is, dealing with the status and powers of traditional authorities which has a bearing on the administration of justice. Also, third respondent submitted that he has an interest in the relief sought against the fifth respondent in as much as it seeks to review and set aside the decision of the fifth respondent as allegedly in violation of section 10 of the Constitution; on the grounds that the actions of the King were not offences in terms of the Criminal Procedure Act read with the Transkei Penal Code; and that the decision to prosecute the King by fifth respondent violates the provisions of section 211(1) of the Constitution to the extent that it violated the principle of judicial immunity extended to traditional leaders in the exercise of their judicial power.

[29] It was argued that legal proceedings can be stayed if - it can be shown that the point at issue has already been adjudicated upon. That is the fundamental doctrine of *res judicata*. It is common cause that the King has been criminally prosecuted by the High Court Mthatha, the Supreme Court of Appeal and the Constitutional Court where his application for leave to appeal was refused. So the King's guilty finding and his subsequent imprisonment constitute *res judicata*.

[30] Further, Mr Arendse SC submitted that the principle of judicial immunity as claimed by applicant is misconceived, and is based on a misunderstanding and misinterpretation of what constitutes judicial immunity. The reasons for judicial immunity are founded on legal policy. Historically, judges have been held immune against actions for damages arising out of the discharge of their judicial functions, but there was an exception from this immunity: when the Judge's conduct was

malicious or in bad faith. In the case of the King, it would not apply, having regard to the serious and grave charges he was found guilty of in various courts and for which he was sentenced to an effective 12 year term of imprisonment. Besides, this judicial immunity principle was neither addressed in the 2008 Traditional Courts Bill nor in the current Draft Bill.

[31] The King was instrumental in inflicting corporal punishment upon the victims, which is unconstitutional. By doing so, he brought the law, the Courts and the entire administration of justice into disrepute. He acted as judge, jury, prosecutor and enforcement officer in his case. The conduct of the King cannot be countenanced in customary law.

[32] According to third respondent, the Traditional Courts Bill was initially introduced into the National Assembly in 2008. It was developed to replace sections 12 and 20 of the Black Administration Act 38 of 1927, colonial-era provisions that still empowered chiefs and headman to determine civil disputes and try certain offences in Traditional Courts. It was apparent that no sufficient consultation was initiated on this Bill. Further public hearings were therefore suspended by the Portfolio Committee until further consultation had taken place. The Bill lapsed when Parliament dissolved prior to 2009 elections. The Bill was again introduced in the National Council of Provinces ("*NCOP*") in 2012 in order to address concerns raised previously. The Bill was referred to the Provincial Legislatures for consultation, as the purpose was to advance South Africa's access to justice by recognising the traditional justice system in a way that upholds the values of customary law, and our Constitution.

[33] When the Bill was first introduced into Parliament in 2008, it was met with a mountain of criticism that: - people who were mostly affected by it were excluded, whilst the traditional leaders have been involved in the drafting process. Rather than the Bill affirming the traditional process, it fundamentally altered the customary law by centralising power in the hands of senior traditional leaders and added powers that they did not traditionally hold under customary law; it denied those appearing before traditional courts legal representation; it did not promote the right of access to traditional courts by women, either as parties or members; it created new inequalities

including denying people right to appeal to state courts and empowering traditional leaders to deprive people of customary law benefits or to sentence them to community services which were perceived in some quarters as forced labour. More objections were raised that the Bill did not allow a person to "opt out of the traditional justice system." It perpetuated the boundaries of the *"Bantustan"* system and it did not recognise the constitutional imperative of the National Prosecuting Authority to institute and conduct prosecutions in criminal matters. It lapsed eventually.

[34] Third respondent detailed the history of the delay in the Bill as follows: - In July 2014, his Department embarked on a process towards proposing a new draft Bill and a task team was formed. At a meeting held on 11 August 2015, core principles which would form the basis of the new Bill were discussed by his Department and the Department of Traditional Affairs. Further meetings followed on 30 November 2015 and 3 December 2015 respectively with all key stakeholders, the applicant, the National House of Traditional Leaders and civil society. Further consultative meeting followed on 4 December 2015 when it was agreed that a reference group be established to take the process forward. The reference group met on 29 February 2016 and 22 April 2016 respectively.

[35] Otherwise, it has been demonstrated that attempts have been made to give effect to Parliament's constitutional duties in terms of section 212(2) of the Constitution. Applicant's application should be dismissed with costs including costs of two Counsel.

[36] In addition, the submission advanced by applicant that the decision of the fifth respondent to prosecute the King should be reviewed and set aside are without any legal or factual foundation. They are speculative and based on hearsay evidence. No substantive argument rooted in or based on customary law is, neither advanced, nor expert evidence to that effect in support of applicant's claim. As has been submitted, the issue related to the prosecution, conviction and sentence of the King is *res judicata – See* *Molaudzi v S 2015 (8) BCLR 904 (CC) paras [14], [15], [22] and [23]* where the legal doctrine of *res judicata* was captured. The argument advanced by applicant is flawed, and not consistent with the proper interpretation of the constitution. The status of customary law in South Africa is constitutionally

entrenched. The decision by the fifth respondent to prosecute the King for exercising his civil and criminal jurisdiction cannot be said to be in violation of section 211(1) of the Constitution. Section 211 of the Constitution provides that the institution, status and role of traditional leaders are subject to the Constitution. Currently, the traditional authority observes the system of customary law subject to the relevant legislation, in this regard, the Black Administration Act 38 of 1927. The relevant sections do not confer upon the King the criminal jurisdiction, traditional authority or judicial immunity as contended by the applicant.

[37] It was therefore the fifth respondent's contention that applicant's claims are unsubstantiated. At the time of the occurrence of the incidents that led to his trial he was not acting or ruling as a King. According to his evidence he was merely implementing a community decision; he did not act as a tribal authority in relation to any decision made; and that he was not involved in those offences. This Court should therefore not consider new or other grounds of defence that were never raised at trial or at the SCA. Judging from his defence, it is clear that when those offences were committed, at no stage was the King exercising any civil or criminal jurisdiction in a judicial capacity. If a violation of dignity has taken place, it is the King himself who violated the dignity of his victims. There is no indication on the record of proceedings from the Mthatha High Court that the King's right to dignity was violated. Applicant's contention that the King was charged in terms of the Criminal Procedure Act is misplaced as the King was charged with offences under the Transkei Penal Code Act 9 of 1993.

[38] In as far as the judicial immunity that is enjoyed by judicial officers, and that has to be extended to traditional leaders is concerned, fifth respondent submitted, this was never raised by the King at the High Court, it never formed grounds of appeal or was ever part of issues to be determined by the Supreme Court of Appeal. This application has to be dismissed with costs including two costs of Counsel.

E. ANALYSIS OF EVIDENCE AND THE APPLICABLE LEGISLATION

[39] On considering the submissions that were put before this Court, it is evident that the relief sought by applicant has reduced dramatically, though Mr Masuku failed

to concede that applicant has abandoned some prayers. The issues have now crystalized to the following:- (i) judicial immunity, (ii) failure of Parliament with its obligations in terms of sections 211 and 212 of the Constitution to pass legislation; (iii) and the review and setting aside of the fifth respondent's decision to prosecute the King. These were the three (3) issues that were substantially dealt with in these proceedings.

(i) *Judicial Immunity*

[40] Judicial Immunity is a form of protection afforded to judicial officers by public policy in the performance of their duties. It protects the judiciary against legal action brought against them for judicial actions, regardless of their incompetency, negligent conduct or in violation of the status. The purpose of judicial immunity is to encourage judges to act in a fair and just manner, without regard to the possible extrinsic harms their acts may cause outside of the scope of their judicial work. This protection is not at all absolute. Judicial immunity does not protect judges from decisions made while off the bench. However, while the judiciary may be immune from legal action involving their conduct or actions, they may still be subject to criminal prosecutions. It cannot be disputed that judicial immunity is not legislated in our statutes. It is public policy whose origins can be traced back from the English law.

[41] Applicant seeks a declaratory order that the Parliament of the Republic of South Africa has violated the constitutional rights of the traditional leaders guaranteed in terms of section 9(1) of the Constitution to equality and the equal protection and benefit of the law, in that they do not enjoy judicial immunity from criminal and civil liability arising from their decisions in the traditional courts.

[42] I turn to agree with first and second respondents' submission that applicant's claim of discrimination in this regard is terse, veiled and unsubstantiated. It is trite law that where a complainant invokes the equality clause to attack a legislative provision or executive conduct on the ground that it differentiates between people or categories of people in a manner that amounts to an unequal treatment or unfair discrimination, the approach to follow is laid out in *Mbana and Harksen* (*supra*).

Applicant has failed dismally to establish a foundation on which such discrimination is founded.

[43] In law, context is everything. It is common cause that the spark or trigger of this application is the incarceration of King Dalindyebo. If the genesis for the claim of judicial immunity by traditional leaders is the King - ***first***, the question arises to whether the King was acting as King when these offences were committed? The answer is No. At his trial in Mthatha High Court, he testified that he was not a King, at that time of the commission of these offences his brother Patrick Dalindyebo was acting as a King. He was deployed by the Africa National Congress to the Eastern Cape Provincial Government as a Member of Parliament ("*MP*"). ***Second***, when these offences were committed, was the King acting as a judicial officer? The answer again is No. The King's response in testimony was that he was carrying out the decision of the community. ***Third***, since he relinquished his position as a King at that time, the Paramount Chief of Abathembu and head of the regional authority was his brother Patrick Dalindyebo. The King did not act as Tribal Authority or Regional Authority at the time of the commission of the offences. Patrick Dalindyebo, the King's brother acted in these capacities – See *S v Buyelekhaya, Case No. 267/04 ECDM.*

[44] In order for judicial immunity discussion to be alive, the King should have acted as a King and or judicial officer when these offences were committed. There should be some foundation laid by the applicant, whether factual or legal that the King was performing judicial functions. In my opinion, there has not been a linkage demonstrated for this judicial immunity discussion to ensue.

[45] Besides, this judicial immunity defence was never invoked as a defence at the Mthatha High Court or at the SCA. I would imagine that it was not necessary to raise such a defence. During his cross-examination at the High Court Mthatha High Court, the King said; "the assaults were not authorized by him; that it did not constitute any form of punishment under Tribal Law or customary law; but that it constituted "*people's justice*." And by people (*sic*) … "*taking the law into their own hands* …" He said that the injuries were and assaults were caused by the community who assaulted them before he, the accused, administered only three (3) light lashes". –

See *S v Buyelekhaya Dalindyebo* (*supra*) para [158]. The King even called this type of justice, "*Jungle Justice*." If that was the status of the King's actions when these offences were committed, other traditional leaders can only be fearful and their anxiety be raised if they themselves administer "*people's justice" or "jungle justice*." There could be no fear or panic caused if traditional leaders apply punishment and sanction in terms of the customary law guiding principles, and within the confines of the Constitution. Applicant has to take into account that the status and role of traditional leaders is constitutionally entrenched. Hence, their actions have to keep up with the rule of law and constitution.

[46] Traditional leaders and or the Kings are not above the law, more especially in our constitutional democracy. The King testified that he knew of the structure obtaining in his area of jurisdiction. He was aware of the legislation governing the traditional leaders and all other officials resorting in those structures. The civil and criminal disputes are dealt with from the lower levels, i.e. by headmen, chiefs, tribal authority up until they reach the regional authority, if all other levels fail to resolve them. The King is the Head of the Regional Authority. In the offences that he was charged with, this well-known traditional court process was not followed despite his knowledge of his own structure. There was no sitting of any traditional court which sanctioned the punishment that the King meted out to his victims.

[47] At this stage, the claim by the applicant for judicial immunity to extend to traditional leaders has no factual foundation. Though it has always been denied by applicant's counsel Mr Masuku that this application was nothing other than a back-door appeal by the King to this Court – when asked by Davis J, if what would happen, if this Court were to find that the King should have enjoyed judicial immunity at the High Court, Mthatha? Mr Masuku responded "*The King will walk tomorrow, my Lord*." That was rather an acquiescence that this application has to do with the incarceration of the King, and intends to reverse the findings of the High Court, Supreme Court of Appeal and Constitutional Court.

[48] It was applicant's assertion that the threat of prosecuting traditional leaders for their judicial decisions is a violation of the Constitution and can be cured by Parliament passing appropriate legislation giving immunity to traditional leaders.

This assertion by the applicant is rather peculiar in nature. Even though traditional leaders derive this judicial immunity from the magistrates and judges, they failed to point out to this Court the authority in South African law - affording magistrates and Judges such immunity in order to equalise the discrimination complained about. I turn to agree with the submission by the first and second respondents that this is a disjointed application. Judicial Immunity enjoyed by magistrates and judges is not legislated. It therefore follows that this Court cannot instruct Parliament, without more, to pass *[a]* legislation without any basis being laid by the applicant. Besides it is not the business of the Court to trench on Parliaments terrain and prescribes to Parliament how to legislate. The Courts should always be seen to respect the doctrine of separation of powers. – See *My Vote Counts* (*supra*) *at paragraph [156]* and other numerous authorities to this effect.

[49] In my opinion, if traditional courts perform their judicial functions according to applicable customary legislation and more importantly in line with the Constitution, there would be no need for them to be anxious, and fear prosecution. The judicial immunity will flow to them automatically the way it is applicable to magistrates and judges. For the reasons stated above, this relief fails.

(ii) *Failure of Parliament with its obligations in terms of sections 211 and 212 of the Constitution to pass legislation*

[50] It was applicant's argument that in order to ensure that the integrity of traditional leaders and traditional courts are preserved, Parliament has a constitutional obligation to pass laws which give effect to the spirit and purport of traditional leaders and the courts they preside over. Parliament has a constitutional duty to pass legislation that protects the constitutional rights of citizens who operate under the customary law system. The failure of Parliament to pass appropriate legislation in accordance with sections 211 and 212 of the Constitution has undermined these constitutional rights, as a consequence of which traditional leaders are not able to discharge their judicial functions without fear, favour or prejudice. The High Court in Mthatha when convicting King Dalindyebo, did not address the matter in the context of sections 211 and 212 of the Constitution, particularly section 211(3) of the Constitution that makes it mandatory for the Courts

to apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

[51] This assertion was vigorously opposed by Parliament. Parliament pointed out that, *first*, there is no obligation imposed on Parliament by section 212 of the Constitution to pass a kind of legislation contended by the applicant; *second*, pursuant to the provisions of section 212 of the Constitution, Parliament has enacted the Traditional Leadership and Governance Framework Act 41 of 2003, which provides for the institution, status and role of traditional leadership in accordance with customary law. For this reason, Parliament cannot be held to have failed to discharge, its obligation in terms of section 212 of the Constitution; *third*, to the extent that Parliament may not have fulfilled its obligations as contended by the applicant, and in accordance with the principle of subsidiarity, the applicant must challenge the constitutionality of the Traditional Leadership Act and not seek to compel Parliament to legislate in the manner preferred by the applicant; *fourth*, the order sought by the applicant would amount to interference with the principle of separation of powers; and the claims of discrimination made by applicant are not only unsubstantiated, but also unfounded on facts and in law.

[52] Sections 211 and 212 of the Constitution deal with traditional leaders and it reads as follows:-

"*CHAPTER 12*
Traditional Leaders

Recognition

211. (1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.

(2) A traditional authority that observes as system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.

(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

Role of traditional leaders

212. (1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.

(2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law –

(a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and

(b) national legislation may establish a council of traditional leaders."

It was first and second respondents submission that applicant's interpretation of the provision of section 212 is wrong for the following reasons: ***first***, the provision is permissive and not obligatory; ***second***, it requires Parliament to pass legislation at local level on matters affecting local communities; ***third***, it requires national and provincial legislation to provide for the establishment of house of traditional leaders and that the national legislation may establish a council of traditional leaders. These sections do not have anything to say about traditional courts and their status and or their judicial role. I agree fully with this interpretation.

[53] Regrettably it seems applicant read the judgment of the High Court superficially when it contended that the High Court, Mthatha convicted the King without applying customary law when that law is applicable, subject to the Constitution and any legislation that deals with customary law. This contention by applicant is incorrect as Alkema J in *S v Buyelekhaya* (*supra*) in the background of his judgment states that:-

> "[3] ... *The accused derives his powers as Paramount Chief from Statutes which date back to the old constitutional order and which are still operative in our new democratic constitutional order. His powers, duties and functions are regulated by the Transkeian Authorities Act No. 4 of 1965 (Transkei) ("the TAA Act")*, *and his area of jurisdiction is regulated by the Black Administration Act No. 38 of 1927, as amended ("the BLA Act") (sic)*.
>
> …
>
> [11]… *The accused is charged not in terms of South African common law, but under the Transkei Penal Code (Act 9 of 1983 Transkei) which, for mysterious reasons, has not yet been repealed and it remains operative in the former geographic area of the Transkei. The constitutionality of the code and the practice to prosecute accused persons under its terms are often questioned by the Judiciary and practitioners, but since this is not issue in this case I am called upon, and will, decide the case under the Code.*"

Applicant contended that the King was charged in terms of the Criminal Procedure Act read with the Transkei Penal Code. Judging from the extract of Alkema J's judgment para [11] (*supra*), which was not the case. In fact the application of customary law including the Transkei Penal Code, is evident throughout the judgment. Further, there was no challenge to the constitutionality of the Transkei Penal Code when the King was charged at the High Court, Mthatha. It appears that this challenge is only put before this Court for the first time in order to bolster applicant's case. Without condoning the applicability of the old laws in the erstwhile Transkei jurisdiction, it is so that the Courts in that jurisdiction have to function with what is applicable at the time, in the absence of any challenge and repeal for constitutional alignment. Applicant's submission that the High Court, Mthatha did not address the matter in the context of sections 211 and 212 and more especially section 211(3) of the Constitution is flawed. It can be so that the High Court Mthatha did not mention these sections specifically. Judging from the extracts I have referred to above, it is clear that the High Court Mthatha recognised the status and role of traditional leaders in a constitutional democracy. It could not have been expected for this Court to go beyond what it was called to determine at that particular time.

[54] I agree with first and second respondent that there is no obligation imposed on Parliament by section 212(1) of the Constitution to pass any legislation as envisaged by the applicant. The Traditional Leadership Act has already been passed by parliament in fulfilment of its duty to recognise the institution, status, role and functions of traditional leadership according to customary law. That is evident in Chapter 5, Sections 19 and 20 of the Traditional Leadership Act. Respondents correctly put that Parliament's duty to fulfil its constitutional mandate in terms of Section 212(1) was acknowledged fully by the Constitutional Court in *Bapedi Marota Mamone* (*supra*) at para [15] where it was stated:-

> "*As the Constitution recognises traditional leadership institutions that were established in terms of customary law only, Parliament passed the Traditional Leadership and Governance Framework Act (Framework Act) to regulate traditional leadership. In passing the Framework Act, Parliament was giving effect to Chapter 12 of the Constitution. One of the objects of the Act was to "restore the integrity and legitimacy of the institution of traditional leadership in line with customary law and practices. To that end, the Framework Act established the Commission on Traditional Leadership Disputes and Claims, the first respondent in these proceedings*."

[55] Applicant did not dispute that the Traditional Leadership Act has fulfilled this constitutional duty as submitted by the respondent, hence in my view it did not challenge the constitutionality of the same Act. The absence of certain legislation that is envisaged by applicant does not amount to failure by Parliament to discharge an obligation in terms of section 212 of the Constitution. In any event, section 212(1) is permissive or lenient. It is not obligatory, rigid, instructive or authoritarian in nature. Likewise, this Court is not empowered by that section to instruct Parliament to enact certain legislation as contemplated by applicant.

[56] Moreover, applicant contended that within the Traditional Leadership Act, there is a legislative deficiency in that there is no mechanism in place for dealing with judicial misconduct involving traditional leaders when they exercise judicial authority. In my view, this assertion amounts to nothing other than a mere complaint. It is trite law that a party is not permitted to rely directly on an obligation imposed on

Parliament to pass legislation pursuant to that provision of the constitution, where parliament has already passed such legislation in accordance with the same provision of the Constitution. A litigant should challenge the validity of the legislation enacted pursuant to that particular provision of the Constitution. That is referred to as the constitutional subsidiarity principle. In *Mazibuko and Others v City of Johannesburg and Others 2010 4 SA 1 (CC)*, it was held that a litigant who seeks to assert his or her rights in terms of the provisions of the Constitution should in the first place base his or her case on any legislation enacted to regulate the right and not on a particular provision of the Constitution. If the legislation is for any reason wanting in its protection of a right in the litigant's view, then that legislation should be challenged constitutionally. This principle has always been articulated in numerous Constitutional Court judgments and the most recent being the *My Vote Counts* (*supra*) at paragraph [20] of this judgment.

[57] The approach adopted by applicant, to say the least, is legally impermissible if regard is had to these authorities. Applicant, in essence seeks to have Parliament legislate in a manner preferred by it. The judiciary should not be seen to be interfering in the processes of other branches of government unless mandated so by the Constitution. See paragraph [25] above.

[58] Applicant acknowledged that Parliament has recognized its constitutional duty to pass the law dealing with the status and role of traditional courts by processing the Traditional Courts Bill. Regardless of such acknowledgment, there is no nexus between applicant's complaints and the outstanding Bill before Parliament. Be that as it may, there is no relief sought by the applicant on this Bill. Applicant only or merely registered a complaint of delay in its processing, nothing more and nothing less. Third respondent has, in any event, explained the reasons for its delay. Seemingly, the traditional leaders are somehow to blame for the delay, as concerns were raised about the traditional leader's conduct which is neither in line with the applicable customary law, nor with the Constitution. It seems they need to put their house in order before approaching this Court with complaints. First and second respondents have also explained the reasons for the delay in processing the Bill which tallies with third respondent's explanation. It is not for this Court to direct Parliament what to do. In any event, the relief sought has nothing to do with the

Traditional Courts Bill that is before Parliament. Whereas it makes perfect sense to align traditional and civil courts, it was not an issue for determination before this Court. This Court was comforted by the fact that the Bill was in the process of being introduced, with the hope that there would not be a delay in this instance.

[59] Even if there was a proper case made by applicant, the relief sought in this regard amounts to interference with the principle of separation of powers. In any event, there is no merit in applicant's complaint. This relief fails.

(iii) *The review and setting aside of the fifth respondent's decision to prosecute the King*

[60] Applicant contended that the decision of the fifth respondent to prosecute the King for exercising his civil and criminal jurisdiction violated section 211(1) of the Constitution of the Republic of South Africa in that it violated the principle of judicial immunity extended to traditional leaders when they exercise their judicial power; it violates section 10 of the Constitution which guarantees the right to dignity; and that the decision to prosecute the King should be set aside on the ground that the actions of the King were no offences in terms of the Criminal Procedure Act read with the Transkei Penal Code.

[61] It is common cause that when the King committed those offences, he was not exercising his civil and criminal jurisdiction as a King nor acted in any capacity as a Tribal Authority or Regional Authority. Section 211(1) was never invoked as a defence in the High Court, Mthatha – See extract Alkema J's judgment (*supra*). Judicial Immunity cannot apply to a person who was not performing his judicial functions. Further, the King did not raise a complaint at the High Court, Mthatha that his right to dignity has been violated in terms of section 10 of the Constitution. This argument as it were cannot hold.

[62] The contention by the applicant that the King was charged in terms of the Criminal Procedure Act read with the Transkei Penal Code is unfounded. In fact, the King was charged with offences under the Transkei Penal Code 9 of 1983 and not in

terms of the Criminal Procedure Act. Most unfortunately, it is the law applicable in the former Transkei, despite the current constitutional order.

[63] This Court finds that the matter involving the prosecution of the King is *res judicata*. It cannot tolerate a situation where there would be an endless litigation on the same case - same issues involving the same party coming through the back door. The King has exhausted all legal avenues and his leave to appeal to the Constitutional Court was refused. It is inevitable that there should be some finality to this matter.

[64] Be that as it may, even if applicant's claim were constitutionally legitimate, this Court does not have jurisdiction to review and set aside the decision of a Court of an equal status sitting in another Province. Likewise, it does not have jurisdiction to overturn the decision of the Supreme Court of Appeal. This prayer is impermissible and should therefore fail.

[65] Having considered this application, it seems there was no foundation laid by applicant both in facts and in law. The prosecution of the application amounts to nothing other than a swaggering show of courage on a shaky ground. The application was misconstrued or wrongly planned, and as a result has no merit. It is for these reasons that it fails.

[66] In the result, the following order is made:-

66.1 The application is dismissed.

66.2 Applicant is ordered to pay costs of first, second, third, .fourth and fifth respondents, including the costs of each set of counsel in these proceedings.

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MANTAME, J

DAVIS J

Introduction

[1] I have had the considerable benefit of reading the judgment of Hlophe JP and Mantame J. Both judgments advance compelling reasons for the conclusion to which they arrive. The significant difference is that, whereas Mantame J dismissed the entire application brought by applicant, the learned Judge President concluded that certain of the relief should be granted because the Republic of South Africa Constitution Act 108 of 1996 ("the Constitution")imposes, in his view, a mandatory duty on Parliament in terms of ss 211 and 212 read together with ss 34, 38 and 165 of the Constitution to pass specific legislation dealing with the administration of justice in traditional communities and a consequent provision for judicial immunity to traditional leaders when acting as judicial officers.

[2] The reasons, which are compellingly advanced in the judgment of Hlophe JP, justify the grant of declaratory order in terms of which the court would confirm Parliament's mandatory duty to recognise traditional leaders and thus pass legislation specifically giving effect to the constitutional rights of traditional leaders and to their courts.

[3] It is here where the difference between the two judgments lies, because it is common cause that any order could not grant judicial immunity to the King of the AbaThembu Nation, His Majesty Dalindyebo. Such an order is not legally competent and accordingly this Court could not fashion an order which would disturb the

conviction and sentence of the King, the details of which are set out in the judgment of Mantame J.

[4] Given the differences of approach between the two judgments, it is appropriate for me to set out the reasoning that I adopt insofar as the relief sought is concerned; that is whether Parliament should be compelled to pass legislation specifically dealing with the status of traditional authorities and their right to judicial immunity from civil and criminal liability for acts performed within traditional courts. I agree fully with Hlophe JP that, at present, traditional courts cannot be said to operate in the same fashion as other courts of the land; that is within an established statutory framework which gives appropriate recognition to traditional leaders as judicial officers. This omission is most unfortunate in that it represents a failure to embrace customary law fully into the legal system of a democratic South Africa

[5] In *Shilubana and others v Nwamitwa* 2009 (2) 66 (CC) at para 42 Van der Westhuizen J said:

> 'The status of customary law in South Africa is constitutionally entrenched. Section 211 of the Constitution provides that the institution, status and role of traditional leadership are recognised subject to the Constitution. It further states that a traditional authority that observes a system of customary law may function subject to applicable legislation and customs, including amendments to or repeal of that legislation and those customs, and that courts must apply customary law where it is applicable, subject to the Constitution and relevant legislation.'

[6] In short, the courts have asserted that customary law enjoys a status that demands equal respect, albeit that it must accord with the Constitution. Customary law must be treated as an integral part of the South African legal system representing an independent source of norms within the legal system. In *Alexkor Ltd and another v Richtersveld Community and others* 2004 (5) SA 468 (CC) the Court said at para 51:

> 'It is clear, therefore, that the Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system. At the same time the Constitution, while giving force to indigenous law, makes it clear that such law is subject to the Constitution and has to be interpreted in the light of its values. Furthermore, like the common law, indigenous law is subject to any legislation, consistent with the Constitution, that specifically deals with it. In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.'

[7] That customary law is by its nature a system which involves constant evolution (save during the apartheid period when its development was frustrated and its rules and principles were polluted by the racist practices of a cynical regime) is a critical issue; the other is the extent to which Parliament is under a legal obligation to pass legislation which gives full and substantive effect to customary law and its institutions as an integral part of a South African legal system. In the view of Hlophe JP, ss 211 and 212 of the Constitution provide broad constitutional obligations

imposed upon Parliament to pass the necessary legislation which would give full recognition to traditional courts. I fully agree with the learned Judge President that far too much time has passed without relevant legislation having been adopted by Parliament. It may well be as he notes 'had the applicants not brought this application Parliament may well have taken another 22 years to give to a law specifically dealing with the administration of justice within the traditional communities'. I fully associate myself with the judicial frustration at the lack of legal transformation. As to the importance thereof see, for example, Chuma Himonga 'The future of living customary law in African legal systems and beyond with special reference to South Africa in J Fenrich *et al* (eds) The future of African Customary Law (2011) at 31-57

[8] But agreement on the vital importance of this area of law still leaves the critical question open for determination, namely whether there is an obligation imposed upon Parliament to pass legislation, which given the facts, has not yet occurred. I turn to deal with the relevant law.

Legal Framework

[9] Section 211 of the Constitution provides as follows:

> '211. Recognition
>
> (1) The institution, status and role of traditional leadership according to customary law, are recognised, subject to the Constitution.

(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.

(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.'

Section 212 reads thus:

'212. Role of traditional leaders

(1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.

(2) To deal with matter relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law –

(a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and

(b) national legislation may establish a council of traditional leaders.'

[10] It is significant that the wording of these sections is couched in permissive and not mandatory terms. By contrast, s 32 of the Constitution which provides that in as far as the right to access to information is concerned, "national legislation must be enacted to give effect to this right… (my emphasis) See also s 9 (4) and s 33 (3) for

a similar use of the word ‘must’. In short, it is not as if the word ‘may’ is used throughout the constitutional text. When the drafters of the Constitution intended that Parliament have a clear obligation to pass legislation the word ‘must’ was employed. In the case of s 212, it is significant that the word ‘may’ was used.

[11] But even if I am incorrect in this interpretation, the Constitutional Court has provided a clear view of the role and status of the Traditional Leadership and Governance Framework Act 41 of 2003 in the vindication of ss 211-212 of the Constitution. In this connection, Jafta J in *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims and others* 2015 (3) BCLR 268 (CC) said at para 15:

> ‘As the Constitution recognises traditional leadership institutions that were established in terms of customary law only, Parliament passed the Traditional Leadership and Governance Framework Act (Framework Act) to regulate traditional leadership. In passing the Framework Act, Parliament was giving effect to Chapter 12 of the Constitution. One of the objects of the Act was to “restore the integrity and legitimacy of the institution of traditional leadership in line with customary law and practices”. To that end, the Framework Act established the Commission on Traditional Leadership Disputes and Claims, the first respondent in these proceedings.’

[12] To the application of this *dictum* to the present dispute Hlophe JP provides two responses. The first concerns draft legislation with which Parliament is engaged. The learned Judge President suggests that Parliament was engaged in a

"mandatory constitutional exercise" when it sought to pass the Traditional Courts Bill. The object of this Bill is described in the Preamble to:

1. affirm the values of the traditional justice system, based on restorative justice and reconciliation and to align them with the Constitution;
2. affirm the role of the institution of traditional leadership;
3. create a uniform legislative framework, regulating the role and functions of the institution of traditional leadership in the administration of justice, in accordance with the constitutional imperatives and values; and
4. enhance the effectiveness, efficiency and integrity of the traditional justice system.

[13] It is common cause that this Bill was originally introduced to Parliament through the National Assembly by the Minister of Justice and Constitutional Development 2008 has not been passed. Since its inception a number of controversial questions have arisen insofar as the contents of the Bill are concerned. In first and second respondents answering affidavit, Mr Tau explains the delay during the recent period. I cite extensively from this affidavit because it explains problems encountered with the Bill:

> 'In response to the publication of the draft Bill the Select Committee received 57 submission on the Bill from NGO's, civil society and communities. The outcome of this process was that the Select Committee received eight (8) negotiating mandates from all Provincial Legislature except Mpumalanga. The Mpumalanga legislature requested an extension of the deadline for concluding the public hearing process, and a postponement of the negotiating mandates' meeting by three (3) months. I point out that at that stage there

was insufficient support from the Provincial Legislatures to pass the Bill as there were only 2 provinces in support thereof, namely Free State and Northern Cape, although they proposed some amendment to the Bill. Five (5) provinces' negotiating mandates were not in support of the Bill, namely Eastern Cape, Gauteng, North West, Western Cape; and, apart from Mpumalanga, 2 provinces had not adopted a mandate, namely KwaZulu Natal and Limpopo. In terms of NCOP, the Rule 155 (2) five (5) supporting provinces are required in order to pass a Bill into legislation.

In addition to Mpumalanga's request for an extension, the Deputy Minister for Women, Children and People with Disabilities requested a meeting with the Select Committee to outline her concerns regarding the Bill in a letter annexed and marked "RT3". There were also requests by national stakeholders and interested parties that had not had an opportunity to present their concerns on the Bill, such as the Law, Race and Gender Research Unit ("LRG"), the Federation of Unions of South African ("FEDUSA"), …

The Select Committee considered the request for extension reasonable. An extension would give effect to the political premise for hosting parliamentary public hearings, namely to afford the widest possible public participation on the Bill without compromising the provinces' constitutional mandate to determine its views on the Bill. It was important while crafting the legislation, for the Select Committee to take into account any concerns raised in the provinces, and to have sufficient information and guidance to propose amendments that would take the provinces' concerns into account and any other matters that might be raised, including the object, principles and constitutional implications of the Bill, as well as the impact to vulnerable

groups in society. The negotiating mandates are important in this regard in that they assist in guiding the thinking of the Select Committee. Clearly, an extension would enhance the application of s 72 (1) (a) of the Constitution by facilitating public involvement in the legislative processes of the Council. I also add that in terms of NCOP Rule 240 (1) all s 76 Bills should be dealt with in a manner that will ensure that provinces have sufficient time to consider the Bill and confer mandates.

There was also a proposal made for the Select Committee to widen the public hearing process by hosting public hearings, not only nationally but also in the provinces, in co-operation with the provincial legislatures, and especially targeting areas not reached by Provincial Legislatures during the provincial haring process.

Another time-related consideration at the time was statutory deadline of 30 December 2012 by which the legislation envisaged by the Bill should be enacted to repeal the Black Administration Act 38 of 1927. The intention was that the Bill would regulate matters dealt with in ss 12 and 20 and the Third Schedule of the Black Administration Act which deal with the judicial functions of traditional leaders. This deadline has been previously postponed in 2008 and 2010, to anticipate the finalisation of the Bill. The Select Committee undertook to endeavour to conclude its business and report to the house before the deadline for the repeal of the Black Administration Act, whilst allowing sufficient time for the National Assembly to consider the Bill.

The Select Committee considered and discussed the above issues at length on 30 May 2012, and decided to request the Chairperson of the NCOP to

approve the extension of the deadline of the Bill, in terms of NCOP Rule 240 (3) which requires the Chairperson's approval for such an extension.

On 31 May 2012 the Select Committee sent a letter to the NCOP Chairperson …, setting out the consideration taken into account in arriving at its conclusion to extend the legislative cycle of the Bill and widen the ambit of its public participation process, and requesting his approval.'

[14] Mr Tau then describes what occurred after 2012 and concludes:

'On 6 April 2016 the Department briefed the National Assembly Portfolio Committee of Justice on key policies and legislation that are currently under development in the short -, to medium -, term. I attach, marked "RT15", a copy of the power-point presentation made by the Department, and refer to pages 4,5 which indicate that the Bill is again under consideration by the Department, and, if all goes according to plan, should be approved by Cabinet by 11 May 2016 for introduction to Parliament by May or June 2016.'

[15] For a detailed critique of the Bill see Jennifer Williams and Judith Klusener "The Traditional Courts Bill: A woman's perspective" 2013 (29) SAJHR 276; Nica Siegal "Thinking the boundaries of customary law in South Africa" 2015 (31) SAJHR 357, particularly at 378

'The battle over access to judicial remedy, and especially debate over the form of the courts available to customary communities, is clearly a major frontier of contemporary legal activism involving customary law. Evidence for this claim includes the recent controversy over the Traditional Courts Bill, an attempt to further institutionalise the damaging conflation of chiefly authority

> and democratic governance in customary communities. The Bill had been returned by the National Council of Provinces to the hands of local communities for further consideration after the Bill was roundly criticised for creating a 'second-tire' legal system that leaves those who are least legally empowered especially vulnerable to abuse.'

Sigel concludes:

> 'As South Africa takes up the challenge of mediating conflicts of genuine diversity, the goal must be to create new kinds of legal institutions and mechanisms, courts and other forms empowered by the Constitution. Such institutions must be suited not to solve the problem of the boundary of customary and statutory law, but rather to mediate and pursue justice without recourse to hegemonic interference on the one hand and the hatred of sovereign institutions that sustains unregulated neoliberal capitalism on the other.'

[16] The delay in passing this Bill is most unfortunate and, and manifestly the time lines set out in Mr Tau's affidavit for the introduction of legislation in 2016 have already come and gone. However, the answering affidavit and the literature I have cited indicate the difficulties which have confront Parliament with regard to the contents of the Bill.

[17] On the assumption that there was a mandatory obligation on the part of Parliament to pass such legislation, what timelines should a Court set? Further, to what extent can a Court dictate to the National Assembly how to regulate its own business in circumstances where there is significant public controversy about the

contents of a particular Bill before Parliament? To what extent can a court provide the precise content of legislation to be passed?

[18] The solution to this problem would have been for the applicants to contend that the piece of legislation already passed by Parliament, namely the Traditional Leadership and Governance Framework Act, which the Constitutional Court has held has given effect to Chapter 12 of the Constitution in general and ss 211 and 212 of the Constitution in particularly, does not pass constitutional muster, in that there is a clear constitutional obligation to provide for the independence of traditional courts and the ancillary requirement of granting immunity to presiding officers acting in a judicial capacity. This however was not the basis upon which the applicant came to court. It failed to attack the contents of the Framework Act and did nothing to suggest that the relief it sought should be granted on the basis that the Framework Act did not cover constitutional obligations imposed upon Parliament to pass legislation.

[19] This conclusion brings me to the question of subsidiarity and the second of the two responses of Hlophe JP which I have noted.

[20] Hlophe JP found that the principle of subsidiarity is not applicable in this case, given that in the Preamble to the Framework Act there is a provision which states that there should be a fair system of administration of justice, as envisaged in applicable legislation. Hence, the Framework Act makes it clear that it was not intended to cover the full gamut of Parliament's constitutional obligations in terms of s 212 of the Constitution.

[21] On the assumption that there was a mandatory obligation upon Parliament to pass such legislation, failure to do so would surely have rendered the Framework Act unconstitutional in that it was passed without the provision of applicable legislation in relation to traditional courts. Absent legislation covering traditional courts, the Framework Act, which purported to give content to ss 211 and 212, does not then cover fully the constitutional promise and, accordingly, the Framework Act stands to be attacked as falling short of the mandatory guarantee.

[22] It is this situation which is covered by the principle of subsidiarity. As the court said in *My Vote Counts v Speaker of the National Assembly and others* 2016 (1) SA 132 (CC) at para 52-53:

> 'But it does not follow that resort to constitutional rights and values may be freewheeling or haphazard. The Constitution is primary, but its influence is mostly indirect. It is perceive through its effects on the legislation and the common law-to which one must look first.
>
> These considerations yield the norm that a litigant cannot directly invoke the Constitution to extract a right he or she seeks to enforce without first relying on, or attacking the constitutionality of, legislation enacted to give effect to that right. This if the form of constitutional subsidiarity Parliament invokes here. Once legislation to fulfil a constitutional right exists, the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role.'

See also para 161-166

[23] In the present case the effect of applicant's argument is that the Framework Act does not fulfil the necessary constitutional obligation. Absent further legislation, there is no legislative provision governing a significant component of customary law; that is the protection and recognition of traditional courts. If this application had been brought to seek an order that Parliament needs to recognise the administration of justice for traditional communities and the provision of traditional immunity for traditional leaders in the Framework Act, this would have fallen within the recognised doctrine of subsidiarity.

[24] I express no firm view on the point, save that this form of relief falls clearly within the scope of the judicial function in respect of orders that effect Parliament's role as the arm of the State which is responsible for legislation.

[25] Mention is made by the learned Judge President about Parliament passing a law which abolished the death penalty and that it introduced recognition of same-sex marriages, notwithstanding public opposition to such legislation. But in these cases, the Constitutional Court found that there was a clear violation of the Constitution, declared the death penalty to be unconstitutional and held that the definition of marriage, that is the then distinction of marriage being between a man and a woman, breached provisions of the Constitution.

[26] Staying with the question of same-sex marriages, the Court in *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) ordered that the common law definition

of marriage was inconsistent with the Constitution. Hence, the omission from s 30 (1) of the Marriage Act 25 of 1961 after the words “or husband” after the words “or spouse” was declared to be inconsistent with the Constitution. Parliament was ordered to cure these defects. Had the Framework Act been attacked in similar fashion on the basis of subsidiarity, Parliament could have been ordered to include particular provisions to cater for the relief sought. But that is an entirely different problem from seeking to impose upon Parliament an obligation to pass a detailed piece of legislation, regarding matters which already are before the House by way of the Bill and where the existing contents thereof have created significant opposition so as to retard the progress of its introduction.

[27] In summary: It does not appear to me that there is a mandatory obligation upon Parliament to pass the legislation sought by applicants. To the extent that legislation has already been passed, it is in the form of the Framework Act. To the extent that the Framework Act falls short of what might be constitutionally required, then, on the basis that I am wrong and there is a mandatory requirement, it should have been the Framework Act which was made the subject of applicant’s legal attack.

[28] For these reasons, but with extreme reluctance, because of the compelling assertion of the importance of customary law to a transformed legal system I depart company from the approach adopted by Hlophe JP. I emphasise that I do so with reluctance because his approach to customary law and the vital importance of ensuring that customary courts operate on a position of parity with the other courts of the land is critical to a constitutional system which substantively recognises the

dignity of difference and diversity as well as the imperative of ensuring the development of law which applies to millions of South Africans. That the present Bill should move expeditiously through Parliament is obvious; that there is nothing, in my view, in the Constitution which justifies the precise relief contended for by applicants is a different question and is the only one which we are required to answer.

[29] With regard to costs, Hlophe JP noted that, were he to have found against the applicants, he would have adopted the approach that as constitutional issues were raised by applicants which are of significance and importance, it is inappropriate for a costs order to be granted. However, it is clear that the substance of this dispute as was outlined clearly by Mr Masuku, who appeared on behalf of the applicant, was to ensure relief for His Majesty the King. As Mr Masuku told the Court, if the orders sought are granted, the King walks free! This relief could never have been granted and accordingly I agree with Mantame J that an adverse costs order is justified. For these reasons I agree with the order as proposed by Mantame J.

_____

DAVIS J

DISSENTING JUDGMENT

HLOPHE JP

INTRODUCTION

1. This application raises very important constitutional issues relating to the

status of traditional leaders and traditional courts within our constitutional system. These issues arise from the arrest, trial, conviction and sentencing of the King of AbaThembu Nation, His Majesty Dalindyebo. Contralesa, the Applicant, contends that the conviction and sentence of His Majesty King Dalindyebo has heightened the constitutional necessity for Parliament to ensure that there is appropriate legislation regulating the proper functioning of traditional courts as required in the Constitution. In particular, the Applicants are concerned that the significance of the case of His Majesty Dalindyebo is that traditional leaders are vulnerable to civil and criminal liability for acts committed by them in their capacity as judicial officers in the traditional courts. They therefore contend that this Court should grant an order affirming that traditional leaders enjoy judicial immunity from civil and criminal prosecution for acts committed by them in traditional courts. Consequent upon that the Applicant seeks an order directing Parliament to pass appropriate legislation in terms of section 212 of the Constitution, giving effect to traditional courts, more particularly, judicial immunity.

2. Although the Applicant sought orders directed essentially at applying the principle of judicial immunity to the case of His Majesty Dalindyebo, it is clear that such orders are not competent. Whether or not King Dalindyebo should not have been tried, convicted and sentenced as a consequence of judicial immunity is not for this court to decide. It is competent for us to decide the issue of principle relating to whether in terms of our traditional court system, judicial immunity for traditional leaders applies. Whether or not judicial immunity applies depends on whether our traditional courts are established and operate in accordance with the Constitution.

3. At the commencement of the hearing, the interdictory relief sought against any member of the executive from causing the removal from his throne of His Majesty King Dalindyebo was abandoned. This was done on the basis that the State Attorney on behalf of the Fourth Respondent had indicated that a decision to remove His Majesty under section 10 of the Traditional Leadership and Governance Framework Act 412 of 2003 (hereinafter the Traditional Framework Act) had been recommended to the President. The Court was informed that the President was considering that recommendation. Furthermore that the President had offered His Majesty the opportunity to make representations to him why the recommendation

should be accepted. His Majesty, King Dalindyebo had availed himself that opportunity to make representations to the President. On the basis of this process, the Applicant abandoned the interdict orders. In my view the abandonment was a reasonable one and I need say no more about it.

4. Similarly, the Respondents abandoned the challenge to the *locus standi* of the Applicant to bring the application and to seek the relief that it sought on behalf of its members. The concession to the *locus standi* of the Applicant was well made and I need say no more than that section 38 of the Constitution would have been dispositive of that challenge had the Respondents persisted with it.

5. There are two issues of constitutional substance that I need to address for which I, with respect, deviate from the judgment of my esteemed sister, Mantame J. The first relates to whether Parliament may be compelled to pass legislation specifically dealing with the status of traditional authorities and their right to judicial immunity from civil and criminal liability for acts performed within the traditional courts. The second relates to the issue of judicial immunity to the extent that the Respondent's initial position was that it was not applicable to traditional leaders. The third relates to costs. I deal with each of these issues in tum.

The constitutional obligation in section 212 of the Constitution

6. Parliament contends that, on a proper construction of the provisions of section 211 and 212 of the Constitution, there is no obligation imposed on Parliament to pass legislation dealing with the administration of justice and the traditional courts. In clear and precise terms, it was argued that 'there is no duty or obligation in terms of section 212(1) of the Constitution or any other provision, on Parliament to pass the specific legislation, dealing with the status of traditional authorities when they exercise judicial functions, and more particularly legislation that grants immunity to traditional leaders when they exercise judicial functions.' This position requires some attention because if Parliament's approach represents the correct interpretation of the obligations set out in section 211 and 212 of the Constitution, then the very existence of traditional courts and the role of traditional leaders to apply African

customary law within the constitutional system is dependent on Parliament's attitude and not what the Constitution requires of Parliament. On the approach adopted by Parliament, it cannot be held accountable for the state of our African customary system of law and the establishment of our customary courts to operate within the Constitution.

7. Parliament's stance in respect of the obligations it has in section 211 and 212 of the Constitution is troubling for a number of reasons. Firstly, while it was the position of Parliament that section 211 and 212 of the Constitution imposes a permissive obligation generally, it was not clear whether that was its attitude when it passed the Traditional Leadership and Governance Framework Act, 41 of 2003. I did not understand Parliament's position to be that when it passed the Traditional Framework Act, it was not in terms of a mandatory constitutional obligation. Of course that position would be inconsistent with the ordinary meaning of section 211 and 212 of the Constitution. Parliament, in my view, could not say that it was not mandatory in terms of the constitutional obligation in section 211 and 212 of the Constitution for it to pass the Traditional Framework Act. The obligation in section 212 of the Constitution is clearly mandatory, even though the provisions are couched in permissive terms. It would gravely undermine the institution, status and role of traditional leaders if it was not mandatory for Parliament to pass national legislation to provide for the role for traditional leadership as an institution at local level on matters affecting local communities and dealing with matters relating to traditional leadership, the role of traditional leaders, African customary law and the customs of communities observing that legal system. If that were the position, we would have no alignment between the traditional law and customs with the Constitution, alternatively the obligation to implement African customary law in accordance with the dictates of the Constitution would be left on the shoulders of traditional leaders and communities alone. If there is no mandatory constitutional obligation on Parliament to develop legislation specifically dealing with the administration of justice within communities practising traditional and customary law, it is not difficult to see why the Applicant is concerned that traditional leaders who must implement African customary law in a manner consonant with the Constitution, without any guidance from Parliament, are left vulnerable to civil and criminal liability, should they implement what is acceptable in terms of customary law but not consonant with the

Constitution.

8. Secondly, Parliament saw the enactment of the Traditional Leadership and Governance Framework Act as a complete fulfilment of its obligations under section 212 of the Constitution. It contends that the Applicant must, on the principle of subsidiary, challenge the constitutionality of the Traditional Framework Act, if its claim is to succeed. This approach accepts that the Traditional Framework Act does not deal with the administration of justice in traditional communities. It does not provide any guidance to traditional leaders on what procedural and substantive aspects of customary law must be bended to conform to the dictates of the Constitution. There are problems with this approach to interpreting the scope of the duty of Parliament to traditional communities. It is this aspect that causes gross offence to the traditional communities - that while the Constitution requires traditional leaders to operate within the framework of the Constitution when they administer justice, Parliament does not see it as a mandatory obligation in terms of section 212 to pass specific legislation dealing with the administration of justice in traditional communities. The administration of justice in traditional communities is so central to how traditional communities are governed by traditional leaders just as the administration of justice outside the traditional system is to the proper governance of that community. It is unimaginable that our constitutional state would be complete and function properly without the institutions that are central to the administration of justice being established. The proper constitutional governance of traditional communities is impossible without the institutions responsible for the administration of justice being in place. Rule of law as encapsulated in the supremacy of the Constitution, is as important to traditional communities as to the modem communities. To suggest that Parliament's legislative obligations are not obligatory where they relate to the enactment of legislation giving effect to the proper administration of justice in traditional communities is to denigrate not just the Constitution, but to deliberately place the development of African customary law and institutions at grave risk.

9. The question is whether the issues in this application may be fobbed off on the basis of the principle of subsidiarity. In my view not. Firstly, in my view, the principle of subsidiarity does not apply in this case, for l have found that Parliament's

duty under sections 211 and 212 is mandatory and requires the enactment of specific legislation dealing with the administration of justice. Secondly, as was mandatory for Parliament to pass the Traditional Framework Act, it is mandatory for it to pass a law that deals with the administration of justice in traditional communities. Thirdly. according to the principle of subsidiarity, it is not competent for a party to *..directly invoke the Constitution to extract a right he or she seeks to enforce without first relying 011, or attacking the constitutionality of. legislation enacted to give effect to that right.*" The Applicant, so Parliament contended, should attack the constitutionality of the Traditional Framework Act, to the extent that the Traditional Framework Act does not give effect to its right. The principle of subsidiarity would apply in this matter if the Traditional Framework Act was held to represent the precise scope of the constitutional duty in section 211 and 212 of the Constitution. (see My Vote Counts case, para 67-74, minority) This case is distinguishable from My Vote Counts, because it is clear that sections 211 and 212 read with the Traditional Framework Act does not require Parliament to pass only one piece of legislation to address everything about the constitutional existence of traditional communities. It is envisaged that Parliament has the power to pass different legislation dealing with different aspect relevant to the constitutional governance of traditional communities.

10. In my view, the principle of subsidiarity does not apply since this is not a challenge to the constitutionality of the Traditional Framework Act. The question is not whether or not the Traditional Framework Act is valid, but whether Parliament has fulfilled its duty to pass a law dealing with the administration of justice in African traditional courts. In any event, the constitutional duty envisaged in section 211 and 212 of the Constitution is broad and permits Parliament to pass a range of different legislation dealing with different aspects relevant to the proper constitutional functioning of the system of traditional communities. The Traditional Framework Act is one of them and deals with issues relating to the recognition and political governance in traditional communities. It broadly deals with the recognition and establishment of traditional communities, recognition of Kings and Queens, removal of Kings and Queens and the establishment of traditional councils. It does not purport to address everything necessary for the institution, status and role of traditional leadership. For example, the Traditional Framework Act does not purport

to deal at all with the issue so central to the governance of traditional communities and rule of law- the administration of justice.

11. Sections 211 and 212 of the Constitution create broad constitutional duties of Parliament to enable Parliament to pass legislation relevant to different areas of traditional communities. This is reflected more clearly in section 19 and 20 of the Traditional Framework Act. Section 19 states that:

> "A traditional leader performs the functions provided for in terms of customary law and customs of the traditional community concerned, and in applicable legislation."(emphasis added)

12. Section 20 of the Traditional Framework Act states the following:

(1) National government or a provincial government, as the case may be, may, through legislative or other measures, provide for a role for traditional councils or traditional leaders in respect of-
   (a) Arts and culture;
   (b) Land administration;
   (c) Agriculture;
   (d) Health;
   (e) Welfare;
   (f) Administration of justice(emphasis added)
   (g) Safety and security;
   (h) Registration of births, deaths and customary marriages;
   (i) …
   (j) …
   (k) …

13. Section 20 of the Traditional Framework Act clearly demonstrates that the scope of legislation for Parliament does not end with the enactment of the Traditional Framework Act. It is clear that Parliament has a duty to pass specific law dealing with the administration of justice. The Applicant wants Parliament to pass a law dealing with the administration of justice in traditional communities. That demand is

long overdue in my view and sabotaged by Parliament's own mistaken interpretation of what its duties are to traditional communities and leaders.

14. The recognition of the institution, status and role of traditional leadership and customary law in section 211 of the Constitution, provides as follows:

"211 Recognition

(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.
(3) The courts must apply customarily law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."

15. It is necessary to point out that the constitutional status of traditional leadership includes their role in the traditional courts to dispense justice in accordance with African customary law. When they dispense justice, they are equally bound by section 38(2) Constitution which states that when interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. This means that traditional communities have a right to African traditional court that is able to resolve disputes by reliance on African customary law in a manner that is consonant with the Bill of Rights. The African customary courts must therefore be courts referred to in section 34 and 165 of the Constitution, able to dispense justice in a manner that upholds the Constitution. They must enjoy the attributes of impartiality and independence, fully equipped to dispense justice without fear, partiality and bias.

16. The constitutional change in 1994 would be incomplete without the recognition of traditional courts and their system of justice. The recognition was specifically given constitutional imprimatur, first in the section 181 of the Interim

Constitution. Section 181 of the Interim Constitution:

"181 Recognition of traditional authorities and indigenous law -

(1) *A traditional authority which observes system of indigenous law and is recognised by law immediately before the commencement of this Constitution, shall continue as such an authority and continue to exercise and perform the powers and functions vested in it in accordance with the applicable laws and customs, subject to any amendment or repeal of such laws and customs by a competent authority.*

(2) *Indigenous law shall be subject to regulation by law."*

17. The difference between section 181 of the Interim Constitution and section 211 of the Constitution is important for evaluating the status of African customary law and traditional leadership prior to the adoption of the Constitution in 1996.

18. Section 211(3) of the Constitution provides that customary law is subjected to the Constitution and any legislation that specifically deals with African customary law. This means that Parliament must provide for a legislation that would give guidance to this qualification for the application of African customary law. It was not expected for traditional leaders, in their traditional courts, to develop customary law in accordance with the Constitution, without legislative guidance. Recognising the importance of aligning customary law with the Constitution, section 212(1) of the Constitution imposes a constitutional obligation on Parliament to pass national legislation to clarify the role for traditional leadership as an institution at local level on matters affecting local communities. In addition, section 212(2) of the Constitution requires Parliament to pass legislation that deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law.

19. Section 181 of the Interim Constitution did not provide for the limitation provided for in section 211(3) of the Final Constitution in that nothing is said about African customary law being subject to the Constitution. This is important when analysing the relief sought by CONTRALESA against the background facts involving

the charging, trial, conviction and sentencing of His Majesty King Dalindyebo. Section 181 of the Interim Constitution specifically states that a traditional authority *'shall continue as such an authority and continue to exercise and pe1form the powers and functions vested in it in accordance with the applicable laws and customs, subject to any amendment or repeal of such laws and* customs by a competent authority. '

20. The Constitutional Court, when certifying the Constitution, recognised and certified the constitutional legitimacy of traditional leaders and african customary law. The Constitutional Court said the following;

> *"In a purely republican democracy, in which no differentiation of status on grounds of birth is recognised, no constitutional space exists for the official recognition of any traditional leaders, let alone a monarch. Similarly, absent an express authorization for the recognition of indigenous law, the principle of equality before the law in Constitutional Principle IV (CP) could be read as presupposing a single and undifferentiated legal regime for all South Africans, with no scope for the application of custom01y law, hence the need (or expressly articulated CPs recognising a degree of cultural pluralism with legal and cultural, but not necessarily government consequence."*[1] *(Emphasis added.)*
>
> *"The New Text (of the Constitution) (NT) complies with CPX/11by giving express guarantees of the continued existence of traditional leaders and the survival of an evolving customary law. The institution, status and role of traditional leadership are thereby protected. They are protected by means entrenchment in the NT and any attempt at inte1ference would be subject to constitutional scrutiny. The Constitutional Assembly (CA) cannot be constitutionally faulted for leaving the complicated, varied and ever-developing specifics of how such customary law should develop and be interpreted, to future social evolution, legislative deliberation and judicial interpretation."*[2] (Emphasis

[1] Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC) CC 1996, Butterworth Constitutional Lew Report, 1996 (October) at page 1322
[2] Ibid page 1323.

added.)

21. The constitutional authority for the argument that Parliament has a constitutional obligation to pass a law dealing with the judicial obligations and privileges of traditional leaders is not only section 212(1) of the Constitution. It is also a judgment of the Constitutional Court when the Constitution was certified. The Constitutional Court specifically commended the Constitutional Assembly for *"leaving the complicated, varied and ever-developing specifics of how such customa1y law should develop and be inte1preted, to future social evolution, legislative deliberation and judicial interpretation."*

22. In any event, the position of Parliament in this matter is inconsistent with its own demonstrated understanding of its constitutional obligation to pass a law regulating the operation of traditional courts. When Parliament introduced the Traditional Courts Bill for debate sometime in 2012 it did not do so on the understanding that this obligation was not mandatory. The Traditional Courts Bill may well have demonstrated the complexity of ensuring that African customary law reflects the constitutional values and principles, but that does not mean that Parliament was entitled to abandon its constitutional obligation to pass such a law.

23. To show that Parliament was acutely aware of this mandatory constitutional duty to pass a law governing the administration of justice in the traditional communities, one must look at the preamble and the objectives of this Traditional Courts Bill. The Traditional Courts Bill leaves no doubt that Parliament understands its constitutional obligation to pass a law dealing specifically with traditional courts and the application of African customary law.[3] There can be no doubt to my mind that Parliament's position in these proceedings regarding its duty to pass a law dealing specifically with the administration of justice in traditional communities is inconsistent with its constitutional obligation as reflected in section 211 and 212 read together with section 165, 34 and 38 of the Constitution.

24. Whereas Parliament has failed in its duty to pass a law dealing with traditional

[3] See clause 2, 3, 7, 8, 9 and 10 of the Traditional Courts Bill.

courts, it has nonetheless passed the Traditional Framework Act. It contends that the passage of this particular legislation was the complete fulfilment of the duty imposed on it in terms of section 212 of the Constitution. What is clear from the provisions of the Framework Act though is that it was not intended to address the issue of traditional courts or the administration of justice to ensure that traditional leaders governed in accordance with the rule of law and the Constitution. Only through the traditional courts can the rule of law be given effect to in traditional communities. Only through the traditional courts can the protection of constitutional rights in traditional communities be achieved.

25. The Framework Act provided the framework envisaged in section 212(1) of the Constitution, *inter alia,* the recognition of traditional communities;[4] the establishment, and recognition of traditional councils;[5] the functions of traditional councils[6] and the functions of traditional leaders;[7] Section 19 of the Framework Act defers to those functions of a traditional leader as provided for in terms of customary law and customs.

26. The Framework Act itself does not purport to be the complete fulfilment of the duty imposed on Parliament in terms of section 212 of the Constitution. The last principle expressed in the preamble to the Framework Act, states that the institution of traditional leadership must "promote an efficient, effective and fair dispute-resolution system, and a fair system of administration of justice, ***as envisaged in applicable legislation.****"(emphasis* added). Section 20 of the Framework Act disposes of Parliament's submission that the Framework Act represents the fulfilment of the constitutional obligation imposed on Parliament and that the Applicant's case is hit by the principle of subsidiarity.

27. The duty to pass legislation specifically dealing with the administration of justice in traditional communities is engraved in section 20 of the Framework Act. This cannot be a discretionary legislative function. It is a mandatory power. It is inconceivable that Parliament's duly to ensure that the traditional communities enjoy

[4] Section 2 of the Old Act.
[5] Ibid section 3.
[6] Ibid sections 4 and 5.
[7] Ibid section 19.

a judicial system that is consonant with the Constitution can be regarded as merely discretionary. This would essentially mean that traditional institutions responsible for the administration of justice are left untouched by the Constitution and therefore unable to give effect to constitutional rights.

28. The Courts have given their view of the importance of customary law and the role African traditional leaders in giving effect to three inalienable rights- the right to access courts and the right to dignity and equality. Parliament has no discretion over passing laws that give effect to these constitutional rights and to argue thus is to denude the full extent of its legislative power. Read with section 7(2) of the Constitution, it is clear that Parliament has a constitutional duty to ensure that "it respects, protect, promote and fulfil the rights in the Bill of Rights." Section 212 of the Constitution specifically imposes a broad constitutional power intended to enable Parliament to pass laws that give effect to the constitutional rights of traditional communities under African customary law.

29. In Bhe & others v Magistrate, Khayalitsha & others (Commission for Gender Equality as amicus curiae); Shibi v Sithole & others; South African Human Rights Commission & Another *v President of the Republic of South Africa & another,*[8] Langa DCJ observed that 'the Constitution itself envisages a place for customary law in our legal system' and that particular provisions 'put it beyond doubt that our basic law specifically requires that customary law should be accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution'. (see: Mabuza v Mbatha 2003 (4) SA 218 (C) at 226-229 (Hlophe JP for similar sentiments).

30. In *Alexkor Ltd & another v The Richtersveld Community & others,*[9] the following was said:

'While in the past indigenous law was seen through the common-law lens, it

[8] Bhe & others v Magistrate, Khayalitsha & others (Commission for Gender Equality as amicus curiae); Shibi v Sithole & others; South African Human Rights Commission & another v President of the Republic of South Africa & another 2005 (1) SA 580 (CC), para 41.

[9] Alexkor Ltd & another v The Richtersveld Community & others 2004 (5) SA 460 (CC), para 51. Also Bhe's case (note 15), paras 42-46; MM v MN & another 2013 (4) SA 415 (CC), paras 23-25; Shilubana's case (note 10), paras 42-43.

must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution. The courts are obliged by s 2I 1(3) of the Constitution to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law. '

31. In MM v MN,[10] the Constitutional Court dealt with the position of African customary law under the Constitution. Paragraph 24 of the judgment is relevant and says:

"[24] *This court has, in a number of decisions, explained what this resurrection of customary law to its rightful place as one of the primary sources of law under the Constitution means:*

(a) customary law must be understood in its own terms, and not through the lens of the common law;

(b) so understood, customa1y law is nevertheless subject to the Constitution and has to be inte1preted in the light of its values;

(c) customary law is a system of law practiced in the community, has its own values and norms, is practiced from generation to generation and evolves and develops to meet the changing needs of the community;

(d) customary law is not a fixed body of formally classified and easily ascertainable rules. By its ve1y nature it evolves as the people who live by ii its norms change their pattern of life;

(e) customary law will continue to evolve within the context of its values and norms consistent with the Constitution;

(f) the inherent flexibility of customary law provides room for consensus seeking and the prevention and resolution, in family and clan meetings, of disputes and disagreements;

(g) these aspects provide a setting which contributes to the unity of family structures and the fostering of co-operation, a sense of responsibility and belonging in its members, as well as the nurturing of healthy

[10] 2013 (4) SA 415 (CC) at para 23 to 25.

communitarian traditions like Ubuntu."

32. The Constitutional Court reaffirmed its observation that the strength of customary law, which is its "adaptive inherent flexibility", is also its potential weakness and difficulty when it comes to its application and enforcement in a court of law. In Alexkor v Rkhtersveld Community, the Constitutional Court held that African customary law must be recognised as an, 'integral part of our law' and 'an independent source of norms within the legal system'. In Shulubana & Others v Mwamitwa[11] the Constitutional Court held that customary law "is a body of law by which millions of South Africans regulate their lives and must be treated accordingly." Furthermore, the Court held that the process of determining the content of a particular customary-law norm must be one informed by several factors.

> *"First, it will be necessary to consider the traditions of the community concerned. Customary law is a body of rules and norms that ha,\· developed over centuries. An inquiry into the position under customary law will therefor invariably involve a consideration of past practice of the community. Such a consideration also focuses the enquiry on customary law in its own setting rather than in terms of the* common-law paradigm, in line with the approach set out in Bhe ...*"*[12]

33. The right of communities to observe and practice customary law includes, in terms of section 211(2) of the Constitution, the right of traditional authorities to amend and repeal their own customs.[13] This is because of the nature of customary law, which is its inherent adaptive flexibility. The Constitutional Court called for the respect of communities to develop their own laws to meet the needs of a rapidly changing society and the Constitution.[14]

34. The conclusion made by the Constitutional Court is worth quoting in full and is as follows:

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[11] 2009 (2) SA 66 (CC) at para 43
[12] Ibid para 44.
[13] Ibid para 45.
[14] Ibid para 45.

[49] To sum up: where there is a dispute over the legal position under customary law, a court must consider both the traditions and the present practices of the community. If development happens within the community, the court must strive to recognise and give effect to the development, to the extent consistent with adequately upholding the protection of rights. In addition, the imperative of s 39(2) must be acted on when necessa1J1, and deference should be paid lo the development by customary communities of its own laws and customs where this is possible, consistent with the continuing effective operation of the law.

35. This approach is significant for many reasons relevant to this case. First the Courts recognise the constitutional status of traditional leaders and their institutions. Secondly, the Courts have also recognised that the traditional institutions may on their own develop their Jaws and customs in a manner that must conform to the values of the Constitution. That said, traditional institutions have autonomy on how their laws must be developed. Furthermore, there is a constitutional responsibility on Parliament to ensure that traditional institutions function with a legislative environment that does not undermine their independence and the Bill of Rights.[15] Whether or not traditional leaders have immunity from civil and criminal liability, is a matter that must be deliberated upon by Parliament, and cannot be left to the traditional Courts. While the Courts during the apartheid period recognised the common law principle of immunity for traditional leaders for their judicial decisions, the Constitution now requires that Parliament should specifically recognise this protection to traditional leaders in legislation - so as to ensure the independence of traditional leaders and their courts. It should not be expected that traditional leaders themselves will develop the scope of immunity that they enjoy when they preside over cases. To give guidance to all the stakeholders, it is necessary for Parliament to pass a law specifically giving traditional leaders immunity from civil and criminal liability for their judicial role in the customary courts. All other Courts in South African, including Small Claims Courts operate within a statutory framework. There is no reason why traditional courts should not be regulated, as all other courts in South Africa, properly by legislation.

[15] Section 7 of the Constitution

THE STATUS OF TRADITIONAL COURTS

36. The constitutional status of traditional courts is recognised by the Constitution and immunity flows from such recognition. Traditional Court, are courts as referred to in the Constitution. Sections 165 and 166 of the Constitution provide as follows:

> *"**165 Judicial Authority***
>
> *(1) The judicial authority of the Republic is vested in the courts.*
>
> *(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.*
>
> *(3) No person or organ of state may inte1fere with the functions of the courts.*
>
> *(4) Organs of state, through legislative and other measures. must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.*
>
> *(5) An order or decision issued by a court binds all person to whom and organs of state to which it applies."*

And

> *"**166 Judicial System***
>
> *(1) The Courts are –*
>
> *(a) …*
>
> *(b) …*
>
> *(c) …*
>
> *(d) …*
>
> *(e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts."*

37. The genesis of the recognition is the Interim Constitution that dealt with judicial authority and the transitional arrangement relating to the judiciary that was

valid at the relevant time. Section 96 of the Interim Constitution provided as follows:

> *"96 Judicial Authority*
>
> *(1) The judicial authority of the Republic shall vest in the courts established by this Constitution and any other law.*
>
> *(2) The judiciary shall be independent, impartial and subject only to this Constitution and law.*
>
> *(3) No person and no organ of state shall interfere with judicial officers in the performance of their functions. "*

38. The relevant subsections of section 241 of the Constitution provided as follows:

> ***"241 Transitional arrangements: Judiciary***
>
> *(1)* ***Every court of law existing immediately*** *before the commencement of this Constitution in an area which forms part of the national territory,* ***shall be deemed to have been duly constituted in terms of this Constitution*** *or the laws in force after such commencement, and shall continue to function as such in accordance with the laws applicable to it until changed by a competent authority. Provided –*
>
> *(a)* …
>
> *(b)* …
>
> *(c)* …
>
> *(1A) Until the court structures contemplated in Chapter 7 have been established as required by section 242(1),* ***the jurisdiction of courts of law which existed immediately before the commencement of this Constitution and which continued to exist by virtue of subsection (1) of this section, shall be as follows:***
>
> *(a)* …
>
> *(b)* …
>
> *(c)* ***Any other court shall****, in addition to the jurisdiction vested in it immediately before the commencement of this Constitution, have the* ***same jurisdiction as that which is vested in terms of section 103 in a court of similar status*** *contemplated*

therein, and shall exercise such jurisdiction in respect of the area of jurisdiction for which it was established. [Subs. (l A) inserted by s 15(b) of Act 13 of 1994.]" (My emphasis.)

39. The legislative and constitutional context set out above make it abundantly clear that the traditional system of jurisprudence and customary law are not only recognised within the South African Law but also that our Courts should recognise and adhere to these principles when applicable.

40. Section 42(1) of the TA Act which provided as follows:

"A paramount chief, chief or headman shall –

(a) enjoy the status, rights and privileges and be subject to the obligations and duties conferred or imposed upon his office by recognised customs or usages of his tribe;

(b) …

(c) …

(d) ***maintain law and order*** *and report to the Government, without delay, any matter of important of concern, including any condition of unrest or dissatisfaction ,'*

(e) exercise within his area, in relation to any resident –

(i) ***The powers of arrest*** *conferred upon him, in his capacity as a peace officer, by Chapter IV of the Criminal Procedure Act, 1995 (Act No. 56 of 1995); and*

(ii) *Subject to the provisions of subsections (3) and (4) of section* ***forty- six*** *of the said Act ,* ***the powers of search and seizure*** *relating to stolen stock, liquor, habit-forming drugs, arms, ammunition and explosives, referred to in subsection (1) of that section;*

(f) ensure tile protection of life, persons and property and the safety of bona fide travellers within his area, and report forthwith to the competent authority

(g) …

(h) …

(i) …

(j) ***ensure compliance with all laws and the orders and instructions of any competent authority****."* (My emphasis.)

41. Section 20 of the Black Administration Act 38 of 1927 deals with the powers of the chiefs, headman and chiefs deputies to try certain offences:

"20 ***Powers of chiefs, headman and chief's deputies to try certain offences***

(1) The Minister may –

(a) by writing under his hand confer upon any Black chief or headman jurisdiction to try and punish any Black who has committed, in the area under the control of the chief or headman concerned –

(i) any offence at common law or under Black law and custom other than an offence referred to in the Third Schedule to this Act; and

(ii) any statutory offence oilier than an offence referred to in the Third Schedule to this Act, specified by the Minister:

Provided that if any such offence has been committed by two or more persons any of whom is not a Black, or in relation to a per.r;on who is not a Black of property belonging lo any person who is 1101 a Black other than property, movable or immovable, held in trust for a Black tribe or a community or aggregation of Blacks or a Black, such offence may not be tried by a Black chief or headman;

(b) at the request of any chief upon whom jurisdiction has been conferred in terms of paragraph (1), by writing under his hand confer upon a deputy of such chief jurisdiction to try and punish any Black who has committed, in the area under the control of such chief. any offence which may be tried by such chief.

[NB: (Sub-s.(l) has been repealed by s.1(3} of the Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005, with effect from such date as national legislation to further regulate the matter dealt with in sub-s (1) is implemented.]

(2) ***The procedure at any trial by a chief, headman or chief's deputy under this section, the punishment, the matter of execution of any sentence imposed*** *any subject to the provisions of paragraph (b) of subsection (1) of section nine of the Black Authorities Act, 1951 (Act 68 of 1951), the appropriation of fines shall, save in so far as the Minister may prescribe otherwise by regulation made under subsection (9), be in accordance with Black law and custom: Provided that in the exercise of the jurisdiction conferred upon him or her under subsection (1) a chief. headman or chief's deputy* ***may not inflict any punishment involving death, mutilation, grievous bodily harm or imprisonment or impose a fine in excess of R100 or two head of large stock or ten head of small stock or impose corporal punishment.***" (My emphasis.)

[NB:Sub-s *(2) has been repealed by s. 1(3) of tile Repeal of tile Black Administration Act and Amendment of Certain Laws Act 28 of 2005, with effect from such date as national legislation to further regulate the matters dealt with i11 sub-s. (1) is implemented.]*

(3) *Any jurisdiction conferred upon a chief, headman or chief's deputy under any provision of this Act before the date of commencement of the Black Administration Amendment Act, 1955, and which at that date had not been revoked under any such provision , shall be deemed to have been conferred under and subject to the provisions of this section.*

[NB: Sub-s. (3) has been repealed by s.1(3) of tile Repeal of tile Black Administration Act and Amendment of Certain Laws Act 28 of 2005, with effect from such date as national legislation to further regulate the matters dealt with in sub-s. (4) is implemented.]

(4) *The Minister may at any time revoke the jurisdiction conferred upon a chief, headman or chief's deputy under any provision of this Act before or after the commencement of the Black Administration Act, 1955.*

NB: Sub-s. (4) has been repealed by s. 1(3) of the Repeal of the Black

Administration Act and Amendment of Certain laws Act 28 of 2005, with effect from such date as national legislation to further regulate the matters dealt with in sub-s. (4) is implemented.]

(5) …

42. It is clear from the provisions of the BA Act quoted above that there is an expectation of national legislation that will specifically address issues relating to the administration of justice and traditional courts. It follows therefore that section 211 and 212 of the Constitution provide broad constitutional obligations on Parliament to pass legislation giving recognition to traditional communities. The Traditional Framework Act itself expects Parliament to pass a law dealing with the administration of justice in traditional communities. It is also an expectation in the BA Act that Parliament will pass a law dealing with the administration of justice and the application of African customary law. Finally, the Constitution itself expects Parliament to pass a law to ensure that the institutions necessary for the constitutional governance of traditional communities are established. The traditional Courts play a vital role in how justice is dispensed. In particular, they play a role in upholding the rule of law. Therefore, it is expected that the African traditional courts would give effect to the constitutional rights of people in traditional communities. This cannot be done in a vacuum. Thus it is deeply flawed for Parliament to see the important legislative duty relating to the proper functioning of traditional courts as merely discretionary.

43. The administration of justice is central to the proper constitutional functioning of traditional communities in that only through it is the rule of law consonant with the Constitution possible. The Traditional Framework Act is, but one such legislation in the many steps that Parliament must take to give effect to section 2I I and 212 of the Constitution. It also follows that Parliament was incorrect to believe that it had no obligation in section 211 and 212 read together with section 165, 34 and 38 of the Constitution to pass legislation specific to the administration of justice in the traditional communities. I would, in all circumstances, grant the order.

44. In addition to this, I accept that Parliament indicated that it was already

engaged in developing the specific legislation demanded by the Applicant. However, this appears to have been on the false premise that this was not a mandatory constitutional obligation of Parliament. Had the Applicants not brought this application, Parliament may well have taken another 22 years to give effect to a law specifically dealing with the administration of justice within traditional communities. I would accordingly grant the declaratory order declaring Parliament to be in breach of its constitutional obligation to pass legislation dealing with the administration of justice in traditional communities. I would further grant an order declaring that as a consequence of Parliament's failure to pass the specific law dealing with the administration of court, the constitutional rights of traditional communities have been undermined.

45. In my judgment, the submissions made on behalf of the Applicant correctly reflect the duty of Parliament to traditional leaders and traditional communities in respect of section 212 of the Constitution. I specifically find that the obligation in section 212 of the Constitution is a mandatory one requiring Parliament to pass legislation specifically dealing with the status of traditional Courts and the role of traditional leaders in those courts. Secondly, the Traditional Framework Act does not represent the full compliance of the constitutional duty imposed on Parliament lo ensure that appropriate legislation giving recognition to traditional leaders and communities is passed. I agree with the submission that the Traditional Framework Act specifically deals with the political governance in traditional communities and not the administration of justice. In my view, Parliament's interpretation of its constitutional obligations towards traditional leaders and communities is not consistent with the constitutional recognition of traditional leaders, institutions and African customary law. More specifically, I did not understand that Parliament believed that it was not mandatory for it to process the Traditional Courts Bill.[16] A reading of the Traditional Courts Bill indicates that Parliament was engaged in a mandatory constitutional exercise.

46. There was much said about why Parliament could not pass the Traditional Courts Bill but it does not appear that the reasons had anything to do with the fact

[16] Annexure NM6.

that Parliament believed that it was mandatory for it to do so. As I understood the issues, in terms of Parliament's practice, the term for the passing of the Traditional Courts Bill lapsed. I do not accept the reason offered by Parliament that public opposition to the Traditional Courts Bill forced it to abandon its duty to pass the legislation. The institution of traditional courts is so central to the governance of traditional communities as our Courts are to the modem constitutional governance to be left unregulated by legislation. If, as I have found, the duty to pass a law dealing with the administration of justice in traditional communities arises from the Constitution, public sentiments about it play a secondary role. In other words, where Parliament is mandated by the Constitution to pass a law, public sentiment about that law is not paramount and may not be used to abandon that constitutional duty. That is why Parliament could pass the law abolishing the death penalty or same sex marriages despite what the public sentiment may have been about such legislation.

47. The absence of a law giving guidance to traditional Court has far reaching constitutional ramifications for the exercise of constitutional rights and the rule of law in traditional communities. Our democratic system specifically guarantees the right to access courts, and this must include the right of communities to have their disputes resolved in traditional courts and in accordance with the application of African customary law. The lacuna in the law dealing with the status, role and functions of traditional leaders has had profound constitutional consequences, one of which is depriving traditional communities to enjoy the constitutional right to have their disputes resolved in traditional courts and in accordance with African customary law. A more sinister impact of Parliament's failure to pay attention to this constitutional duty is possibly the criminalization of judicial actions taken under customary law within a customary system of law.

48. Parliament has a constitutional duty to pass a law specifically dealing with traditional courts and how those courts should dispense justice within the Constitution. This duty is found in a number of interrelated constitutional provisions. The first is section 211 and 212 read together with section 165, section 38 and 34 of the Constitution. Read within the context of the Constitution as a whole, it cannot be correct that the duty of Parliament is not mandatory. The current position of traditional courts is constitutionally untenable and cannot be said to comply with the

Constitution. The fact that the authority of traditional leaders to exercise their judicial powers in traditional courts by applying African customary law depends on the Minister's powers, in terms of the BA Act is not a position consonant with the Constitution. The authority of the traditional leaders to operate independently and impartially in traditional courts is a matter that requires urgent resolution and should not continue to be a gift of the responsible Minister.

49. It does not reflect the correct constitutional position that traditional leaders and traditional courts are not operating in a manner consistent with section 165 of the Constitution. In its current form, traditional courts are not independent and traditional leaders cannot be said to operate in courts that are free from interference. While all other courts in South Africa operate within a statutory framework, it is untenable for Parliament to regard its duty to extend similar legislative recognition to traditional leaders as merely permissive.

50. Traditional Courts must enjoy the constitutional attributes of independence. Traditional leaders must perform their functions without fear, favour or prejudice as all other judicial officers. Customary law has unique attributes that reflect the values of traditional communities. These unique attributes may be undermined by the failure of Parliament to give specific recognition to the institution of traditional courts.

51. The legislation cried out for should have been passed a long time ago after the promulgation of the Constitution. Furthermore to approach the issues of traditional communities in the manner advocated by Parliament would essentially mean that it was not constitutionally mandatory for Parliament to pass the Traditional Framework Act. To suggest that Parliament does not have a mandatory duty to pass a law specifically dealing with the administration of justice in traditional communities is essentially to bring the supremacy of Parliament to decide whether to give effect to the constitutional rights of traditional communities or not.

52. It would undermine the constitutional status of customary or traditional institutions if Parliament continued to see its constitutional duty to pass legislation specifically recognising traditional courts as merely discretionary and not mandatory. It is for this reason that I differ with the judgment of my sister, Mantame J.

The power to impose criminal sanction in a criminal traditional court

53. The constitutional and legislative context for this matter has been addressed above and from that, it is clear that traditional leaders are a constitutional institution with powers to adjudicate civil and criminal cases according to customary law. In the absence of specific legislation dealing with the powers of traditional leaders to impose specific forms of punishment, it is unclear how they can be expected to operate within the Constitution if no legislation giving them guidance is enacted. The power of punishment is a critical incident in the protection of rights on the one hand and the rule of law on the other. The current position is that traditional leaders cannot lawfully impose punishment that would otherwise be acceptable in terms of customary law, without being exposed to civil or criminal liability. In the absence of specific legislation regulating the proper functioning of traditional courts, traditional leaders do not have procedural or substantive safeguards to guide how they exercise their judicial powers.

54. Although the issues relating to His Majesty King Dalindyebo cannot be dealt with by this court, it is important to make remarks relevant to the risks of Parliament not accepting, as mandatory, the duty to pass appropriate legislation that gives guidance to how traditional leaders may exercise their powers of punishment in a manner that is consonant with the Constitution. The King's acts for which he was convicted were committed in early 1996 and before the new (final) Constitution took effect. Under the hodgepodge legislation existing at the time, the King may well have been properly exercising his civil and criminal jurisdiction over his subjects. Because there is no legislation giving traditional leaders guidance on how they may exercise their powers of punishment, a traditional leader, who under customary law has the power to impose particular forms of punishment, may find himself or herself held liable in civil or criminal law for his punishment decisions.

55. The issue of immunity was debated extensively during argument and requires some attention since it is critical to the proper functioning of any judicial or prosecutorial system. At the hearing, it is clear that the Respondent, who had initially opposed the submission that traditional leaders enjoyed immunity when they

exercise their powers in traditional court and in accordance with customary law, changed their view and conceded that immunity was applicable to traditional leaders. The scope of this immunity was a matter extensively debated with the parties, demonstrating the complexity of the issue. Let me first deal with the position prior to the Constitution.

56. The power of African Kings and Chiefs to impose a compulsory levy to pay for the expense of tribal litigation and to seize property of those who refused to pay was recognised in **Molusi v Matlaba** 1920 TPD 389. The power to levy, said Wessels JP, was *"an extraordinarily large power ".*

57. In the mid-1920s the Appellate Division had an opportunity to consider the extent of a chief s powers. In **Mokhatle and Others v Union Government** 1926 AD 71; the judges decided that according to native law and custom a chief had power to banish a *"recalcitrant and rebellious"* person from his tribe and home. Significantly, the Court ruled that this power, as it was not an exercise of criminal jurisdiction, could be exercised without an investigation or trial, and was not in conflict with the general principles of civilization.

58. Kotze JA accepted the evidence given by a missionary, and an *"aged headman",* and explicitly rejected that of the applicant's star witness, the African intellectual and ANC leader Sol Plaatjie. Plaatjie's education, said Kotze, *"has evidently influenced him in the forming of hi.,· opinions, which incline towards the introduction of modem civilised principles in the government of native tribes by their chiefs"* (76-7).

59. The extraordinary powers of the traditional authorities to banish recalcitrant persons had not been abrogated in 1996 when the final Constitution was adopted.

60. The Applicant's case exposes the incomplete process of transformation of the judicial system with all its flaws inherited from apartheid and colonialism. While it is clear that the High Court and the Supreme Court of Appeal, King Dalindyebo's 'customary justice' exemplifies the worst kinds of abuses possible in customary courts, the question is whether, the remedy for the abuse is criminalising those

perceived excesses.

61. And yet, no answer has been provided and no legislation has been introduced to give guidance to traditional authorities and their subjects on the proper boundaries of criminal justice in customary courts. Section 212(1) of the Constitution provides that *"(N)ational legislation may provide for a role for traditional leadership at local level on matters affecting local communities."* Parliament has simply failed to pass the legislation that could give guidance to traditional leaders when they exercise criminal or civil authority. The consequences for such failure may be far-reaching, in that they may well result in judicial acts of traditional leaders being criminalised or subjected to civil liability. The absence of a clear Jaw specifically setting out the scope of immunity enjoyed by traditional leaders when they exercise civil or criminal jurisdiction, in my view undermines the constitutional status of traditional and customary law. Immunity from civil and criminal liability is therefore important to whether traditional courts may function properly.

JUDICIAL IMMUNITY

62. Judicial immunity is central to judicial independence. It was recognised as a common law principle but has received constitutional recognition. Historically, judges (and others exercising adjudicative functions) have been held immune against actions for damages and criminal liability arising out of the discharge of their judicial functions. An exception from this immunity has been granted only when the judge's conduct was malicious or in bad faith.[17]

63. The decisive policy underlying the immunity of the judiciary is the protection of its independence to enable it to adjudicate independently and fearlessly. Litigants (like those depending on an administrative process) are not 'entitled to a perfect process, free from innocent [ie, non *mala fide*] errors'[18] The threat of an action for damages, or criminal prosecution for that matter, would 'unduly hamper the expeditious consideration and disposal of litigation.[19]

[17] Claassen v Minister of Justice and Constitutional Development and Another 2010 (6) S 399 (WCC).
[18] Logbro Properties CC v Bedderson NO & others 2003 (2) SA 460 (SCA) para (17).
[19] Knop v Johannesburg City Council [1994] ZASCA 15; 1995 (2) SA 1(A) 33C-D.

The Position in South Africa

64. In South Africa the position regarding judicial immunity stems from the common law and has been the subject matter of many cases in the last 80 years.

Johannes Voet in his *Commenta1y on the Pandects* 5.1.58 said:

> 'But in our customs and those of many other nations it is rather rare for the judge to [bear the responsibility for the outcome] by ill judging. That is because the trite rule that he is not made liable by mere lack of knowledge or [lack of skill], but by fraud only, which is commonly difficult of proof. It would be a bad business with judges, especially lower judges who have no skill in law, if in so widespread a science of law and practice, such a variety of views, and such a crowd of cases which will not brook but sweep aside delay, they should be held personally liable to the risk of individual suits, when their unfair judgment springs not from fraud, but from mistake, lack of knowledge or lack of skill.'

65. This statement reflects the current legal position.[20] The different judgments in *R v Kumalo & Others*[21] are in this regard instructive. A chief, who had civil jurisdiction but did not have the necessary jurisdiction to impose corporal punishment, imposed it on the complainant for contempt of his court. The chief and some others were then criminally charged with assault. Van den Heever JA thought that the chief was entitled to the indemnity mentioned by Voet and in addition quoted an 1886 judgment of Lord de Villiers holding that judicial officers are also not liable in damages in relation to administrative functions performed by them in good faith in the course of their duties. Hoexter JA, speaking on behalf of the majority, confirmed the conviction on the ground that the chief knew that he was acting outside the terms of his judicial authority.

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[20] Penrice v Dickinson 1945 AD 6 at 14-15. Similar considerations apply to defamation claims: May v Udwin 1981 (1) SA 1(A)19E-F.
[21] 1952 (l) SA 381 (A).

66. In the *Telematrix*[22] judgment, in reference to the *Khuma/o* judgment, the Supreme Court of Appeal states that:

> 'More of interest though is Schreiner JA's finding (concordant with that of van den Heever JA) that the fact that the chief had exceeded his jurisdiction on its own would not have made him liable. This, I would suggest, in the ordinary course of things makes good sense because a wrong assumption of jurisdiction does not differ in kind from any other wrong decision.'[23]

67. In the *Claasen* case the Court asked the question whether judicial immunity applies in a situation in which a magistrate exercised powers that he did not have, i.e. he acted outside of his jurisdiction. To this Binns-Ward J responded that the acts of the magistrate were in relation to the subject matter of the case before him. Accordingly, 'his acts in connection therewith, fundamentally misdirected though they might have been, were nevertheless 'judicial acts'.'[24] The Court therefore found that the actions of the magistrate were performed within the context of his capacity as a magistrate and accordingly judicial immunity thus applied.

68. The proper functioning of the traditional courts will require that traditional leaders be afforded immunity from criminal and civil liability for their actions as judicial officers. In Claassen v Minister of Justice and Constitutional Development,[25] Justice Binns-Ward quoted from the judgment of Chief Justice of Australian as following;

> *"This immunity from civil liability is conferred by the common law, not as a perquisite of judicial office for the private advantage of judges but for the protection of judicial independence in the public interest ..."*

69. Section 165(4) of the Constitution specifically requires organs of state to,

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[22] Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461(SCA)
[23] Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461(SCA) at para 19
[24] Claassen v Minister of Justice and Constitutional Development and Another 2010 (6) SA 399 (WCC) at para 27
[25] At para 30.

through legislative and other measures, assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of all Courts. Section 165(3) prohibits any person from interference with the functioning of the Courts. The threat of prosecuting traditional leaders for their judicial decisions is a violation of the Constitution and can be cured by Parliament passing appropriate legislation giving immunity to traditional leaders.

70. The principle of immunity is universal and has been the reason for the effectiveness of traditional courts until the conviction and sentencing of King Dalindyebo. Without deciding whether immunity would have covered the actions of His Majesty King Dalindyebo, it is important to recognise that, there are forms of punishment accepted under customary law, but are not consonant with the Constitution. To leave customary law untouched by legislative intervention would place it in constant conflict with the constitutional norms and principles.

71. Common law courts have recognised absolute immunity for nearly 400 years.[26] The origins of the litigation privilege have been traced back to medieval England. The privilege arose soon after the Nonnan Conquest and the introduction of the adversarial system in the eleventh century. Courts have aptly declared that the doctrine of absolute immunity is *"as old as the law."*[27] The first opinion dismissing a lawsuit against an attorney by applying the doctrine of absolute immunity was rendered in 1606.[28] In that case, the attorney was accused of slandering his client's adversary during a previous trial by asserting that the opponent was a convicted felon."[29] Even assuming that the attorney's assertion was false, the court held that the attempt to discredit the witness during the previous litigation was protected by

[26] See authorities referred to for the discussion on litigator's privilege: Paul T. Hayden, Reconsidering the Litigator's Absolute Privilege to Defame, 54 OHIO ST. L.J. 985, 1018 (1993) (citing R.H. HELMHOLZ, SELECT CASES ON DEFAMATION TO 1600 (1985) and Frank Carr, The English Law of Defamation, 18 L. Q. REV. 255, 263-67 (1902)); see also Post v. Mendel, 507 A.2d 351, 353-55 (Pa. 1986) (detailing history of doctrine or absolute immunity).
The first English case to apply the privilege was decided in 1497; R.C. Donnelly, History of Defamation, 1949 WIS. L. Rev. 99, 109 n.48 (1949); William S Holdsworth, A History of English Law 376 (1926) (dating same case 1569); Theodore F.T. Plucknett, A Concise History of the Common Law 497 n.3 (5th ed. 1956); David R. Cohen, Note, Judicial Malpractice Insurance? The Judiciary Responds to the Loss of Absolute Judicial Immunity, 41 Case W. Res. L. REV. 267, 272 (1990) (dating the first English case to advance absolute immunity for judges in the early fourteenth century).
[27] Randall v. Brigham, 74 U.S. (7 Wall.) 523, 536 (1868) (endorsing the doctrine of absolute judicial immunity).
[28] Brook v. Montague, 79 Eng. Rep. 77, 77 (K.B. 1606).
[29] Brook, 79 Eng. Rep. at 77.

absolute immunity." The court declared: "[A] *counsellor in law retained hath a privilege to enforce any thing which is informed him by his client, and to give it in evidence, it being pertinent to the matter in question, and not to examine whether it be true or false ."*

72. Centuries later, the doctrine of absolute immunity remained intact. In the 1883 case of Munster v Lamb, an English court granted an attorney immunity from suit even assuming his conduct was *"without any justification or even excuse, and from the indirect motive of personal ill-will or anger"* toward his former client's adversary.[30] The court explained: *"With regard to counsel, the questions of malice, bona fides, and relevancy, cannot be raised; the only question is, whether what is complained of has been said in the course of the administration of the law. If that be so, the case against a counsel must be stopped at once."*[31] Munster v. Lamb was followed by Henderson v. Broomhead, which declared the following: *"No action will lie for words spoken or written in the course of any judicial proceeding. In spite of all that can be said against it, we find the rule acted upon from the earliest times. The mischief would be immense if the person aggrieved, instead of preferring an indictment far perjury, could turn his complaint into a civil action. By universal assent it appears that in this country no such action lies."*[32]

English Courts

73. Early English decisions initially found that judges lost immunity from suit for acts clearly beyond their jurisdiction. Only in a single area did the English common law grant a broad form of immunity to judges. Recognizing a need to protect judges from the displeasure of the Crown and its ministers, the Star Chamber in *Floyd v. Barker*[33] had held that a judge could not be prosecuted in another court for an alleged criminal conspiracy in the way he had handled a murder trial. In refusing to try the case, the judges of Star Chamber held simply that if the king wished to discipline a judge, the king must do so himself without resort to a criminal prosecution. Despite this narrow focus, *Floyd* frequently is cited as the foundation of

[30] Munster v. Lamb, II Q.B.D. 588, 599 (1883).
[31] Id. at 605; see also Rex v. Skinner, 98 Eng. Rep. 529 (1772).
[32] Henderson v. Broomhead, 157 Eng. Rep. 964, 968 (Ex. Ch. 1859) (Crompton, J., concurring).
[33] 777 Eng.Rep. 1305 (Star Chamber 1608).

the American judicial immunity doctrine.[34]

74. It is said in English law that; *"an action will not lie against a witness for giving false evidence in a court of justice."*[35] Effectively then *"no action lies, whether against judges', counsel, jury, witnesses or parties for words spoken in the ordinary course of any proceedings before any court or tribunal recognised by law. The evidence of all witnesses or parties speaking with reference to the matter before the court is privileged, oral or written, relevant or irrelevant, malicious or not."*[36] *"This no civil action lies against a witness for perjury at the suit of the person damnified by the false evidence. This immunity is immunity form any form of civil action."*[37]

75. This general immunity from civil liability attaches *"to all persons in respect of their participation in proceedings before a court of justice, judges, court officials, witnesses, parties, counsel and solicitors alike ..." "Why should a witness be able to avail himself of his position in the box and to make without fear of civil consequences a false statement which in many cases is perjured, and which is malicious and affects the character of another? The rule of law exists not because the conduct of those persons ought not to be actionable, but because if their conduct was actionable, actions would be brought against judges and witnesses in cases, where they had not spoken with malice, in which they had not spoken with falsehood. "*[38]

76. The immunity of a witness from suit in respect of evidence given in court was described by Simon Brown LJ in ***Silcott v Commissionr of Police for the Metropolis*** (1996) 8 Admin Law 633 at 636, as a fundamental rule of law. The origins of the rule were traced in the judgment of Kelly CB in ***Dawkins v Lord Rokeby*** (1873) LR 8 QB at 263-265 where the following appears:

> *..upon all these authorities it may now be taken to be settled law that no action lies against a witness upon any evidence given before any court or tribunal constituted according to law."*

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[34] See, for example, Pulliam v Allen, 104 S. Ct. 1970, 1975 (1984). The Supreme Court first relied on Floyd as a precedent for judicial immunity in Bradley v Fisher, 80 U.S. (13Wall.) 335, 351 (1872)
[35] Revis v Smith (1856) 18 CB 126 at 144.
[36] Halsbury 4th Edition Volume 28.
[37] Clerk and Lindsell on Torts, 18th edition, 2000.
[38] Munster v Lamb (1883) 11 QBD, 588. 607).

77. The basis of immunity in respect of evidence given in court was explained by Lord Halsbury in ***Watson v M'Ewan, Watson v Jones*** [1905] AC 480 at 486:

> *"… the conduct of legal procedure by Courts of justice, with the necessity of compelling witnesses to attend, involves as one of the necessities of the administration of justice the immunity of witnesses from actions being brought against them in respect of the evidence they have given. In my view. it is absolutely inarguable. it is settled law and cannot be doubted."*

78. The immunity given to a witness or potential witness in civil or criminal proceedings is based on the reasoning that, the administration of justice would be greatly impeded if witnesses were to be in fear that persons against whom they gave evidence might subsequently involve them in costly litigation."[39] (Additional reasons why immunity is traditionally conferred upon witnesses in respect of evidence given in court include the need to ensure that witnesses, *"may give their evidence fearlessly and to avoid a multiplicity of actions in which the value or truth of their evidence would be tried over again. Moreover the trial process contains in itself, in the subjection to cross examination and confirmtation with other evidence, some safeguard against careless, malicious; or untruthful evidence."(**Roy v Prior*** [1970] 2 All ER 729 at 736, [1971] AC 470 at 480.).

79. It is not only the need to stop matters being litigated over and over again by disgruntled parties *(**Roy v Prior*** [1970] 2 All ER 729), but also the need to protect witnesses themselves from suits stemming from the evidence they are to give *(**Munster v Lamb*** (1883) 11 QBD, 588), *"a* fortiori *the need to encourage witnesses to come forward and say what they have to say in court." (**Stanton v Callaghan*** [2000] 1 Q.B.75.) The immunity extends to any civil proceedings brought against a defendant that are based on the evidence that he or she gives in court. Consequently, immunity from suit extends to the honest as well as the dishonest witnesses, *"immunity is not granted primarily for the benefit of the individuals who seek it. They themselves are the beneficiaries of the overarching public* interest,

[39] See per Salmon LJ in Marsha11 v Vibart [1962) I All ER 869 at 871.

which can be expressed as the need to ensure that the administration of justice is not impeded" (Sta11to11 v Callaghan [2000] 1 Q.B.75). Immunity is granted "on the basis of a supervening public interest which transcends the need to provide a remedy in an individual case." (Stanton (supra) at 88.

80. Collins J pointed out in ***Meadow v General Medical Council*** [2006] EWCH 146 that the dishonest witness may then be guilty of the criminal offence of perjury and can be prosecuted if sufficient evidence exists, however, if such evidence is not available the immunity exists because of the requirement that a witness should be able to give evidence free from fear of any reprisal. Public policy states that there is a need to protect the honest witness. This may result in immunity for the dishonest witness. Nonetheless, the balance between the right of the individual to make a claim and the need, in the interests of the administration of justice, to ensure that witnesses give evidence in the knowledge that they cannot be subjected to action which may seek to penalise them is struck by giving priority to the latter.

81. In ***Darkur v Chief Constable of the West Midlands*** 2001 1 AC 435 at p 464 D, Lord Hutton stated that the rule was necessary, *"in order to shield honest witnesses from the vexation of having to defend actions against them and to rebut an allegation that they were activated by malice the courts have decided that ii is necessary to grant absolute immunity Jo witnesses in respect of their words in court though this means that the shield covers the malicious and dishonest witness as well as the honest one."*

82. Although Lord Hutton was referring specifically to actions for defamation, it is clear that the public policy, which grants immunity, extends for the same reason to any action brought, whether or not it alleges malice, bad faith or dishonesty. The Court continued in Darkur v Chief Constable of the West Midlands *supra* and concluded thus: "By complete authority, including the authority of this house (see ***Dawkins v Lord Rokeby*** (18 75) LR 7HL 744) it has been decided that the privilege of a witness, the immunity from responsibility in an action where evidence has been given by him in a court of justice, is too well established now to be shaken. Practically I may say that in my view it is absolutely unarguable - it is settled law and cannot be doubted. The remedy against a witness who has given evidence which is

false and injurious to another is to indict him for perjury; but for very obvious reasons, the conduct of legal procedure by courts of justice, with the necessity of compelling witnesses to attend, involves as one of the necessities of the administration of justice the immunity of witnesses from actions brought against them in respect of evidence they have given.

United States Courts

83. Absolute immunity from civil liability for damages was affirmed by the Supreme Court in ***Briscoe v LaHue,*** 460 US. 325, 103 S Ct.1108 75 L.Ed 200 96 (1983), "*in damages suits against witnesses, 'the claims of the individual must yield lo the dictates of public policy, which requires that the paths which lead to the ascertainment of the truth should be left as free and unobstructed as possible . A witness's apprehension of subsequent damages liability might induce two forms of self-censorship. First witnesses might be reluctant to come forward to testify. And once a witness is on the stand, his testimony might be distorted by the fear of subsequent liability."* In *US v Parra-Garcia* 2001 10Cir 13 242 F.3d 392 the court held that:

> *"public: policy reasons for the rule include: (1) the absolute immunity for witnesses in judicial proceedings as discussed in Briscoe v Lahue* (supra), *i.e. encourages witnesses to speak fi· eely without fear of civil liability, (2) perjury is a public offence and subject only to the criminal law, (3) the need for finality in judgments, (4) possibility of a multiplicity of suits by parties dissatisfied by the outcomes of trials, and (5) lack of precedent for such actions."*

84. In 1978, the Supreme Court in *Stump v Sparkman*[40] held that the doctrine forbade a suit against an Indiana judge who had authorized the sterilization of a retarded 15-year-old girl under the guise of an appendectomy. The judge had approved the operation without a hearing when the mother alleged that the girl was promiscuous. After her marriage two years later, the girl discovered she was sterile.

[40] 435 U .S. 349 (1978).

85. In 1980, the Seventh Circuit Court of Appeals in *Lopez v Vanderwater*[41] held a judge partially immune from suit for personally arresting a tenant who was in arrears on rent owed the judge's business associates. At the police station, the judge had arraigned the tenant, waived the right to trial by jury, and sentenced him to 240 days in prison. Six days of this sentence were served before another judge intervened. The Seventh Circuit found the judge immune for arraigning, convicting, and sentencing the tenant but not for conducting the arrest and "prosecution."

86. In 1985, the Eleventh Circuit Court of Appeals held in *Dykes v. Hosemann*[42] that the immunity doctrine required dismissal of a suit against a Florida judge who had awarded
custody of a child to its father, himself the son of a fellow judge. This "emergency" order had been entered without notice to the mother or a proper hearing when the father took the boy to Florida from their Pennsylvania home after a series of marital disputes.

87. In 1985, the Tenth Circuit Court of Appeals in *Martinez v Winner*[43] held a federal judge immune who, during a trial, had conducted a secret meeting with prosecutors without notifying the defendant or his attorneys. Expressing concern that the jury would be "intimidated" into a not-guilty verdict, the judge agreed to declare a mistrial after the defense had presented its case so the government could prosecute anew with full knowledge of the defense's strategies.

88. In just 20 years, these precedents and others like them have established absolute judicial immunity as a settled feature of American law. Under the current doctrine, any act performed in a 'judicial capacity' is shielded from suit or criminal liability.

89. The varied approaches to immunity in different jurisdictions demonstrates the importance of immunity to judicial independence. Each approach is influenced by the unique legal and constitutional traditions. Each is influenced by the history and the

[41] 620 F.2d 1229 (7th Cir. 1980).
[42] 776 F.2d 942 (11th Cir.1985)
[43] 771 F.2d 424 (10th Cir. 1985).

unique experiences of particular jurisdiction. South Africa under the Constitution has a stronger claim to judicial independence and with it, a more enhanced form of judicial immunity. The application of judicial immunity in South Africa must reflect the Constitution, taking into account its strong emphasis on the protection and promotion of constitutional rights, accountable and democratic government and independent constitutional institutions.

90. The failure to afford traditional leaders immunity from civil and criminal liability undermines the capacity and ability of traditional courts to act as independent judicial institutions envisaged in section 165 of the Constitution. The absence of clear legislation establishing the precise parameters of judicial immunity for traditional leaders exposes them to criminal and civil liability. The fact that there are certain acts that would be acceptable in terms of African customary law but not consistent with the Constitution, means that traditional leaders who preside in traditional courts to adjudicate disputes in accordance with African Customary law are constantly exposed to the possibility of being held liable in civil and criminal liability. Since African customary courts and law must be bended to the requirements of the Constitution.

91. Traditional leaders may only enjoy immunity from civil and criminal liability if they are operating in traditional courts that are established in a manner consonant with the Constitution. Immunity is for reasons of judicial independence and the protection of constitutional rights. The fact that the traditional courts are unregulated in a manner that complies with the Constitution means that traditional leaders are constantly exposed to the possibility of civil and criminal liability. Their courts exists by virtue of ministerial directive in terms of the BA Act. This means that they are not courts in terms expected by the Constitution in that they are not independent.

92. I am in agreement with the judgment of my esteemed colleague, Mantame J, that the relief sought in respect of His Majesty King Dalindyebo cannot be granted by this Court. I do not agree however that *res judicata* is the reason for this. The basic requirements of *res judicata* are not present in this case. The issues were different, the parties were different and this was certainly not a retrial of His Majesty's case.

The reason, in my view, is that there is no evidence placed before this Court to determine whether or not the question of judicial immunity was applicable to His Majesty's case. I certainly agree that his guilt has been finally determined and it is not for this Court to revisit that issue. As I understood the issue. it was not being asked of us to revisit the issue of His Majesty's guilt or innocence. The question, as I understood it, was whether or not His Majesty's actions could be covered under the principle of judicial immunity. The fact that His Majesty King Dalindyebo and other traditional leaders are not afforded immunity for their judicial acts violates their constitutional rights and undermines judicial independence in traditional communities.

THE RELIEF AGAINST THE FIFTH RESPONDENT

93. The Fifth Respondent was particularly opposed to the existence and application of judicial immunity to traditional leaders. At the hearing of this application, the Fifth Respondent conceded that judicial immunity existed for and applied to traditional leaders. That concession makes it clear that prior to pursuing criminal charges against a traditional leader for acts committed in the traditional court, a prosecutor must first be satisfied that the acts are not covered by immunity. Whether or not immunity applied to His Majesty, King Dalindyebo, is not for this court to decide. Suffice to re-emphasize the correct and proper constitutional position- which is that - traditional leaders enjoy immunity from civil and criminal liability for their judicial acts in traditional courts. This means that traditional leaders may not be held liable in civil and criminal proceedings for their interpretation and application of African customary law in their traditional courts.

CONCLUSION

94. I have concluded that the Constitution imposes a mandatory duty on Parliament in terms of section 211 and 212 read together with sections 34, 38 and 165 of the Constitution, to pass specific legislation dealing with the administration of justice in traditional communities and judicial immunity to traditional leaders. The mandatory duty is reinforced by the general duty of Parliament in section 7(2) of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights of

persons under traditional leadership and governed in accordance with African customary law. This, Parliament, must do by passing appropriate legislation, as required in section 165(4) of the Constitution, to ensure that traditional Courts are independent, impartial, have dignity, are accessible, and effective. Parliament has failed to pass legislation providing for the administration of justice in traditional communities in that no legislation envisaged in section 165(4) of the Constitution exists. It has failed to give legislative recognition to the status of traditional courts the effect of which the position of traditional leaders and communities remains constitutionally vulnerable. The failure of Parliament to pass laws that recognise the judicial status of traditional leaders has undermined customary law and the constitutional rights of communities to that law.

95. Traditional leaders have the power to adjudicate disputes in their courts in accordance with African customary law. When they do so, they enjoy immunity from civil and civil liability, provided they act within the law and the Constitution.

96. It would therefore be appropriate to give the declaratory order in terms of which it is made clear that Parliament's mandatory duty to the traditional leaders and communities of South Africa include passing legislation specifically giving effect to the constitutional rights of the traditional leaders and their court. It would therefore be a just and equitable remedy for an order declaring that Parliament has a mandatory constitutional duty to pass legislation dealing with the administration of justice in traditional communities.

COSTS

97. In my judgment, the Applicant have scored significant success, including a declaratory order that Parliament has a mandatory duty to pass a law specifically dealing with the administration of justice. The Applicant has also succeeded on the issue of inununity. I would grant Applicant costs including costs of two counsel. The fact that they did not succeed in so far as their relief concerned His Majesty, King Dalindyebo does not and cannot detract from the significant success in the relief against Parliament and on the issue of judicial immunity.

98. However even if I had found against the Applicant, I would follow the principle generally accepted in our courts that Applicant who have raised constitutional matters of substance should not be burdened with costs. The constitutional issues raised by the Applicant are significant and important for a great majority of very vulnerable communities who live in traditional communities practising African customary law. The issues were neither recklessly raised nor raised in bad faith. I do not think that a cost order is appropriate in this case even if the Applicant had not been successful in all its orders.

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HLOPHE JP