



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

Case Number: 2751/2021P

Consolidated with Case No: 2752/2021P

In the matter between:

QUEEN SIBONGILE WINNIFRED ZULU

APPLICANT

and

QUEEN BUHLE MATHE

FIRST RESPONDENT

QUEEN SHIYIWE MANTFOMBI DLAMINI

SECOND RESPONDENT

QUEEN THANDEKILE JANE NDLOVU

THIRD RESPONDENT

QUEEN NOMPUMELELO MCHINZA

FOURTH RESPONDENT

QUEEN ZOLA ZELUSIWE MAFU

FIFTH RESPONDENT

PRINCESS THEMBI NDLOVU

SIXTH RESPONDENT

PRINCE MBONISI ZULU

SEVENTH RESPONDENT

PRINCE THULANI ZULU

EIGHT RESPONDENT

PRINCESS LINDI ZULU

NINTH RESPONDENT

PRINCE VULINDLELA ZULU

TENTH RESPONDENT

PRINCE MXOLISI ZULU

ELEVENTH RESPONDENT

PRINCE MATHUBA ZULU

TWELFTH RESPONDENT

QUEEN MAVIS ZUNGU

THIRTEENTH RESPONDENT

OTHER PERSONS WHO MAY BE MEMBERS

OF *UMNDENI WESILO*

FOURTEENTH RESPONDENT

MEMBERS OF THE ROYAL FAMILY

LISTED IN ANNEXURE 'A'

FIFTEENTH RESPONDENT

SIPHO JEROME NGWENYA

SIXTEENTH RESPONDENT

THE PREMIER OF KWAZULU-NATAL

SEVENTEENTH RESPONDENT

**THE PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA
THE MASTER OF THE HIGH COURT
SANLAM TRUST (PTY) LTD**

**EIGHTEENTH RESPONDENT
TWENTIETH RESPONDENT
TWENTY FIRST RESPONDENT**

Case Number: 2751/2021P

Consolidated with Case No: 2752/2021P

In the matter between:

**PRINCESS NTANDOYENKOSI ZULU
PRINCESS NTOMBIZOSUTHU ZULU-DUMA**

FIRST APPLICANT

SECOND APPLICANT

and

QUEEN BUHLE MATHE

FIRST RESPONDENT

THE EXECUTOR OF THE ESTATE LATE:

HER MAJESTY QUEEN MS DLAMINI-ZULU

SECOND RESPONDENT

QUEEN THANDEKILE JANE NDLOVU

THIRD RESPONDENT

QUEEN NOMPUMELELO MCHIZA

FOURTH RESPONDENT

QUEEN ZOLA ZELUSIWE MAFU

FIFTH RESPONDENT

THE MEMBERS OF THE ROYAL FAMILY

LISTED IN ANNEXURE 'A'

SIXTH RESPONDENT

SIPHO JEROME NGWENYA

SEVENTH RESPONDENT

SANLAM TRUST (PTY) LTD

EIGHTH RESPONDENT

PREMIER OF KWAZULU NATAL PROVINCE

NINTH RESPONDENT

THE MASTER OF THE HIGH COURT

TENTH RESPONDENT

THE PRESIDENT OF THE REPUBLIC OF

SOUTH AFRICA

ELEVENTH RESPONDENT

PRINCE MISUZULU ZULU

TWELFTH RESPONDENT

THE MEMBER OF THE EXECUTIVE COUNCIL

FOR COOPERATIVE GOVERNANCE AND

TRADITIONAL AFFAIRS

THIRTEENTH RESPONDENT

Case number: 10879/2021P

In the matter between:

PRINCE MBONISI BEKITHEMBA ZULU	APPLICANT
and	
PRINCE MISUZULU KAZWELITHINI ZULU	FIRST RESPONDENT
PRINCE MANGOSUTHU BUTHELEZI	SECOND RESPONDENT
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	THIRD RESPONDENT
PREMIER OF KWAZULU-NATAL PROVINCE	FOURTH RESPONDENT
THE HOUSE OF TRADITIONAL AND KHOI-SAN LEADERS OF KWAZULU-NATAL PROVINCE	FIFTH RESPONDENT
THE HOUSE OF TRADITIONAL AND KHOI-SAN LEADERS, NATIONAL	SIXTH RESPONDENT
OTHER PERSONS WHO MAY BE MEMBERS OF <i>UMNDENI WESILO</i>	SEVENTH RESPONDENT
MEMBERS OF THE ZULU ROYAL FAMILY AS LISTED IN ANNEXURE 'A' TO THE NOTICE OF MOTION	EIGHTH RESPONDENT

ORDER

The following orders are granted:

In case number 2751/2021P:

The application is dismissed with costs, such costs to include those costs consequent upon the employment of senior counsel.

In case number 2752/2021P:

1. The execution of the last will and testament of his late Majesty King Goodwill Zwelithini Zulu be and is hereby suspended pending the final determination of the action referred to in paragraph (3) of this order;

2. The seventh respondent be and is hereby interdicted and restrained from performing any functions or duties assigned to him in terms of the provisions of the last will and testament of his late Majesty Goodwill Zwelithini Zulu;
3. The applicants are directed to institute an action challenging the authenticity and validity of the will referred to in paragraph (1) above, within fifteen (15) days of the date of this order, failing which the relief granted in paragraph 1 of this order shall lapse;
4. The costs are reserved for the trial court; and
5. The application for the relief sought in prayers (c), (d), and (e) and (f) of the notice of motion is dismissed with costs, such costs to include costs consequent upon the employment of two counsel.

In case number 10879/2021P:

The application is dismissed with costs, such costs to include the costs of two counsel.

JUDGMENT

MADONDO AJP

Introduction

[1] Three applications are brought by various members of the Zulu Royal Family against certain members of the same family and other parties. The relief sought is, in some instances similar, but it is also different. Since these matters arose from almost the same facts and circumstances against the same or slightly different respondents and are interrelated, this court has deemed it appropriate to consolidate case numbers 2751/2021P, 2752/2021P and 10879/21P respectively to facilitate their hearing and to avoid conflicting judgments on the same set of facts. The first two applications were consolidated on 25 May 2021, and on 2 December 2021 this court simply adjourned the third application and ordered that it should be heard together with the other two applications.

Queen Sibongile Winnifred Zulu v Queen Buhle Mathe and others - 2751/2021P

Introduction

[2] In this application, Queen Sibongile Winnifred Zulu ('the applicant queen'), being the first wife of the late King Goodwill Zwelithini ka Bhekuzulu Zulu ('the late *Isilo*') who passed away on 12 March 2021, seeks an order in the following terms:

- (a) a declaratory order that she was married to the late *Isilo* in terms of civil law, in community of property and profit and loss, and that her marriage was subject to the Marriage Act 25 of 1961;
- (b) an order directing the executor of the estate of the late *Isilo* to disregard and to not give effect to any of the provisions of the last will and testament of the late *Isilo* which is at variance with the terms of the declaratory order;
- (c) interdicting the sixth to the fourteenth respondents from declaring, endorsing, proclaiming or appointing the second respondent (Queen Shiyiwe Mantfombi Dlamini) or any of the respondent queens as *ibambabukhosi* or successor to the throne as *Isilo* samaZulu pending the final determination of the relief sought herein;
- (d) interdicting the seventeenth and eighteenth respondents from enforcing and putting into effect any decisions that may have already been taken to appoint or to recommend the appointment of the second respondent or any other respondent queen as regent or successor to the throne by giving effect to the will pending the finalisation of this application;
- (e) directing the seventeenth respondent to furnish and deliver to the applicant queen's attorneys the last list (if any) of the Zulu Royal Family which was signed and submitted by the late *Isilo* to the office of the Premier of KwaZulu-Natal as contemplated by the provisions of section 4(1) of the KwaZulu-Natal Zulu Royal House Trust Act 3 of 2018 (the Royal House Trust Act) and directing the applicant, with the leave of this court, to publish the order in the *Ilanga*, *Isolezwe* and *Mercury* newspapers so that any person or persons who are not cited herein and whose membership of the *uMndeni weNkosi (weSilo)* is unknown to the applicant queen and who has a direct and substantial interest in the application or whose rights will be affected by the relief sought, are informed.

[3] However, the applicant queen amended prayer 2(b) and 2(c) of her notice of motion to read as follow:

(b) A declaratory order is sought that the late *Isilo* was precluded from entering into a customary union with any other person while the marriage between him and the applicant queen subsisted;

(c) That the executor excises and disregards any provision of the will that is at variance with the marriage being in community of property.

The applicant queen indicated further that she was not persisting with paragraphs 2(d) and 2(e) of her notice of motion, since the relief sought therein had been overtaken by the passing of Her Majesty Queen Shiyiwe Manthfombi Dlamini-Zulu ('the late Queen'). She now only seeks relief in terms of prayers 2(a), 2(b) and 2(c) of her notice of motion, as amended.

Parties

[4] The applicant is Queen Sibongile Winnifred Zulu, the first wife and one of the widows of the late *Isilo*, of kwaKhethomthandayo Palace.

[5] The first to fifth respondent are the wives (now widows) of the late *Isilo* of various palaces. The sixth respondent is Princess Thembi Ndlovu of E 9003 Madadeni, Newcastle, a sister to the late *Isilo*. The seventh respondent is Prince Mbonisi Zulu, a half-brother to the late *Isilo* of Ikhwezi homestead, Lindizwe area, Nongoma. These respondents, as well as the eighth to thirteenth respondents, are all cited as members of the *uMndeni weSilo*.

[6] The fourteenth respondent consists of all unknown members of *uMndeni weSilo* as contemplated in the definition section of the KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005 ('the KZN Act') but whose names and identity are not known to the applicant. The fifteenth respondent are members of the Zulu Royal Family as contemplated in the definition section of the KZN Act, read with section 4 of the Royal House Trust Act. The sixteenth respondent is Mr Siphon Jerome Ngwenya, the chairperson of the Ingonyama Trust Board, cited herein as the person who is assigned

certain duties in terms of the provisions of the last will of the late *Isilo*, and as an interested party in this application.

[7] The seventeenth respondent is the Premier of the KwaZulu-Natal Province. The eighteenth respondent is the President of the Republic of South Africa and the nineteenth respondent is the Master of the High Court. The twentieth respondent is Sanlam Trust (Pty) Ltd, a private company incorporated and registered in terms of the company laws of South Africa. It is cited herein as it is designated and appointed in terms of the will of the late *Isilo* as the executor of the joint estate.

Factual background to the applicant queen's application

[8] On 27 December 1969, the applicant queen and the late *Isilo* entered into a marriage in community of property and of profit and loss, regulated by the Marriage Act 25 of 1961. The applicant queen contends that as a consequence of that marriage, the late *Isilo* could not enter into any other marriage, whether civil or customary. At the time, the late *Isilo* was not yet anointed as king but was a prince elect. The Zulu family paid ilobolo to the applicant queen's family as per Zulu customs and traditions. However, her family chose that she and the late *Isilo* should marry in accordance with Christian rites.

[9] During the subsistence of their marriage, the late *Isilo* engaged in other love relationships. These relationships culminated in customary celebrations of such unions between the late *Isilo* and the first to fifth respondents. This happened despite the fact that civil law did not recognise polygamy. During 1981, the now defunct KwaZulu Government passed a Bill which was intended to amend the Natal Code of Zulu Law and sections 22 and 23 of the Black Administration Act 38 of 1927. This dealt with the consequences of marriages by Christian rites and succession. The old Natal Code prohibited a man from taking a wife or wives by customary union in addition to a wife by Christian rites. However, the Bill, which would make it possible for a man to take customary wives even after a marriage by Christian rites thereby restoring the Zulu custom to men married by Christian rites, was not enacted into law.

[10] On 29 November 2016, the late *Isilo* made his last will and testament. However, the applicant queen does not wish to embroil herself in the challenge by the princesses regarding the validity of such will. Her interest is only to assert her rights as the wife of the late *Isilo* in terms of her civil marriage. She has confined her claim to the assets of the joint estate.

[11] In his will, the late *Isilo* states that in the event of the applicant queen seeking to assert her rights, she will be disinherited of all rights in the Royal Household Trust, and that her name would be removed, and all benefits derived therefrom would be terminated with immediate effect. Such a clause, according to the applicant queen, is against the rule of law and is *contra bonos mores* or in conflict with the laws of our country.

[12] The applicant queen categorically states that she has absolutely no intention to evict the first to fifth respondents from the palaces that they presently occupy by virtue of their status as the wives of the late *Isilo*, or their children, or any person lawfully occupying the palaces through them, nor does she have an intention to cause friction or ructions in the Royal Family. Instead, she wants all the descendants of the late *Isilo* to be treated equally, irrespective of whether they are born of civil or customary marriages. They should not be deprived of any title, right or privilege they have obtained through their birth as children of the late *Isilo*.

[13] She, further, states that at the time of the death of the late *Isilo*, his marriage to the applicant queen still subsisted, notwithstanding the fact that the *Isilo* had entered into subsequent customary marriages with the first to fifth respondents. These unions are only recognised to the extent provided for in the Recognition of Customary Marriages Act 120 of 1998 ('Recognition Act'). However, the unavoidable consequence of the marriage between the applicant queen and the late *Isilo* is that their entire estate is owned jointly and in equal shares by them, each owning 50% of the joint estate. In her contention the disposition of the entire estate by the late *Isilo* as if he was the sole owner of the estate is legally incompetent and impermissible. According to the applicant queen, half of the estate must be determined and set aside as a portion that may be

distributed in terms of the will. However, the clauses of the will permitting the disinheritance are unenforceable. Should the second respondent be appointed as *ibambabukhosi*, she would be entitled to dispose of and alienate the property of the late *Isilo* and it is necessary to obtain an order that 50% of the joint estate belongs to the applicant queen.

[14] The applicant queen has averred that in terms of customs and practices, the second respondent is not eligible to ascend to the throne, the reason being that she is not born of the Zulu Royal Family. It is also averred that her customary marriage does not entitle her to ascend the throne. It was also contented that her appointment, either as *ibambabukhosi* or the Monarch must comply with the Traditional Leadership and Governance Framework Act 41 of 2003.¹

[15] The documents reporting the estate of the late *Isilo*, including his last will, were only lodged with the Master of the High Court, the twentieth respondent, on 6 May 2021 in terms of section 8(1) of the Administration of Estates Act 66 of 1965 ('the Estates Act'). The will was registered and accepted on the same day under file no 9108/2021DBN in terms of section 8(3) of the Estates Act. The will is prima facie in compliance with the requirements of the Wills Act 7 of 1953, save for the deletion and amendment found in paragraph 15 at page 5 of the will. Such deletion and amendment related to the deletion of an identity number of a beneficiary mentioned in the will and was replaced with another number. This, according to the Master of the High Court, is not to be considered in interpreting the will as the deletion and amendment does not comply with section 2(1) (b)(iii) of the Wills Act, in that the amendment is not identified by the signature of the two witnesses unless it is accepted by the court. The inclusion of an identity number of a person mentioned in a will is according to the Master of the High Court not a requirement of the Wills Act.

Preliminary issues

Ruling

¹ This Act has been repealed by the Traditional and Khoi-San Leadership Act 3 of 2019, which commenced on 1 April 2021.

[16] Before the commencement of this matter, Mr Redman for the applicant queen, indicated that he would seek an order declaring the subsequent marriages of the late *Isilo* with the other queens to be invalid. He was undecided as to whether or not he intended to bring an application for my recusal since there was a rumour that I had attended or presided over one of the subsequent marriages of the late *Isilo*. This court had to first determine whether on the papers, the applicant queen asked this court to determine and make a finding on the validity of the subsequent marriages of the late *Isilo* with other queens. It appears clearly from the papers that no such relief is sought. Mr Redman then sought reliance on the words that the late *Isilo* was 'precluded from entering into a customary union with any other person while the marriage between him and the applicant still subsisted'. He argued that this court should read the words that the subsequent marriages of the late *Isilo* with other queens were invalid into the words 'the king was precluded'.

[17] The proposed inclusion of these words, in my view, would render the relief sought to be at variance with the averments of the applicant queen in her founding and replying affidavits, and against her wishes as the declaratory order that the subsequent marriages of the late *Isilo* were invalid would impact on the legitimacy of the children of the late *Isilo* born of such marriages

[18] The court ruled that it had not pertinently and pointedly been asked to determine the validity of the subsequent marriages of the late *Isilo* and his other wives, and it would therefore not be just and equitable to read that 'the subsequent marriages of the late *Isilo* with the other queens were invalid' into the word 'precluded'.

Application to amend

[19] Mr Redman then sought to amend, from the bar, the notice of motion to include the prayer that 'all subsequent marriages between the late *Isilo* and first to fifth respondents are declared invalid'. Mr Madonsela, for the second, sixth and twelfth respondents, objected to such amendment on the grounds that the respondents had at all relevant times been made to believe that the validity of the subsequent marriages had not been in issue, and consequently this was not the case they had been expecting

to meet. He further submitted that should the amendment be granted, the relief sought would be at variance with the applicant queen's papers. Mr Madonsela and Mr Topping for the third, fourth and seventh respondents, argued that the intended amendment would cause an injustice to the respondents which could not be compensated for by an order of costs. The respondents could not be put in the same position in which they were when the pleading which was sought to be amended was filed. The addition of the new prayer, according to Mr Madonsela, entailed the introduction of new cause of action. The amendment sought would not only prejudice the first to fifth respondents, as the late *Isilo's* queens, but it would have far-reaching consequences even to their children, since their legitimacy would be at issue. Mr Madonsela argued that the application to amend should timeously have been brought under Uniform rule 28. Mr Redman contended that the invalidity of the subsequent marriages would only impact on the division of the joint estate.

[20] Rule 28(1) sets out the procedure to be followed with regard to an amendment and states that

'[a]ny party desiring to amend a pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment'.

Rule 28(10) further provides that

'[t]he court may . . . at any stage before judgment grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit'.

[21] The application to amend was dismissed on the grounds that the applicant queen had not followed the procedure set out in the Uniform rules. The applicant queen had applied for an amendment at a very late stage of the proceedings and had not advanced any reasons as to why it had not timeously been raised so as to enable proper investigation and responses thereto by the first to the fifth respondents, which was to the prejudice of not only those respondents but to all of those who may adversely be affected by the granting of the relief sought. This was the case, notwithstanding Prince Mangosuthu Buthelezi's comments in the second, sixth and twelfth respondents' answering affidavit, filed in July 2021, that the applicant queen's

averments as to the validity of the subsequent marriages were not clear and that he would assume that their validity was not in issue. The applicant queen failed to advance any reasonably satisfactory account for a delay in bringing the application to amend.

Application for my recusal

[22] The applicant queen thereafter abandoned her application for my recusal and argued the matter. However, on 17 January 2022, the registrar brought it to my attention that the applicant had filed a notice of an application for my recusal, which was to be enrolled for 25 January 2022. At the time it was not complete in that the person who had deposed to the founding affidavit was not even the applicant queen but was her daughter, Ms Ntandoyenkosi Zulu. There was an undertaking that a confirmatory affidavit by the applicant queen would be filed before 25 January 2022. The notice had also not yet been served on the respondents and all interested parties. On 25 January 2022, there was no appearance and nothing was heard of the applicant or her legal representative. The respondents were also not in attendance and there was no indication that any notice of set down had been served on them. On enquiring from the registrar, I discovered that it had not been enrolled at all. I must add that at the time that the application was brought to my attention on 17 January 2022, the matter had already been finalised on 12 January 2022, and judgment had been reserved on that day.

The Issue

[23] The remaining issue is whether the applicant queen is entitled to a declaratory order

Analysis

[24] In *Rail Commuters Action Group v Transnet Ltd t/a Metrorail*,² the Constitutional Court stated that a declaratory order was:

‘a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values.’

² *Rail Commuters Action Group and others v Transnet Ltd t/a Metrorail and others* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) para 107. See also *J T Publishing (Pty) Ltd and another v Minister of Safety and Security and others* 1997 (3) SA 514 (CC); 1996 (12) BCLR 1599 (CC).

It was argued on behalf of the applicant queen that the status of her civil marriage and the subsequent customary unions requires clarity and judicial determination. According to Mr Redman, the determination of these issues will directly have an impact on the patrimonial consequences of the applicant queen's marriage and will affect the manner in which the estate of the late *Isilo* is to be wound up.

[25] Before granting declaratory relief, this court should have regard to various factors, namely whether the law is clear on the subject matter, the existence or absence of a live dispute, the utility of the declaratory relief and whether, if granted, it would settle the question in issue between the parties.³ The courts will not grant relief in respect of an issue which is moot, abstract, hypothetical or academic.⁴ Mr Madonsela for the second, sixth and twelfth respondents argued that the applicant queen's marriage issue is now moot. In this regard he sought support in *J T Publishing (Pty) Ltd and another v Minister of Safety and Security*,⁵ where Didcott J said the following: 'there can hardly be a clearer instance of issues that are wholly academic, of issues exciting no interest but an historical one, than those on which our ruling is wanted have now become.'

[26] It is admitted that the applicant queen and the late *Isilo* had entered into a civil marriage in community of property and of profit and loss. The proprietary consequences of such marriage in community are also not in issue. It appears that this matter was brought to court before any dispute could arise. Although a dispute had arisen with regard to whether the applicant queen and the late *Isilo* had first entered into a customary marriage and subsequently thereafter into a civil marriage in community of property, this dispute fell away immediately prior to the hearing.

³ AC Cilliers, C Loots and HC Nel *Herbstein and Van Winsen: Civil Procedure of the High Courts and the Supreme Court of Appeal of South Africa* 5 ed (2009) at ch43-p1438.

⁴ *J T Publishing (Pty) Ltd and another v Minister of Safety and Security and others* 1997 (3) SA 514 (CC); 1996 (12) BCLR 1599 (CC) para 15.

⁵ *Ibid* para 17.

[27] Courts will not decide mere academic disputes but only disputes 'where rights have actually been infringed'.⁶ There must be a concrete dispute between the parties.⁷ The court may be asked.

'to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination'.⁸

However, a proper case for a declaratory order is not made out if no consequential relief is claimed or could be claimed, and if the result would be a decision on a matter that is really of academic interest to the applicant.⁹ An applicant must show that he has a vested right and not merely a hypothetical one, as it is not the function of a court to give legal advice.¹⁰ An applicant must 'allege all those facts which the Court must find in his favour for the purpose of issuing the declaration of rights'.¹¹ The applicant queen has failed to show that she has a right which is being infringed and needs protection.

[28] If there is a dispute between the parties, it must be alleged as one of the factors which the court will take into account in considering whether it will exercise its discretion. In the present matter, there is no dispute as to the nature, status and proprietary consequences of the marriage between the applicant queen and the late *Isilo*. Evidence of such marriage is borne out by the marriage certificate as well as the declaration register. The late *Isilo* also conceded in his affidavit before making his last will that he and the applicant queen entered into a marriage in community of property. Even if the marriage was at the time out of community of property, the Constitutional Court has recently in *Sithole*¹² amended the law in respect of such marriages. All marriages of black persons that are out of community of property and were concluded under section 22(6) of the Black Administration Act, before the commencement of the

⁶ *Williams v Rhodes Fruit Farms Ltd* 1917 CPD 6 at 9. See also *Geldenhuis and Neetling v Becuthini* 1918 AD 426.

⁷ *Maitland Cattle Dealers (Pty) Ltd v Lyons* 1943 WLD 1; *Apartments (Pty) Ltd v City Council of Johannesburg* 1937 WLD 54; *Ex Parte Morris* 1954 (3) SA 153 (W). Cf *Ex Parte Von Broembsen*, NO 1948 (3) SA 1040 (O).

⁸ Section 21(1) (c) of the Superior Courts Act 10 of 2013.

⁹ *Adbro Investment Co Ltd v Minister of the Interior and others* 1961 (3) SA 283 (T) at 295B.

¹⁰ Cf *Bekker v Commissioner for Inland Revenue* 1945 WLD 193; *Durban City Council v Association of Building Societies* 1942 AD 27.

¹¹ *Souter, NO v Said, NO* 1957 (3) SA 457 (W) at 460C-D.

¹² *Sithole and another v Sithole and another* [2021] ZACC 7; 2021 (5) SA 34 (CC); 2021 (6) BCLR 597 (CC).

Marriage and Matrimonial Property Law Amendment Act 3 of 1988, have, save for those couples who opt for a marriage out of community of property, been declared to be marriages in community of property.

[29] The parties in this matter have disposed of all that which could be issues between them.

‘Once the parties have disposed of all disputed issues by agreement inter se, it must logically follow that nothing remains for a court to adjudicate upon and determine’.¹³

No practical effect would be achieved by a determination of the questions posed in the present matter.¹⁴ It is trite that courts will not make determinations that will have no practical effect.¹⁵

[30] The legal consequences of the applicant queen’s civil marriage to the late *Isilo* are prescribed by the relevant legislation applicable to civil marriages in community of property, and common law. The law governing the marital regime of a marriage in community of property, both in the form of legislation and the common law, is clear on the subject and need not be restated. A wife and husband have joint and equal ownership and other rights to marital property, and joint and equal rights of management of and control over marital property, which rights must be exercised in the manner provided for in legislation. The proprietary consequences of a marriage in community of property are also explicit. Whether or not the late *Isilo* was precluded from marrying any other person during the subsistence of his marriage with the applicant queen is also a consequence of the civil marriage in community of property. The law on the subject matter is clear and, accordingly, I do not deem it necessary and equitable to grant a declarator in this regard.

[31] To hold that the late *Isilo* was precluded from marrying any other person during the subsistence of his marriage with the applicant queen will have no practical effect in the absence of any relief as an outcome of such preclusion. Absent the consequential

¹³ *Legal-Aid South Africa v Magidiwana and others* [2014] ZASCA 141; 2015 (2) SA 568 (SCA); [2014] 4 All SA 570 (SCA) para 22.

¹⁴ *Premier, Provinsie Mpumalanga, en ‘n ander v Groblersdalse Stadsraad* 1998 (2) SA 1136 (SCA).

¹⁵ *Rand Water board v Rotek Industries (Pty) Ltd* 2003 (4) SA 58 (SCA) para 26.

relief sought, this court cannot as a result of such a finding automatically conclude that the late *Isilo*'s marriages with his other wives were invalid. The preclusion of each party to the civil marriage from marrying any other person party during the subsistence of the marriage is a consequence of the marital regime which the applicant queen and the late *Isilo* entered into.

[32] The applicant queen has not, in fact, sought an order declaring the *Isilo*'s customary marriages invalid. This court therefore does not want to, and cannot, overstep the bounds of what it has been called upon to decide as per the amended notice of motion.¹⁶ In *Normandien Farms (Pty) Ltd v South African Agency for Promotion of Petroleum Exportation and Exploitation (SOC) Limited and others*,¹⁷ the Constitutional Court warned against determining matters that no longer have a practical effect. The order this court would make if it were to deal with the question of the validity of the subsequent marriages in the absence of the relief that they should be declared invalid, would not resolve any live dispute between the parties and, accordingly, it would have no practical or useful consequence.¹⁸ There are no live issues, the determination of which depends on the marriage issue. The declaratory orders are not accompanied by any other form of relief except that the executor should disregard any provision of the will which is in conflict with the marriage in community of property. This is in my view too broad, vague and impracticable to implement.

[33] The applicant queen seeks a declarator that she is entitled to a fifty percent share of the joint estate. However, it is not clear from her application as to which type of estate the applicant queen lays her fifty percent claim to, regard being had to the fact

¹⁶ *Director-General Department of Home Affairs and another v Mukhamadiva* [2013] ZACC 47; 2014 (3) BCLR 306 (CC) para 38. See also *Four Wheel Drive Accessory Distributors CC v Rattan NO* [2018] ZASCA 124; 2019 (3) SA 451 (SCA) para 21 where the court held that 'On first principles, a judgment must be confined to the issues before the court. In *Slabbert [Minister of Safety & Security v Slabbert* [2010] 2 All SA 474 (SCA) ([2009] ZASCA 163 para 11] this court said: "A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case."

¹⁷ *Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation (SOC) Limited and others* [2020] ZACC 5; 2020 (4) SA 409 (CC); 2020 (6) BCLR 748 (CC) Para 47.

¹⁸ *Director-General Department of Home Affairs and another v Mukhamadiva* 2013] ZACC 47; 2014 (3) BCLR 306 (CC) para 39.

that the estate of the Royal Household is divided into five categories. That she is entitled to fifty percent of the estate is the proprietary consequence of her marriage in community of property and the law is, as previously stated, clear on the subject. However, as against what estate she makes that fifty percent claim is, in my view, a matter for the executor, and ultimately the Master of the High Court, to determine at an appropriate time, when the liquidation and distribution account lies for inspection and the claims by various queens are determined.

[34] In *J T Publishing (Pty) Ltd*,¹⁹ the Constitutional Court had the following to say about a declaratory order:

‘. . . a declaratory order is a discretionary remedy, in the sense that the claim lodged by an interested party for such an order does not in itself oblige the Court handling the matter to respond to the question which it poses, even when that looks like being capable of a ready answer. A corollary is the judicial policy governing the discretion thus vested in the Courts, a well-established and uniformly observed policy which directs them not to exercise it in favour of deciding points that are merely abstract, academic or hypothetical ones.’ (Footnotes omitted.)

[35] In *National Coalition for Gay and Lesbian Equality and others v Minister of Home affairs and others*,²⁰ the Constitutional Court defined the mootness of a case as being as follows:

‘A case is moot and therefore not justiciable, if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.’

[36] In *Geldenhuys and Neethling v Becuthini*,²¹ Innes CJ said:

‘After all, Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important.’

¹⁹ *J T Publishing (Pty) Ltd and another v Minister of Safety and Security and others* 1997 (3) SA 514 (CC) para 15; 1996 (12) BCLR 1599 (CC) .

²⁰ *National Coalition for Gay and Lesbian Equality and others v Minister of Home affairs and others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 fn 18. See also *Geldenhuys and Neethling v Becuthini* 1918 AD 426 at 441.

²¹ *Geldenhuys and Neethling v Becuthini* 1918 AD 426 at 441.

However, the Constitutional Court has held that, where it is in the interests of justice to do so, it has a discretion to consider and determine matters even if they have become moot.²²

[37] There is no live dispute about the proprietary consequences of the late *Isilo*'s wives and the executor which is worthy of the court's declaration and the law does not sustain the relief sought. The applicant queen seeks a final declaration of rights. The application was apparently brought in anticipation of the impending installation of the late Queen as the regent or successor to the throne. This has been rendered moot because in the intervening period (between the launching of the application and the hearing of the matter), the late Queen passed away. The matter in this regard is accordingly moot and hypothetical and will have no future practical effect. It is against this background that the applicant queen no longer pursues the relief sought in 2(d) and 2(e) of the notice of motion.

[38] The validity of the subsequent marriages between the late *Isilo* and his other wives (first to fifth respondents) has not pertinently and pointedly been challenged on the papers as they presently are constituted. Furthermore, no consequential relief declaring such customary marriages invalid has been sought. Instead, the applicant queen seems to concede that such marriages have been given statutory recognition by the Recognition Act. It appears from the version of the applicant queen that an omission to seek consequential relief was somehow deliberate on her part. There is no live dispute between the applicant queen and the first to fifth respondents and/or with the executor. This court is in fact asked to give an advisory opinion on an abstract proposition of law.²³

[39] The applicant queen also challenges the will of the late *Isilo* insofar as it purports to deal with assets to which the applicant queen has a legitimate claim arising from her marriage to the late *Isilo*. It has been argued on behalf of the first to fifth respondents

²² *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) para 11.

²³ *Legal-Aid South Africa v Magidiwana and others* [2014] ZASCA 141; 2015 (2) SA 568 (SCA); [2014] 4 All SA 570 (SCA); *Qoboshiyane No and others v Avusa Publishing Eastern Cape (Pty) Ltd and others* [2012] ZASCA 166; 2013 (3) SA 315 (SCA).

that the executor is yet to wind-up the late *Isilo*'s estate. This matter was brought to court long before the estate of the late *Isilo* was reported to the Master of the High Court. This court is asked to pre-empt a dispute which may arise between the applicant queen and the executor or other queens. The applicant queen is entitled to lodge her claim with the executor in terms of the Estates Act. The applicant queen has not made out a case in respect of any of the relief sought in the amended notice of motion. Her application, accordingly, falls to be dismissed with costs.

Order

[40] The application is dismissed with costs, such costs to include costs consequent upon the employment of senior counsel.

Princess Ntandoyenkosi Zulu and another v Queen Buhle Mathe and others, Case No: 2752/2021P

Introduction

[41] The applicants in this application challenge the authenticity and validity of the will of the late *Isilo* on the grounds that the signatures appended thereto in various places are not those of the late *Isilo*. The applicants contend that the validity of the impugned will has a fundamental impact not only on the devolution of the estate of the late *Isilo*, but also on the determination of the successor to the Zulu Royal throne.

[42] In the amended notice of motion, among other things, the applicants seek an order:

- (a) interdicting the execution of the impugned will pending the final determination of an action to be instituted by the applicants relating to the validity thereof;
- (b) interdicting and restraining the seventh respondent from performing any function or duties assigned to him in terms of the provisions of the last will and testament of his late Majesty King Goodwill Zwelithini Zulu;

- (c) interdicting the ninth respondent from recognising or undertaking any step which may reasonably be construed as recognising the twelfth respondent as *Isilo* samaZulu;
- (d) interdicting the ninth respondent from announcing the date of the coronation;
- (e) in the event that the ninth respondent has completed all processes envisaged in section 17 of the KZN Act, interdicting and restraining the eleventh respondent from issuing the certificate of recognition to the twelfth respondent; and
- (f) directing the eleventh respondent in terms of section 9(3) of the Traditional Leadership and Governance Framework Act 41 of 2003 to refer the matter concerning the identification of the successor to the throne as *Isilo* samaZulu back to the Zulu Royal Family for reconsideration and resolution.

[43] The original notice of motion only contained prayers (a) and (b) and the prayer that the ninth respondent be directed to furnish and deliver to the applicants' attorneys, within five days of the order, the last list (if any) of the names of the Zulu Royal Family which was submitted by the late *Isilo* to the Office of the Premier of KwaZulu-Natal as contemplated in terms of the provisions of section 4(1) of the KwaZulu-Natal Royal House Trust Act 3 of 2018. The applicants, in amending the notice of motion on 17 May 2021, also added Annexure 'B' to the amended notice of motion which was however abandoned immediately prior to the hearing, and it is therefore no longer necessary to set out the relief sought in annexure 'B'.

Parties

[44] The applicants ('applicant princesses') are the daughters of the late *Isilo*, who passed away on 12 March 2021. The first to fifth respondents are the wives (now widows) of the late *Isilo* of various palaces. The sixth respondent constitutes the members of the Zulu Royal Family. The seventh respondent is Mr Siphon Jerome Ngwenya, the chairperson of the Ingonyama Trust Board, cited herein as the person who is assigned certain duties in terms of the provisions of the will of the late *Isilo*, and as an interested party in this application.

[45] The eighth respondent is Sanlam Trust (Pty) Ltd, a private company incorporated and registered in terms of the company laws of South Africa. It is cited as it is

designated and appointed in terms of the will as the executor of the joint estate of the late *Isilo*.

[46] The ninth respondent is the Premier of KwaZulu-Natal Province. The tenth respondent is the Master of the High Court. The eleventh respondent is the President of the Republic of South Africa. The twelfth respondent is Prince Misuzulu, who is the designated heir and prince-elect of the Zulu kingdom in terms of Zulu customary law and customs. He has been identified and nominated by the Zulu Royal Family as the successor to the late *Isilo*. The thirteenth respondent is the Member of the Executive Council ('MEC') in KwaZulu-Natal responsible for Cooperative Governance and Traditional Affairs, cited herein by virtue of section 17 of the KZN Act, which provides that the MEC must give the name and the reasons for the identification of a person as the *Isilo*.

Background

[47] In 2016, the late *Isilo* made a will in which he appointed the late Queen as his successor and bequeathed various assets to his six wives and their children. However, the late Queen passed away on 29 April 2021. Her will and last testament was read on 7 May 2021 after the funeral. At the reading of her will, it was announced that she had nominated Prince Misuzulu as the successor to the throne. On 8 May 2021 Prince Mangosuthu Buthelezi, addressing the media, allegedly stated that the issue of succession was closed, and that the Zulu Nation was preparing to crown Prince Misuzulu as *Isilo*.

[48] In the history of the Zulu Nation, according to Prince Mangosuthu Buthelezi, there is a long-standing tradition of reigning kings identifying their successors by means of a written document. King Dinuzulu appointed his son, King Solomon Maphumzana ka Dinuzulu, through a written instrument to succeed him. King Cyprian Bhekuzulu Zulu ascended to the throne in accordance with the wishes of his father, King Solomon. That tradition stands for over a hundred years.

[49] The *Isilo*'s written nomination of his successor would seldom be questioned by the Royal Family and it would play a fundamental role in the identification of the incumbent *Isilo*. Invariably, the Royal Family would not act against the wishes of the late king. Other eligible candidates would defer to the wishes of the late *Isilo*. However, the wishes of the deceased king are not binding on the Royal Family. However, the Royal Family would follow such wishes unless they were at odds with Zulu customary law and traditions.

[50] The applicant princesses brought an application on 28 April 2021 for interdictory relief pending the institution of an action before this court to determine whether the last will of the late *Isilo* is valid and enforceable, and whether the signatures appearing in the will are free of forgery and fraud.

[51] The Zulu Royal Family met on 14 May 2021 and identified and nominated Prince Misuzulu as the successor to the Zulu throne. No dispute was raised in this regard. The applicant princesses' application has all along been based upon the alleged 'forged will'. No dispute has ever been raised regarding the Zulu Royal Family's decision of 14 May 2021 or the composition thereof. After the death of the late Queen, the application which was enrolled to be heard on 7 May 2021, was removed from the roll on 6 May 2021 to enable the internment of the late Queen's mortal remains to take place. On 17 May 2021, the applicant princesses re-enrolled the urgent application with the added relief against Prince Misuzulu, without the leave of this court. The applicant princesses vaguely stated that some of the 140 members of the Royal Family who were listed on the attendance list, were not members of the Zulu Royal Family, however they could not identify who those people actually were. This statement was later changed to aver that no decision was taken on 14 May 2021 and that the meeting was not convened for the purpose of identifying the successor to the throne but for cleansing purposes. However, no proof of such averments was tendered.

[52] Mr Redman, for the applicant princesses, argued that the validity of the will of the late *Isilo* will have a fundamental impact not only on the devolution of the estate of the late *Isilo* but also on the determination of the successor to the Zulu Royal throne. The

identification of a successor to the throne is an issue which requires proper ventilation and debate by the Royal Family. According to the applicant princesses, at the commencement of the meeting on 14 May 2021, Prince Mangosuthu Buthelezi introduced Prince Misuzulu as the king of the Zulu Nation. The applicant princesses contended that the meeting of 14 May 2021 did not constitute a valid identification decision as contemplated by section 8 of the Traditional and Khoi-San Leadership Act 3 of 2019 ('Leadership Act') read with section 17 of the KZN Act. The declining of the nomination by Prince Simakade as the king of the Zulu Nation was read out at the meeting of 14 May 2021 by Prince Thulani at the behest of Prince Mangosuthu Buthelezi.

[53] The applicant princesses contend that members of the Royal Household will be directly impacted by the appointment of Prince Misuzulu as *Isilo* pursuant to the nomination contained in the impugned will read with the will of the late Queen. In the absence of the nomination of the late Queen in the impugned will, she would not have the authority to nominate the successor and her wishes would have no role to play in the ultimate determination of the *Isilo*.

[54] Mr Redman argued that the balance of convenience favours the applicant princesses in that if it is found that the signatures appended to the impugned will are a forgery, this will render the will invalid and impact on the legitimacy of the nomination of Prince Misuzulu as *Isilo*. It is against this background that the applicant princesses seek an order that the process of executing the will and the determination of the successor to the throne should be stayed pending the finalisation of the action to be instituted. However, it is common cause between the parties that having regard to the importance and public interest in the outcome of the action, the proceedings should be expedited.

[55] The applicant princesses admittedly say that they are not contenders for the Zulu throne nor do they know of anyone in the Zulu Royal Family who has a better right or entitlement to the throne than Prince Misuzulu. The applicant princesses also do not seek to review the Royal Family's decision of 14 May 2021.

Issue

[56] The issues for determination in this application are:

- (a) The authenticity and validity of the will of the late *Isilo*;
- (b) Whether the applicant princesses are entitled to stay the process leading to the identification, nomination, recognition and coronation of Prince Misuzulu as the successor to the throne.

Analysis

[57] The applicant princesses have failed to establish a discernible correlation between the proceedings relating to the impeachment of the late *Isilo*'s will, and the dispute relating to the alleged identification and nomination of Prince Misuzulu as the successor to the Zulu throne by the Royal Family. The applicant princesses have also not shown a direct and substantial interest which can be adversely affected if Prince Misuzulu is appointed king of the Zulu Nation.

[58] On their own version, the applicant queen and the applicant princesses admit that both the marital status of the applicant queen and the authenticity and validity of the late *Isilo*'s will have nothing to do with the issue of succession to the Zulu throne. The evidence establishes that the identification, nomination and appointment of Prince Misuzulu as the king of the Zulu Nation is not solely dependent upon the validity of the late *Isilo*'s will. On 14 May 2021, the Zulu Royal Family assembled and identified Prince Misuzulu as the successor to the Zulu throne according to the Zulu customary law and customs.

[59] In the premises, the marital status of the applicant queen and the validity of the late *Isilo*'s will do not in any way stand in the way of the court determining the issue of succession to the Zulu throne. The interdictory relief sought in this regard will therefore be unnecessary. However, the question of succession to the Zulu throne is to be determined with reference to the Zulu customary law and the traditions which are self-standing rules, separate and distinct from common law and the Marriage Act, which govern the validity of the late *Isilo*'s will and the applicant queen's civil marriage. It is the customary law, not common law, which should be strictly applied in resolving a

traditional leadership dispute.²⁴ The king is not appointed, but is determined by birth. Only a mother of a would-be king is appointed to bear an heir. The status of the mother of the person who intends to ascend to the throne or is to be appointed king is a decisive factor. However, it is common cause that this application is not about who the successor to the throne is but about an interdict against the implementation of the will of the late *Isilo* and the process leading to the coronation of Prince Misuzulu. The applicant princesses reiterate in their replying affidavit that the application is for interdictory relief and is not in respect of succession to the throne.

[60] The impeachment of the late *Isilo*'s will has no bearing whatsoever on the succession dispute since the name of Prince Misuzulu does not feature anywhere therein. The applicant princesses further do not claim that Prince Misuzulu was not identified or appointed in accordance with Zulu customary law and traditions or that they or someone else has a better entitlement or right than that of Prince Misuzulu to succeed to the throne. There is therefore no dispute for the Premier or the President to investigate and to refer back to the Zulu Royal Family for reconsideration and resolution in terms of section 8(4) of the Leadership Act.

[61] The authenticity and validity of the will of the late *Isilo* is in issue. Messrs Yossi Vissoker and Cecil Greenfield were instructed to compare the signatures in the will of 29 November 2016 purporting to be those of the late *Isilo*, with the late *Isilo*'s acknowledged signatures and to express an opinion on their authenticity. There are divergent findings and conclusions by these experts. One expert states that the signatures are a forgery and the other expert states that the signatures in question were those of the late *Isilo*. The handwriting report prepared by the expert Mr Yossi Vissoker reveals various serious discrepancies in the signatures appended to the impugned will and accordingly he concludes that the signatures contained in the impugned will differ from the known signatures of the late *Isilo* to the extent that they are not signed by the same hand. Mr Cecil Greenfield, whose expert report is attached to the respondents' supplementary answering affidavit, states that notwithstanding the similarities there are obvious dissimilarities. According to him, this is not unusual as variations are bound to

²⁴ *Mkhize NO v Premier of the Province of, KwaZulu-Natal and others* [2018] ZACC 50; 2019 (3) BCLR 360 (CC) paras 66-67.

occur in everybody's signature. Natural variations randomly occur during writing. Mr Greenfield defines natural variation as the variance in the strokes, forms, and features of the writing of the same person which results from the inherent inability of the human hand to write with mechanical precision. According to Mr Greenfield, the signatures on the late *Isilo's* will dated 29 November 2016 were probably written by the late *Isilo* despite 'dissimilarities' and are as such, in his view, authentic.

[62] What is common cause is that the signatures somehow differ and the cause of such difference as advanced by Mr Vissoker is forgery and according to Mr Greenfield, it is attributable to natural variation. This raises a sharp dispute of fact which should be resolved by trial or referral of the issue for the hearing of oral evidence. However, the applicant princesses do not ask this court to make a determination of the authenticity and validity of the will but, requires the court to grant interdictory relief in respect thereof. The applicant princesses are in the near future expected to institute an action with regard to the authenticity and validity of the will. The question whether clause 15 of the impugned will is ultra vires the provisions of section 17 and 30 of the KZN Act has to be decided by the trial court. It would not be advisable nor appropriate to decide the issues of the authenticity and validity of the impugned will and whether the late *Isilo* violated the provisions of KZN Act when signing the impugned will separately and independent of each other. Logic dictates that these issues should be decided together.

[63] However, much of the relief sought in the present case has been overtaken by events and rendered moot. The death of the late Queen on 29 April 2021, who had been named in the impugned will as the successor to the throne, dealt a serious blow to the impeachment of the late *Isilo's* will. As a result of the death of the late Queen, the late *Isilo's* nomination and appointment of the late Queen as the successor to the throne fell away. It was also overtaken by the intervening Royal Family's decision to appoint the late Queen as the regent at the meeting of the Royal Family on 24 March 2021. At the time of her death, however, she had not yet officially been recognised as the regent. Apart from the will of the late Queen, the Zulu Royal Family had assembled and identified Prince Misuzulu as the successor to the Zulu throne. The Zulu Royal Family is

the structure which is central to the decision-making process, with regard to the identification of a successor to the throne.

[64] With regard to the question of whether the applicant princesses will suffer any prejudice and irreparable harm in the event of the interdictory relief not being granted, it has been argued on their behalf that if the will is ultimately found to be invalid they will suffer great prejudice as the will would have been executed. The applicant princesses contend that the impugned will has been given effect to by the recognition of the late Queen as a regent of the Zulu Nation. Such recognition, according to them, was ultra vires sections 17 and 30 of the KZN Act. The applicant princesses in my view have satisfied this court that if they are not afforded any protection, they would suffer prejudice and the balance of convenience favours them in that the will can be implemented at any time. However, the applicant princesses have not made out any case for the stay of the process leading to the coronation of Prince Misuzulu.

Costs

[65] Though it may be correct that the applicant princesses have succeeded in obtaining the interdictory relief sought with regard to the suspension of the execution of the impugned will, it will not be just and equitable to award them costs before the question of its authenticity and validity has been finally decided. In my view, costs relating to the impugned will should be reserved for the court determining its authenticity and validity. The applicant princesses have not made out any case for the interdictory relief sought on the question of succession to the throne. Therefore, the costs should follow the result in respect of that relief sought.

Order

[66] In the result, I make the following order:

1. The execution of the last will and testament of the late His Majesty King Goodwill Zwelithini Zulu be and is hereby suspended pending the final determination of the action referred to in paragraph (3) of this order;

2. The seventh respondent be and is hereby interdicted and restrained from performing any functions or duties assigned to him in terms of the provisions of the last will and testament of the late his Majesty Goodwill Zwelithini Zulu;
3. The applicants are directed to institute an action challenging the authenticity and validity of the will referred to in paragraph (1) above, within fifteen 15 days of the date of this order, failing which the relief granted in paragraph 1 of this order shall lapse;
4. The costs are reserved for the trial court; and
5. The application for the relief sought in prayers (c), (d), (e) and (f) is dismissed with costs, such costs to include costs consequent upon the employment of two counsel.

Prince Mbonisi Bhekithemba Zulu and Prince Misuzulu and Others Case No: 10879/21P

Introduction

[67] Prince Mbonisi seeks to interdict the coronation of Prince Misuzulu as the *Isilo* of the Zulu Nation which was allegedly scheduled to take place on 3 December 2021. This court on 2 December 2021 declined to grant the urgent relief sought and adjourned the matter and directed that it be heard together with the applicant queen's and applicant princesses' applications. The primary issue in this application is the question of succession to the Zulu throne.

[68] In this matter the applicant seeks an order in the following terms:

- (a) Interdicting and restraining the first and second respondents from preparing and organising the coronation of the first respondent as *Isilo* samaZulu scheduled for 3 December 2021 pending the final determination of the applications under case numbers 2751/2021P and 2752/2021P;
- (b) Interdicting and restraining the fourth respondent from recognising or undertaking any steps which may reasonably be construed as recognising the first respondent as *Isilo* samaZulu pending the final determination of the applications under case number 2751/2021P and 2752/2021P; and
- (c) In the event that the fourth respondent has completed all processes envisaged in section 17 of the KZN Act, that the third respondent be interdicted and restrained from issuing a certificate of recognition to the first respondent as *Isilo* samaZulu.

Parties

[69] The applicant is Prince Mbonisi Bhekithemba Zulu ('the applicant prince'), who is the half-brother of the late *Isilo*, residing at Ikhwezi Homestead, Nongoma. The first respondent is Prince Misuzulu Zulu, who is the first-born son of the late Queen and the late *Isilo*, the designated successor to the throne, of KwaKhangelamankengane, Nongoma. The second respondent is Prince Mangosuthu Buthelezi, the traditional Prime Minister of the Zulu kingdom and a member of the Zulu Royal Family of kwaPhindangene Homestead.

[70] The third respondent is the President of the Republic of South Africa and the fourth respondent is the Premier of KwaZulu-Natal Province. The fifth respondent is the House of Traditional and Khoi-San Leaders of KwaZulu-Natal Province. The sixth respondent is the National House of Traditional and Khoi-San Leaders. The seventh respondents are unknown persons who may be the members of *uMndeni weNkosi* as contemplated in section 1 of the KZN Act, and the eighth respondents are the members of the Zulu Royal Family.

Factual background

[71] Prince Mbonisi, the brother to the late *Isilo*, brought an application for interdictory relief acting on the basis of a rumour spread at the funeral of Mr Mgiliji Nhleko, the leader of the Zulu warriors. According to this rumour, the coronation of the first respondent was allegedly scheduled to take place on 3 December 2021. After enquiring from the first and second respondents as to the veracity of the rumour and receiving no answer, the applicant approached this court for the relief set out above.

[72] According to the applicant prince, after the passing of the *Isilo*, the Royal Household was engulfed by serious divisions. The late *Isilo's* will nominated and appointed the late Queen, as his successor to the throne. The late *Isilo's* will was read on 19 March 2021. On 24 March 2021 the Zulu Royal Family met and appointed the late Queen as regent, to hold the throne during the mourning period. The minutes of such meeting were subsequently forwarded to the Premier for him to undertake the

necessary official processes for the finalisation of the appointment. However, before her appointment was gazetted, as required by law, the late Queen passed away on 29 April 2021. The applicant queen and applicant princesses had instituted motion proceedings on 28 April 2021, a day before her death.

[73] Prior to her death, the late Queen, at the meeting of the Royal Family of 30 March 2021, proposed and nominated Prince Misuzulu as the successor to the throne in terms of Zulu customary law and customs.

[74] The late Queen's mortal remains were interred on 7 May 2021 and her will was read out in the evening of the same day. In her will she nominated and appointed Prince Misuzulu as the successor to the throne.

[75] The Zulu Royal Family assembled on 14 May 2021 and identified Prince Misuzulu as the successor to the Zulu throne in accordance with Zulu customary law and customs. Prince Mbonisi and Princess Thembi Ndlovu did not attend the meeting and tendered their apologies. However, the applicant princesses did not attend the meeting although they had been invited and did not tender any apology. At such meeting, Prince Mangosuthu Buthelezi proposed and nominated Prince Misuzulu as the successor to the throne. The proposal and nomination of Prince Misuzulu as the successor to the throne was unanimously supported and Prince Misuzulu accepted the nomination. No dissension was recorded, no query was raised, and no grievance was lodged at such meeting.

[76] A meeting was allegedly later held by a dissenting faction of the members of the Royal Family whereat Prince Simakade was purportedly nominated as a contender to the throne. However, he did not accept the nomination. Subsequent to the meeting, on 3 June 2021, Princess Thembi Ndlovu purportedly lodged a dispute with the President of the Republic of South Africa in terms of section 8 and 12 of the Leadership Act. She stated that there was no agreement within the Zulu Royal Family as to who should be the successor to the throne. One section had appointed Prince Misuzulu Singqobile

kaZwelithini as a successor and the other Prince Simakade Jackson kaZwelithini. There was thus an alleged disagreement regarding the succession to the throne.

[77] Prince Mbonisi instituted motion proceedings in this court on 19 November 2021 and he enrolled the application for 2 December 2021. Prince Mbonisi alleged that the intended coronation was being organised purely to circumvent the court process and to pre-empt its outcome to the detriment of the core members of the Royal Family in particular, and the Zulu Nation in general.

Issues

[78] The issues raised by the affidavits and in argument are whether:

- (a) there is any coronation implicating public funds underway;
- (b) the applicant prince, applicant queen and applicant princesses, have *locus standi* and valid reasons to stay the process leading to the identification, recognition and coronation of Prince Misuzulu;
- (c) Prince Misuzulu was legitimately and appropriately identified and nominated as the successor to the late *Isilo*; and
- (d) there is any dispute as to the Zulu Kingship.

Analysis

Coronation

[79] Prince Mbonisi brought the application to stay the coronation of Prince Misuzulu merely on the basis of an unfounded rumour. His application was grounded on the fact that should the coronation take place pending the finalisation of the applications of the applicant queen and applicant princesses that would cause the members of the Zulu Royal Family to divide even further. He further contended that such coronation would result in the wasteful and worthless expenditure of public funds.

[80] The date of 3 December 2021 has come and gone without the alleged coronation taking place, notwithstanding the fact that this court declined to grant the urgent relief sought on 2 December 2021. As a consequence, it is now common cause that there is no coronation implicating public funds underway. This application has in fact become

moot and irrelevant. However, in my view, it is in the interests of justice and of the Zulu Nation to deal with the question of the succession to the throne as it has been raised, both in the affidavits and argument, as the source of dissension and tension in the Royal Family. Prince Mangosuthu Buthelezi has warned in the second, sixth and twelfth respondents' answering affidavit that if this situation cannot be curbed, it would result in bloodshed.

[81] Prince Mangosuthu Buthelezi states that the conduct of the applicant princesses and applicant prince (the applicants) is tantamount to holding the entire nation, as well as the Zulu Royal Family, to ransom through frivolous litigation for the sole purpose of delaying the inevitable. He further submits that the conduct of the applicants has the effect of sowing division within the Royal Family as well as within the Zulu Nation. It is, however, common cause between the parties that the finalisation of these matters should be expedited.

Stay of the process leading to the identification, recognition and coronation of Prince Misuzulu

[82] The process leading up to the appointment and coronation of the successor to the Zulu throne is a five-tiered process:

- (a) the identification process;
- (b) the recognition process;
- (c) the investigative process;
- (d) the post-investigation step; and
- (e) the coronation process.

No case has been made by any of the applicants for the staying of the process leading to the identification, recognition and coronation of Prince Misuzulu as the king of the Zulu Nation. In her application, the applicant queen repeatedly stated that her application had nothing to do with succession. This is also evident from her abandonment of the interdictory relief she sought in her application relating to the succession issue.

[83] For the applicant princesses to succeed in staying the process leading to the identification, appointment and coronation of Prince Misuzulu, they must be directly affected by the appointment and coronation of Prince Misuzulu. They must have a direct and substantial interest in the appointment and coronation of Prince Misuzulu to such an extent that they will be adversely affected if the relief sought is not granted. That the applicant princesses do not have the required interest in the identification, appointment and coronation of Prince Misuzulu is quite evident from the applicant princesses' admission that their application has nothing to do with the succession. They are merely challenging the identification as set out in the late *Isilo's* will but not the identification of Prince Misuzulu per se. The allegation that the late *Isilo's* will is fraudulent has no direct correlation with Prince Misuzulu's appointment as a king. His name does not feature anywhere in such will. It only features in the late Queen's will which is not the subject of the applicant princesses' application. The issue relating to succession should therefore be dealt with separately from the issues relating to the marital status of the applicant queen and the authenticity and validity of the late *Isilo's* will.

[84] According to the second, sixth and twelfth respondents, the applicant prince also does not have *locus standi* to bring an application to stay the identification, recognition and coronation of Prince Misuzulu. Prince Mangosuthu Buthelezi states that, as the Prime Minister of the Zulu Nation, he is the only one who is authorised to convene meetings of the Royal Family to discuss matters pertaining to the Royal House. Prince Buthelezi goes on to state that no one has ever convened such meetings except him. This issue should be decided on the *Plascon-Evans* rule,²⁵ and as a consequence, the version of Prince Buthelezi is accepted in this regard. Further, his application (the applicant prince's) is characterised by the non-joinder of the members of the late *Isilo's* family, that is, his queens and their respective children. Not even the applicant queen and applicant princesses, whose applications the applicant prince claims to be supporting, are joined. In the applicant queen's application, where he has been cited as the seventh respondent, the applicant prince did not take any interest in the matter and thereby effectively elected to abide the decision of the court. The applicant prince furthermore does not state whom he represents. The applicant prince has approached

²⁵ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

this court on misinformation and incorrect facts. He eventually admitted that there is no official coronation of Prince Misuzulu utilising public funds underway. Consequently, the applicant has not made out a case for the relief sought in the notice of motion.

Identification and nomination of Prince Misuzulu as the successor to the Zulu throne

[85] In terms of section 8(1) of the Leadership Act, read with section 17(3) of the KZN Act, the *Isilo* is identified and nominated in terms of customary law and customs. Section 8(1) and (3) provides:

‘(1) Whenever the position of a king or queen is to be filled or the successor to a principal traditional leader is to be identified, the following process applies—

(a) The royal family concerned must, within 90 days after the need arises for the position of a king or queen, or principal traditional leader to be filled, and with due regard to applicable customary law and customs—

- (i) identify a person who qualifies in terms of customary law and customs to assume the position of a king or queen, or principal traditional leader, as the case may be, taking into account whether any of the grounds referred to in section 9 (1) or 16 (11) (h) or 16 (14) (a), (c), (d), (e) or (k) apply to that person; and
- (ii) apply to the President or relevant Premier, as the case may be, for the recognition of the person so identified as a king or queen, subject to section 3 (2), or principal traditional leader which application must be accompanied by—
 - (aa) the particulars of the person so identified to fill the position of a king or queen, or principal traditional leader; and
 - (bb) the reasons for the identification of that person as king or queen, or principal traditional leader.

(b) The President may, after consultation with the Minister and the Premier concerned, and subject to subsections (3) and (4), recognise as a king or queen a person so identified in terms of paragraph (a) (i), taking into account whether a kingship or queenship has been recognised in terms of section 3.

(c) The Premier may recognise as the successor to a principal traditional leader a person so identified in terms of paragraph (a) (i), taking into account whether a principal traditional community still exists.

...

(3) Whenever the President recognises a king or queen, or a Premier recognises the successor to a principal traditional leader or recognises a senior traditional leader, headman or headwoman, the President or the Premier, as the case may be, must—

(a) publish a notice in the *Gazette* recognising such person as a king or queen, or publish a notice in the relevant Provincial *Gazette* recognising such person as a principal traditional leader, senior traditional leader, headman or headwoman;

(b) issue a certificate of recognition to such person; and

(c) inform the National House of the recognition of a king or queen and inform the relevant provincial house of the recognition of a principal traditional leader, senior traditional leader, headman or headwoman.'

[86] In terms of section 17(3) of KZN Act the following procedure should be followed whenever the position of *Isilo* is to be filled:

'(3) Whenever the position of *Isilo* is to be filled, the following process must be followed-

(a) the royal family must, within a reasonable time after the need arises for the position of *Isilo* to be filled, and with due regard to applicable customary law-

(i) identify a person who qualifies in terms of customary law to assume the position of *Isilo* after taking into account whether any of the grounds referred to in section 10(a), (b) or (d) of the Traditional Leadership and Governance Framework Act, 2003, apply to that person;

(ii) provide the Premier and the responsible Member of the Executive Council with the name and the reasons for the identification of that person as *Isilo*; and

(iii) the Premier must advise the President accordingly;

(b) the person identified as contemplated in paragraph (a)(i), must be recognised as *Isilo*, as provided for in sections 9(1)(b) and 9(2) of the Traditional Leadership and Governance Framework Act, 2003.

(4) The Premier must inform the National and Provincial Houses of Traditional Leaders of the recognition or appointment of *Isilo*.

(5) The Premier may arrange a special ceremony to enable *Isilo* to affirm his allegiance and faithfulness to the Republic of South Africa and the Province and to obey, respect, and uphold the Constitution and the law.'

[87] Section 1 of the Leadership Act defines 'the royal family' as the:

'core customary institution or structure consisting of immediate relatives of the ruling family within a traditional or Khoi-San community, who have been identified in terms of customary law or customs, and includes, where applicable, other family members who are close relatives of the ruling family.'

[88] As previously pointed out, there is a long-standing tradition in the Zulu Nation of reigning kings identifying their successors by means of a written document. It was apparently against that background, that the late *Isilo* nominated and appointed the late Queen as his successor to the throne. The latter, in turn, nominated and appointed Prince Misuzulu, her first born son of her marriage with the late *Isilo*, to be the successor to the throne instead, in terms of the Zulu customary law and customs.

[89] However, the Leadership Act and KZN Act do not make provision for the identification and nomination of a successor to the throne through a will. But, in terms of the Leadership Act and KZN Act, the Royal Family has the prerogative to identify and nominate the successor in accordance with customary law and traditions.

[90] The Royal Family is the fabric of traditional leadership. It is responsible for the identification of the traditional leaders.²⁶ The Royal Family must identify the king or queen. It must do so in terms of customary law, customs and traditions, and it must identify a suitable person for the position.²⁷ This identification must occur before the relevant government functionary can appoint him or her. The traditional council has no legal right to appoint a traditional leader. It is the Royal Family, the Premier or the President and the Department who are involved in the appointment of a king or principal traditional leader.

[91] The Royal Family is not an organ of state, but an institution of customary law, exercising its powers in terms of customary law, custom and processes. The genesis of the processes leading to the recognition of a traditional leader lies with the Royal Family. In performing that function, the Royal Family initiates a process of identification

²⁶ *Mphephu v Mphephu–Ramabulana and others* [2019] ZASCA 58; 2019 (7) BCLR 862 (SCA); confirmed in *Mphephu–Ramabulana and another v Mphephu and others* [2021] ZACC 43; 2022 (1) BCLR 20 (CC).

²⁷ *Maxwell Royal Family and another v Premier of the Eastern Cape Province and others* [2021] ZAECMHC 10 para 30.

of a person, which process leads to the exercise of public power and the performance of a public function recognising that person by the President or the Premier in terms of the Leadership Act. The identification of a traditional leader, or a successor to a traditional leader, is only the initial part of an administrative action, which would only become ripe for review after the organ of state has taken the necessary decision. It is after that stage that an aggrieved party whose rights have been adversely affected may exit the process and approach a court for appropriate relief. In this application, the applicant prince does not seek to review the identification of Prince Misuzulu but rather seeks interdictory relief. The question whether or not the matter is ripe for review does not, therefore, arise. Pending the decision to recognise, the President or the Premier is obligated by the Leadership Act to ensure that the identification process complied with customary laws, custom and processes. These are internal processes to the Leadership Act which must be followed before a review of the decision is referred to court.

[92] The Zulu Royal Family meeting was held on 14 May 2021. The attendance list of such meeting reveals the names of the persons who attended, the houses from which they emanate and their Zulu Royal lineage. The members of the Royal Family who were present identified Prince Misuzulu as the successor to the throne. The meeting was attended by 140 members from various houses of the Zulu Royal Family. The applicant princesses and the applicant prince were invited but they elected not to attend. They do not dispute the entitlement of Prince Misuzulu to succeed to the Zulu throne and no such dispute was raised at the meeting or subsequently thereafter.

[93] Prince Mangosuthu Buthelezi, in his capacity as a member of the Zulu Royal Family through Princess Magogo ka Dinuzulu, proposed and nominated Prince Misuzulu as the successor to the late *Isilo* and the members present at the meeting accepted and agreed with the appointment of Prince Misuzulu to the throne. In fact, he was unanimously identified and nominated as a successor to the late *Isilo*. Nobody raised a dispute as to the identification of Prince Misuzulu as the successor to the late *Isilo*. There is not a scintilla of an assertion that any person other than Prince Misuzulu is eligible to succeed to the late *Isilo*. Prince Simakade disavowed that he had expressed any wish to contend for the throne. If anyone disputed Prince Misuzulu's

identification and nomination, he or she should have done so at the Royal Family meeting where the matter was discussed.

[94] No allegation has been made that the purported identification of Prince Simakade Zulu accords with Zulu customary law and customs pertaining to succession. Prince Mbonisi lacks locus standi. He has failed to identify the persons whom he allegedly represents. He has also failed to identify the lineage of such persons, if there are any, and the core structure under which they seek relief. His application was in any event without merit.

[95] The Royal Family is constituted of members who form part of the Royal Family of the five precedent kings: Cetshwayo, Dinuzulu, Solomon, Bhekuzulu and Zwelithini. There has been no genuine dispute as to the core structure of the Royal Family, which is central to the decision-making process of the successor to the king. A feeble assertion has been made that the Royal Family meeting was attended by persons who were not members of the Zulu Royal Family and reliance has been placed on the matter of *Mphephu v Mphephu-Ramabulana and others*.²⁸ In *Mphephu*, the decision to identify the King of VhaVenda was not only taken by the Royal Family, as required by customary law, customs and the Traditional Leadership and Governance Framework Act 41 of 2003: it was taken by a joint sitting of the Royal Family and the Royal Council. The decision of the meeting was thus not in accordance with the law and stood to be reviewed and set aside in terms of section 6(2)(a)(ii) of the Promotion of Administrative Justice Act 2 of 2000. However, in the present case the persons referred to are faceless and have no names so as to make the assertion a reality. Under Zulu customs, a child born of a princess is a prince or princess and a member of the Royal Family, even if he or she bears a different surname to 'Zulu'. It could have been possible that some members who attended the Zulu Royal meeting did not bear a Zulu surname, like Prince Mangosuthu Buthelezi, but if they were born of Zulu princesses they are members of the Zulu Royal Family. The applicant princesses and applicant prince did not make out any case that some of the people who took a decision to identify and nominate Prince Misuzulu as the successor were not members of the Zulu Royal Family. The applicant

²⁸ *Mphephu v Mphephu-Ramabulana and others* [2019] ZASCA 58; 2019 (7) BCLR 862 (SCA); confirmed in *Mphephu-Ramabulana and another v Mphephu and others* [2021] ZACC 43.

princesses and the applicant prince confessed that they were not in attendance at such meeting and the allegation that persons were present who were not members of the Zulu Royal Family is accordingly hearsay in nature and requires confirmation by persons who were in attendance. No such confirmation has been forthcoming.

[96] The identification and nomination of Prince Misuzulu accords with the Zulu law and custom in that the subjects of the Zulu Kingdom contributed towards the payment of his mother's ilobolo. However, according to Prince Mbonisi, the identification process of Prince Misuzulu on 14 May 2021 was flawed because it failed to develop criteria for the identification of a suitable person to be a successor in terms of section 2 of the Leadership Act. For his contention he relies on section 2(1) of the Leadership Act which provides:

'2. (1) A kingship or queenship, principal traditional community, traditional community, headmanship, headwoman ship and Khoi-San community must transform and adapt customary law and customs relevant to the application of this Act so as to comply with the relevant principles contained in the Bill of Rights in the Constitution, in particular by—

- (a) preventing unfair discrimination;
- (b) promoting equality; and
- (c) seeking to progressively advance gender representation in the succession to traditional and Khoi-San leadership positions.'

The section does not deal with the identification and recognition of traditional leadership but deals with the development of customary law by a particular community so as to be in line with the Bill of Rights. That decision should be taken by a particular traditional institution in its operations but it does not advocate that the existing customary law and customs should be changed willy-nilly. The relevant section which deals with the identification and recognition of a traditional leader is section 8 of the Leadership Act. However, due to Prince Mbonisi's non-attendance at the Royal Family meeting, whatever he states in this regard is hearsay.

[97] Prince Mangosuthu Buthelezi, who was in attendance at the meeting, states that before proposing and nominating the name of Prince Misuzulu as the successor to the late *Isilo*, he explained the criteria which are to be taken into account when identifying a person as a successor to the throne. Such criteria are laid down by the Zulu customary

law and customs. The following criteria are taken into account: whether the ilobolo of that person's mother was contributed wholly or in part by the relevant tribe or nation and the status of the maternal grandfather of such person. In the present case, it is common cause that the late Queen's ilobolo was paid by the Zulu Nation and that she was born of eSwatini Royalty, being a daughter of King Sobhuza II. On the ground of the contribution of her ilobolo by the Zulu Nation alone, she precedes other wives in polygamous marriages and becomes a great wife, who is expected to bear a successor to the throne. The status of her father may now legitimately be interpreted as constituting discrimination on a listed ground, i.e. 'birth' and could be in conflict with the equality clause.²⁹ If it discriminates unfairly against other wives born of commoners, it may fall foul of the provisions of equality clause. But, the fact that her ilobolo was provided by the Zulu nation cannot be assailed, as it is not a listed ground but a fact, which only serves as a distinguishing feature.

Dispute to the Zulu kingship

[98] It is common cause that there is no contender to the Zulu royal throne. Prince Simakade, who has been mooted as a possible contender, addressed a letter to Prince Mangosuthu Buthelezi, dated 11 May 2021, with the request that the letter should be read out at the Zulu Royal Family meeting of 14 May 2021. In that letter, he disavowed any claim to the throne, or any intention to claim it. He indicated that he was willing to abide by the decision of the Royal Family. As a consequence, Prince Misuzulu remains the undisputed successor to the Zulu throne. The two princesses confessedly stated that their application has nothing to do with succession to the throne. It has been argued that Prince Misuzulu has been appointed as successor to the late *Isilo* by the late Queen who had been nominated and appointed as the successor in the late *Isilo*'s will. However, the will of the late Queen is not impeached. The inevitable conclusion is that even if the late *Isilo*'s will is found to be invalid, it would not have any bearing on the succession to the Zulu throne. In addition, the Royal Family, which in terms of the Leadership Act and customary law has the prerogative to appoint traditional leadership, assembled on 14 May 2021 and identified Prince Misuzulu as the successor to the late *Isilo*.

²⁹ Section 9 of the Constitution.

[99] None of the queens, who are the wives of the late *Isilo*, is the mother of Prince Simakade. He is born of a spinster, as his mother had never married the late *Isilo*, and he cannot, therefore, under customary law and traditions oust the children of the great wife and of any of the other queens. He has therefore no basis for contending for the throne at all in terms of the Zulu customary law and custom. The king is appointed on the basis of the status of his mother.³⁰ As the appointment of a king or queen is done under Zulu customary law and traditions, the exclusion of Prince Simakade from succeeding to the throne in this case cannot fall foul of the equality clause. He can only succeed to the throne in the absence of any male issue by the late *Isilo* in any of his houses. He must first be linked or assigned to a great house with the consent of the great wife or whichever wife in terms of the Zulu custom and traditions should be the bearer of the successor to the throne. The late Queen had sons and such sons could not be ousted from succeeding to the throne by any of the late *Isilo*'s sons from other houses, even if their mothers had been married to the late *Isilo* during his life time.

[100] Prince Mbonisi, acting on his own frolic, brought this application before this court on the pretext that he was acting in the interests of the Royal Family and in the interests of peace. Surprisingly, Prince Mbonisi had been cited as the seventh respondent in the applicant queen's application, in which application he elected to abide by the decision of the court. He took no part in the applicant queen's and applicant princesses' applications.

[101] There is no genuine dispute as to the succession of Prince Misuzulu, as he is in terms of the customary law and customs the rightful heir to the throne. No one has disputed the correctness of the customary law and customs by which the name of Prince Misuzulu was raised and endorsed by the Royal Family. The applicant princesses and the applicant prince, neither in their founding affidavit nor in their supplementary and replying affidavits have made any assertion that the appointment of Prince Misuzulu was not in accordance with Zulu customary law and traditions. The letter that Princess Thembi Ndlovu addressed to the President stating that there was a

³⁰ Madondo MI *The Role of Traditional Courts in the Justice System* (2017) para 49 at 26.

disagreement in the Zulu Royal Family as to who should succeed to the throne between Prince Misuzulu and Prince Simakade did not comply with the provisions of section 8(4) of the Leadership Act. The President should act when there is evidence or an allegation that the identification of a person as a king or queen was not done in accordance with customary law and customs. No such evidence or allegation has been brought to the notice of the President in this regard. The letter of Princess Thembi Ndlovu lacked the necessary allegation that Prince Misuzulu, who was identified by the Royal Family, had not been identified in accordance with Zulu customary law and traditions, and that Prince Simakade has a better right or entitlement to succeed to the throne. More so, it is common cause that Prince Simakade declined the nomination. As a result, he is not a contender. Even if he purported to accept the nomination, he could not have legitimately been identified, as he does not qualify in terms of Zulu customary law and customs. Prince Simakade's purported identification was accordingly doomed. The applicant has therefore failed to make out a case that there is a dispute about the successor to the throne on the basis of which the President or the Premier may investigate or refer the matter back to the Zulu Royal Family for consideration and resolution.

[102] There is accordingly no basis for interdicting the process leading to the recognition and coronation of Prince Misuzulu. The Premier or the President as the organ of state has not yet acted which could justify an approach to the court for a review, if it were to be sought. Had the applicants sought a review of the identification, their application would have been solely dismissed on the ground that it is premature. The nomination and appointment of Prince Misuzulu as the successor to the throne and king of the Zulu Nation in terms of the wishes of the late Queen in her will has been subsumed by the decision of the Zulu Royal Family, identifying and nominating him as the king of the Zulu Nation. The Royal Family has the prerogative to identify and nominate traditional leadership. The wishes of the late king or queen with regard to succession are important but they are not decisive. The late Queen nominated and appointed her first born son, Prince Misuzulu, as the king of the Zulu Nation. Failing him, she nominated and appointed any of her sons to be the successor to the throne. This demonstrates clearly that the late Queen was fully alive to the fact that her last wishes as to the nomination and appointment of Prince Misuzulu may not be decisive.

More so, there is nothing in this matter showing that the Royal Family merely deferred to the wishes of the late Queen, and that such wishes were not in accordance with Zulu customary law and traditions.

[103] The evidence establishes that there is no contender to the throne who professes or is professed to have a better right, entitlement or title to succeed to the throne than Prince Misuzulu. The applicant has not made out any case that the identification of Prince Misuzulu as the successor to the throne was not in accordance with Zulu customary law and customs and the provisions of section 8(1) of the Leadership Act read with section 17 of the KZN Act. The applicant has, accordingly, failed to establish any right which is protectable by an interdict.

Order

[104] In the result, the application is dismissed with costs, such costs to include the costs of two counsel.

MADONDO AJP

Date reserved: 12 January 2022

Date delivered: 2 March 2022

Case no: 2751/2021P - /2752/25021P

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