



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

**CASE NO: 7512/2020P**

**In the matter between:-**

**THE EXECUTIVE COUNCIL OF THE  
PROVINCE OF KWAZULU-NATAL** **FIRST APPLICANT**

**THE PREMIER OF THE  
PROVINCE OF KWAZULU-NATAL** **SECOND APPLICANT**

**THE MEMBER OF THE EXECUTIVE COUNCIL  
FOR THE PROVINCE OF KWAZULU-NATAL  
DEPARTMENT OF CO-OPERATIVE GOVERNANCE  
AND TRADITIONAL AFFAIRS** **THIRD APPLICANT**

**and**

**INKOSI BHEKIZIZWE NIVARD LUTHULI** **FIRST RESPONDENT**

**THE THULINI TRADITIONAL COUNCIL** **SECOND RESPONDENT**

**THE UMDENI WENKOSI OF INKOSI LUTHULI** **THIRD RESPONDENT**

**MINISTER OF CO-OPERATIVE GOVERNANCE  
AND TRADITIONAL AFFAIRS** **FOURTH RESPONDENT**

**NATIONAL DEPARTMENT OF CO-OPERATIVE  
GOVERNANCE AND TRADITIONAL AFFAIRS** **FIFTH RESPONDENT**

**NATIONAL HOUSE OF TRADITIONAL AND  
KHOI-SAN LEADERS** **SIXTH RESPONDENT**

**NATIONAL HOUSE OF TRADITIONAL  
LEADERS**

**SEVENTH RESPONDENT**

**KWAZULU-NATAL DEPARTMENT FOR  
CO-OPERATIVE GOVERNANCE AND  
TRADITIONAL AFFAIRS**

**EIGHTH RESPONDENT**

**THE SECTION 23(4) ENQUIRY PRESIDING  
OFFICER: MR DUBE**

**NINTH RESPONDENT**

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**ORDER**

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[1] In respect of the main application:-

[a] The main application is dismissed;

[b] The Rule *Nisi* granted on 19 November 2020 is confirmed;

[c] Each party is directed to pay their own costs.

[2] In respect of the counter-application:-

[a] The provisions of Sections 21(4), 22, 23 and 24(1) of the KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005 (“the impugned sections”) be and are hereby declared inconsistent with the Republic of South Africa Constitution Act, 1996 (“the constitution”) and are invalid.

[b] The KwaZulu-Natal Provincial Parliament is to re-enact the impugned sections in a manner which is consistent with the constitution.

[c] During the period that the KwaZulu-Natal Provincial Parliament is re-enacting the impugned sections, the applicants are interdicted from withdrawing the recognition given to any traditional leader in terms of the KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005.

[d] The decision of the ninth respondent, taken on 30 October 2018 in terms of S23 of the KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005, in terms of which the first respondent was found guilty of misconduct, is reviewed and set aside.

[e] The decision of the first applicant, taken on 9 October 2019 in terms of the provisions of S23(11) of the KwaZulu-Natal Leadership and Governance Act 5 of 2005, in terms of which the first respondent's recognition as traditional leader was withdrawn, is reviewed and set aside.

[f] The applicants are directed to pay the costs of counter-application, jointly and severally, the one paying the other to be absolved, such costs to include the costs consequent upon the employment of three counsel.

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## JUDGMENT

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**R. SINGH, AJ:**

### **INTRODUCTION**

[1] The applicants launched an application for self-review ("the main application") of the decision of the first applicant ("the provincial executive council") taken on 9 October 2019 in terms of the provisions of S23(11)(d) of the KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2000 ("the KZN Act") wherein the first respondent's ("Mr Luthuli") recognition as *Inkosi* was withdrawn. The applicants sought an order that the matter be remitted back to the provincial executive council for reconsideration after Mr Luthuli has had the opportunity to make representations on the question of what sanction, if any, should be imposed in terms of S23(11) of the KZN Act. The applicants further

sought the discharge of the interim order under the same case number granted by my brother, Mathenjwa AJ on 19 November 2020.

[2] The main application is premised on the applicants' failure to comply with the procedure set out in S23 of the KZN Act which consists of two stages. The first stage is a factual enquiry that is conducted by the presiding officer (in *casu* the ninth respondent). After such factual enquiry, the presiding officer is obliged to forward his factual findings together with a record, any observations and recommendations to the provincial executive council. If there is a finding of misconduct, the provincial executive council may impose one or more of the four sanctions set out in S23(11) of the KZN Act but only after having afforded the *Inkosi* the opportunity to make representations to it for the purposes of the sanction. In *casu*, the applicants failed to afford Mr Luthuli an opportunity to make representations in respect of the appropriate sanction hence the applicants launched the main application.

[3] Mr Luthuli and the third respondent ("the *Umndeni Wenkosi*") launched a counter-application ("the constitutional challenge") to declare the provisions of Sections 21(4), 22, 23 and 24(1) of the KZN Act (the "impugned sections") to be inconsistent with the constitution and invalid with such declaration to be suspended for a period of twelve months. During the said period of suspension, they sought orders that the applicants be interdicted from withdrawing the recognition given to any traditional leader in terms of the KZN Act and that the decision of the presiding officer in respect of Mr Luthuli be reviewed and set aside.

[4] Mr Luthuli launched a conditional counter-application where in the event of the constitutional challenge being unsuccessful, then the decision of the presiding officer be reviewed and set aside and that the enquiry be remitted to the presiding officer to commence *de novo*. He also sought an order directing the presiding officer to call for and receive the evidence of the *Umndeni Wenkosi* and him.

[5] The constitutional challenge is a matter of immense significance to millions of people residing in the Province of KwaZulu-Natal, particularly traditional communities and traditional leaders. At the outset of my judgment, I must express my gratitude to both sets of counsel for their insightful heads of argument and very able oral submissions before me.

## **THE BACKGROUND**

[6] In order to deal with the issues for determination, it is necessary to briefly set out briefly the facts which gave rise to the enquiry against Mr Luthuli.

[7] Mr Luthuli was elected by the *Umndeni Wenkosi* and recognized as *Inkosi* of the eMathulini Community some thirty four years ago. Prior to his recognition as *Inkosi*, his father held the position of *Inkosi*. For clarity, *Inkosi* means a traditional leader and is defined as such in terms of S1 of the KZN Act. The third respondent being the “*Umndeni Wenkosi*” means the immediate relatives of an *Inkosi* who have been identified in terms of custom or tradition, and includes where applicable, other persons identified as such on the basis of traditional roles. The definition of *Umndeni Wenkosi* is also stated in S1 of the KZN Act.

[8] Over the period of September 2014 to November 2016, the eighth respondent being, the KwaZulu-Natal Department for Co-operative Governance and Traditional Affairs (“the department”) received complaints from various members of the eMathulini Community alleging misconduct on the part of Mr Luthuli. Pursuant to receipt of these complaints, the second applicant (“the Premier”) appointed Luthuli Sithole Attorneys to *inter alia* investigate the complaints and furnish a written report together with recommendations (“the Luthuli Sithole report”). Following receipt of the report, an enquiry was instituted in terms of S23 of the KZN Act. The ninth respondent was appointed as presiding officer. The charges were served on Mr Luthuli on 15 February 2016. After some correspondence between the department and Mr Luthuli’s

erstwhile attorneys Lourens De Klerk Attorneys, disciplinary proceedings against Mr Luthuli commenced.

[9] Mr Luthuli was advised of the date of the hearing and invited to participate in the disciplinary process. Such invitation included an official from the department's district office, one Mr Shozi attending Mr Luthuli's home and requesting him to attend the enquiry. Mr Luthuli advised that he did not intend to participate in the enquiry. An affidavit by Mr Shozi confirming Mr Luthuli's advices was included in the record.

[10] The enquiry against *Mr Luthuli* proceeded in absentia. This is permitted in terms of S23(9) of the KZN Act which provides that proceedings of an enquiry are not invalidated by the failure of a traditional leader who is charged to attend the enquiry without a valid reason, either personally or by a legal representative.

[11] Pursuant to the enquiry and on 30 October 2018, the presiding officer found that:-

[a] Mr Luthuli had conducted himself "as the law unto himself" and that the members of the community were afraid of him;

[b] The only sanction that was appropriate under the circumstances was the removal of Mr Luthuli from office. The presiding officer accordingly made such recommendation.

[12] Following receipt of the findings of the presiding officer, same was forwarded to the provincial executive council as is required in terms of S23(10) of the KZN Act. The provincial executive council resolved to withdraw the recognition of Mr Luthuli as *Inkosi* in terms of S23(11)(d) of the Act. This decision was made on 9 October 2019.

[13] A meeting scheduled for 30 July 2020 for the purpose of informing Mr Luthuli and the *Umndeni Wenkosi* of the provincial executive council's decision. Neither Mr Luthuli nor the *Umndeni Wenkosi* attended the meeting. On 7 August 2020, Mr Luthuli was given written notice of the withdrawal of his recognition as *Inkosi*. A notice of the withdrawal of recognition was published in the Provincial Gazette on 11 September 2020.

[14] Following thereon, Mr Luthuli brought an urgent application seeking an interim order suspending the operation of the withdrawal of his recognition and interdicting the applicants as well as the department who were all respondents in the said application, from taking any steps to implement the decision to withdraw Mr Luthuli's recognition as *Inkosi*. This application was heard by my brother, Mathenjwa AJ and a Rule *Nisi* with interim relief was granted on 19 November 2020.

[15] I will deal hereunder with the constitutional challenge. It was common cause at the hearing of the matter that should I find that the provisions of the impugned sections are inconsistent with the constitution and invalid, such finding will be dispositive of the main application and conditional counter-application.

#### **THE REPORT OF DR VUSUMUZI KUMALO**

[16] Prior to delving into constitutional aspects of this case, the report filed by Mr Luthuli and the *Umndeni Wenkosi* on the appointment and removal of chiefs in KwaZulu-Natal with specific reference to the removal of *Mr Luthuli* bears mentioning. This report was prepared by Dr Vusumuzi Kumalo who holds a Ph.D. Degree from the University of Witwatersrand and is a lecturer in the history department at the Nelson Mandela University. Dr Kumalo is a professional historian and the purpose of his report was to set out the customary laws and practices of the *eMathulini* traditional community regarding the appointment, discipline and removal of traditional leaders. Dr Kumalo's report dealt with the history of the *amaZulu* nation and chieftainship in great

detail. Chieftainship is vested in a royal lineage of ten generations or more. Chieftain was founded on the principle that family ties are paramount to the healthy development of the entire community and it is the *amaZulu* belief that nothing must weaken family ties. Family ties include, the appointment and removal of the chief. Elders of the family form the council and the traditional ward is “merely notified of events as they happen”. The final prerogative and right to appoint, discipline and remove a chief vested with the senior members of the *Umndeni Wenkosi*.

[17] The change in administrative regimes in South Africa ranging from colonialism to apartheid negatively impacted on the royal family with governors and later apartheid officials appointing and removing chiefs. An examination of the royal chieftains however revealed that royal families continued to appoint and remove chiefs during this time in order to affirm their position within their communities.

[18] South Africa’s move into democracy and the constitution acknowledged the distinctiveness of customary law as an independent source of norms within the legal system. The *Umndeni Wenkosi* is therefore constitutionally permitted to perform its functions in terms of the applicable customs of the community.

[19] Dr Kumalo’s report then went on to examine the powers of chiefs over their subjects and included an interview with Mr Luthuli. Dr Kumalo in summary stated that:-

[a] the *Inkosi* may receive payment of tribal levies which would be used for the upliftment of the community and to assist financially destitute members of the community in times of need. This was commonly known as the *ukukhonza* fee;

[b] the *Inkosi* may receive payment of tributes from the community. The payment of an *ukuphendula ibhantshi* which Mr Luthuli explained was an



amount charged for the transfer of powers of a head of family especially after the death of the head of the family, generally a father figure, to an heir. This fee was levied because of strain and conflict which may arise in a family after a death and there being no one to look after the women and children of the family. The *eMathulini* community would therefore be charged a registration fee by the traditional council (in *casu* the second respondent) for the official registration of an heir to take charge as the head of the household;

[c] the *Inkosi* charged an *ukubekwa* fee for the allocation of a site to a new member of the community and was likened to a registration of transfer of property fee;

[d] the *eMathulini* community have also paid *lobola* (bride price) for their *Inkosi* and in previous times and the community have also bought the chief's horse. This was referred to as *ihashi lenkosi*;

[e] Mr Luthuli also advised Dr Kumalo that where there was a dispute on tribal levies, he would summon his *Izinduna* for consultation with community members. There would be a discussion at a public meeting which was attended by community members who wished to do so to discuss the custom before the custom was implemented. This practice of public meetings was in operation long before Mr Luthuli was appointed to office.

[20] Dr Kumalo was therefore of the view that the centuries old customary law which allows the *Umndeni Wenkosi* to regulate the removal appointment of an *Inkosi* should be adhered to for the purposes of the continuation of AmaZulu political values and that such practice remains relevant in a modern and democratic society. He therefore concluded that the *Umndeni Wenkosi* should be the body that had the power to remove or appoint a chief. The applicants did not file a report from any similar expert such as Dr Kumalo.

## **THE REPORT OF LUTHULI SITHOLE ATTORNEYS**

[21] It is common cause that the report of Luthuli Sithole Attorneys recommended that the third applicant being the MEC for the Department of Co-operative Governance and Traditional Affairs institute an enquiry against Mr Luthuli in terms of S23 of the KZN Act.

[22] In its report, Luthuli Sithole Attorneys conducted interviews with various members of the community regarding the allegations of misconduct and obtained signed sworn statements as well as unsigned statements from general members of the *eMathulini* community. The report went into detail regarding the various amounts of money being levied against members of the community. According to the report, attempts were made to contact Mr Luthuli and the eMathulini traditional council however to no avail. Further Mr Luthuli's erstwhile attorney was non-co-operative. Of significance to the present matter, the report stated that the investigators had no knowledge of the *eMathulini* customary law or customs but expressed serious doubt as to whether Mr Luthuli had the authority to collect or impose taxes, levies, duties, fees or charges alleged by the members of the community. In compiling their report, there was no evidence that the investigators had made any attempt to consult with an independent expert regarding the customary practices of the eMathulini community.

### **THE ISSUES FOR DETERMINATION**

[23] It was common cause that the finding which I make in respect of the constitutional challenge will also determine the fate of the main application and the conditional counter-application.

[24] In the constitutional challenge, the issue to be determined is whether the impugned sections are inconsistent with the constitution and therefore fall to be declared invalid and in the event of me finding same, what a just and equitable remedy is.

[25] Both *Mr De Wet SC* who appeared with *Ms Mbonane* for the applicants and *Mr Topping SC* who appeared with *Mr Veerasamy* and *Ms Nickel* were in agreement that there were no material disputes of fact on the papers.

## **THE CONSTITUTIONALITY CHALLENGE**

### **A: GENERAL**

[26] Sections 30 and 31 of the constitution recognize the rights of persons belonging to a cultural, religious and linguistic community to enjoy participation within their community, provided it is done in a manner which is not inconsistent with the provisions of the Bill of Rights. These rights are further entrenched in S211 and S212 of the constitution which recognize the role and status of traditional leadership, according to customary law. S211(3) allows the court to apply customary law when that law is applicable, subject to the constitution and any other legislation that deals with customary law.

[27] Bearing in mind that the institution of traditional leadership was nearly eroded by colonialism and the approach of the apartheid regime; the recognition, preservation and protection of the institution of traditional leadership has been well warranted in a democratic South Africa and its specific recognition in terms of sections 30 and 31 of the constitution is hardly surprising.

### **B: THE 2003 ACT AND THE KHOI-SAN LEADERSHIP ACT**

[28] Whilst the constitution acknowledged and preserved customary law and tradition, there were various legislation which had been enacted during colonialism and apartheid which would have allowed injustices of the past to be

perpetuated<sup>1</sup>. I will not traverse the details of these legislation because for the purposes of this judgment it is not necessary. Dr Kumalo's report set these out comprehensively.

[29] The Traditional Leadership and Governance Framework Act 41 of 2003 ("the 2003 Act") came into effect in 2003 and the purpose was to give constitutional promise for the recognition of traditional communities and their customs by providing a framework for leadership positions within the institution of traditional leadership, as well as define the role and functions of traditional leaders. This also involved the manner in which traditional leaders were to be removed. The preamble to the 2003 Act is clear on this. The 2003 Act was subsequently repealed and replaced with the Traditional and Khoi-San Leadership Act 3 of 2019 ("the Khoi-San Leadership Act"). The Khoi-San Leadership Act has been declared constitutionally invalid due to the failure of adequate public participation and consultative process<sup>2</sup>. Both these acts sought to incorporate the institution of the royal families in a constitutional democracy including, the rights of the *Umndeni Wenkosi*. They remain instructive for the purposes of determining the present application.

[30] In considering the issue before me, it important to consider the 2003 Act as well as the Khoi-San Leadership Act particularly, because these acts dealt with the definition of the *Umndeni Wenkosi*, the role of the *Umndeni Wenkosi* as well as the removal of an *Inkosi*.

[31] The 2003 Act catered for the following:-

[a] it created traditional councils which replaced traditional authorities which had been established under the Bantu Authorities Act, 1951 and replaced the recognition of tribes under the Black Land Act 27 of 1913;

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<sup>1</sup> Minister of Health and Others v Treatment Action Campaign and Others 2002 (5) SA 721 (CC) at paragraph 24

<sup>2</sup> Mogale and Others v Speaker of the National Assembly and Others (CCT73/22) [2023] ZACC14 (30 May 2023)

[b] it provided for the traditional councils to be more accountable and prescribed the manner in which these councils were to be run;

[c] it allowed the Premier of a province to recognize traditional communities in accordance with provincial legislation and after consultation with the community concerned and the provincial house of traditional leaders, it provided for the appointment of King or Queen, where necessary;

[d] it prescribed the process for the recognition of Kings, Queens, senior traditional leaders and headmen and headwomen;

[e] More importantly, it also provided for the withdrawal of recognition and removal of a King or Queen, a senior traditional leader and a headman or headwoman.

[32] The purpose of the Khoi-San Leadership Act was to recognize Khoi-San communities and Khoi-San traditional leadership and much of the 2003 Act was echoed in the Khoi-San Leadership Act. The various provisions of the Khoi-San Leadership Act, namely S7, S8 and S9 were similar to that of the 2003 Act.

[33] Before dealing with the salient provision of the Khoi-San Leadership Act, I believe it is important to highlight that a “royal family” is a recognized customary institution which is entrenched in the statutes<sup>3</sup>. The *Umndeni Wenkosi* is the “royal family” within a community<sup>4, 5</sup>.

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<sup>3</sup> Maxwele Royal Family and Another v Premier of the Eastern Cape Province and Others (2970/2020) ZAECMHC10 (23 March 2021) at paragraph 32

<sup>4</sup> Mkhize: In Re: Mbuyazi v Premier of the Province of KwaZulu-Natal and Mbuyazi v Mbonambi Community Development Trust (822/13) [2014 ZASCA 204 (28 November 2014) at paragraphs 2 and 14

<sup>5</sup> Mkhize NO v The Premier of the Province of KwaZulu-Natal 2019 (3) BCLR 360 (CC)

[34] S9 of the Khoi-San Leadership Act dealt with the withdrawal of recognition of a King or Queen, principal traditional leader, senior traditional leader, headman or headwoman and sets out the procedure to be invoked in the event of a withdrawal of recognition.

[35] Section 9 of the Khoi-San Leadership Act in summary sets out the following:-

[a] the recognition of a traditional leader must be withdrawn if he or she has been convicted of an offence which imposes a sentence of imprisonment of more than twelve months without the option of a fine, is declared mentally unfit or no longer permanently resides within the area concerned – S9(1)(a);

[b] the recognition of a traditional leader may be withdrawn if he or she has been removed from office in terms of the code of conduct or has transgressed customary laws that warrant withdrawal of recognition – S9(1)(b);

[c] the recognition of a traditional leader must also be withdrawn if the court orders same – S9(1)(c);

[d] where any of the aforementioned grounds comes to the attention of the royal family, the royal family must, through the relevant customary structure, inform the President, the Premier concerned, the minister and senior traditional leaders of the details and the specific grounds – S9(2)(a);

[e] wherever grounds in terms of S9(1)(b) warrant the withdrawal of recognition, the royal family may recommend the withdrawal of recognition to the President – S9(2)(b);

[f] the aforementioned also applies to senior traditional leaders, headmen and headwomen in which instance the traditional council concerned must act as opposed to the Royal Family – S9(3);

[g] when the President or the relevant Premier is informed of any grounds in S9(1)(a), he must, after consultation with the minister or the member of the executive council for traditional affairs in the province, withdraw the recognition of the relevant King or Queen, or senior traditional leader, headman or headwoman as the case may be – S9(4)(a);

[h] When the President or Premier receives information of any of the grounds in S9(1)(b), he may after consultation with the minister or the member of the executive and after having considered the recommendations and reasons for the recommendation for the withdrawal, withdraw such recognition or refuse to withdraw such recognition but he must provide reasons – S9(4)(b).

[36] It is clear from the foregoing provisions of S9, that neither the President nor the Premier may act on their own accord but must only act in consultation with and upon information received from the royal family or the relevant traditional council.

[37] S9(6)(a)(ii) of the Khoi-San Leadership Act sets out what steps the President or Premier may take where there is evidence that an allegation which was brought to his or her attention was done in bad faith. These steps include causing an investigation to be conducted to provide a report as well as recommendations on whether the withdrawal of the recognition of the person concerned was done in accordance with the recognized grounds or whether the information provided or recommendation was made in bad faith. Where the withdrawal was not done in accordance with any recognized grounds or in bad faith, the President or Premier must refer the report to the royal family or traditional council as the case may be, for their comment. The royal family or traditional council must provide the President or Premier with written comments. After considering the report of the investigation committee as well as the comments from the royal family or traditional council as the case may be, he may refuse to withdraw the recognition if the information provided or the

recommendations were done in bad faith or confirm the withdrawal of the recognition of the traditional leader concerned.

C: **THE KZN ACT**

[38] The KZN Act was promulgated in accordance with the provisions of the constitution and is a product of the 2003 Act. It acknowledges the existence of traditional communities within the province of KwaZulu-Natal as well as the need to recognize, transform and provide an enabling environment for the development of traditional communities and institutions as well as customary law and custom. As mentioned in a preceding paragraph, an *Inkosi* is defined in S1 of the Act and the *Umndeni Wenkosi* is defined as being the immediate relatives of the *Inkosi*. The *Umndeni Wenkosi* falls within the definition of a royal family for the purposes of the interpreting the KZN Act<sup>6</sup>.

[39] S17 of the KZN Act sets out the criteria and the considerations in identifying an *Isilo* who in terms of S1 of the Act is defined as “the monarch” of the province of KwaZulu-Natal or “King” as defined in S1 of the 2003 Act. Upon identifying the *Isilo* and providing reasons therefor, the Premier and the MEC are advised and they in turn advise the President. The *Isilo* is then recognized.

[40] S19 of the KZN Act contains similar provisions regarding the appointment and recognition of an *Inkosi* and leaves this role to the *Umndeni Wenkosi*. In the case of the appointment of the *Inkosi*, the Premier after receiving the details of the proposed *Inkosi* must then subject to informing the Provincial House of Traditional Leaders (in *casu* the seventh respondent) of such recognition, appoint the person identified as the *Inkosi*. Where there is evidence or an allegation that the person identified as *Inkosi* was not done in accordance with customary law or the principles of the constitution, the Premier may refer the matter to the Provincial House of Traditional Leaders for comment and refuse to

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<sup>6</sup>

Mkhize: In Re: Mbuyazi



issue a certificate of recognition. The Premier must refer the matter back to the *Umndeni Wenkosi* for reconsideration and a resolution where the certificate of recognition has been refused.

[41] Whilst the *Umndeni Wenkosi* is intimately involved in the appointment of the *Inkosi*, the provisions of the impugned sections relating to the removal of the *Inkosi* from office, affords an almost non-existent role to the *Umndeni Wenkosi*. These sections are in stark contrast to the provisions of S9 relating to the removal of a traditional leader in the Khoi-San Leadership Act.

[42] Section 21(1) of the KZN Act provides for removal of a traditional leader from office where he is convicted of an offence with a sentence of more than twelve months imprisonment without the option of a fine; physical or mental infirmity; wrongful appointment or recognition; a transgression of a customary rule that warrants removal; breach of the code of conduct or misconduct as contemplated in S23 of the KZN Act.

[43] The *Umndeni Wenkosi*, save for misconduct contemplated in S23, may decide to remove the traditional leader concerned and inform the Premier of the details and reason for such removal. In this subsection, the role of the *Umndeni Wenkosi* with regard to removal of the traditional leader is recognized.

[44] S21(4) of the Act states that a traditional leader may only be removed from office on grounds of a transgression of a customary rule or principle that warrants removal, a breach of the code of conduct or misconduct as contemplated in S23, **after an enquiry in terms of S23**.

[45] S23(1)(a) to (j) identifies the following as misconduct:-

[a] a failure or refusal to comply with the provisions of the KZN Act or any other law with which it is the *Inkosi's* duty to comply;

- [b] a breach of the code of conduct;
- [c] disobedience, disregard or wilful default in carrying out a lawful order given to him or her by a competent authority; conducts himself in a disgraceful, improper or unbecoming manner;
- [d] displays insubordination;
- [e] uses intoxicants or drugs excessively;
- [f] abuses his power or extorts, or by use of compulsory or arbitrary means obtains any tribute, fee, reward or give;
- [g] tries to punish any person without the necessary authority to do so;
- [h] is negligent or indolent in the discharge of his duties;
- [i] or has been convicted of an offence.

[46] S22 allows the provincial executive council whenever it deems it necessary to summon a traditional leader to appear before it in order to investigate any matter which is harmful to the traditional community concerned, any matter of importance or concern which directly or indirectly affects the traditional leader in his or her capacity as such or which affects the provincial government of its functions or in any matter where there may be prejudice to the administration of the provincial government within the traditional community concerned. After considering the matter, the provincial executive council may direct the traditional leader to resolve the problem or instruct the MEC (in *casu* the third applicant) to institute an enquiry in terms of S23 where there is reason to believe that the traditional leader is guilty of misconduct. This section though it may have far reaching consequences for the *Inkosi* does not afford the *Umndeni Wenkosi* any role in the process.

[47] S23 of the KZN Act allows the Premier to charge the *Inkosi* and affords him the opportunity to respond. Where the *Inkosi* denies the charge or fails to respond, the MEC appoints a presiding officer to conduct an enquiry on notice to the *Inkosi*. At the conclusion of the enquiry, the presiding officer reports his or her findings to the provincial executive council together with recommendations and if applicable, any sanction. This is done in terms of the provisions of S23(10).

[48] Upon receipt of the report and recommendations of the presiding officer, the provincial executive council may impose a sanction on the *Inkosi* in terms of S23(11), including a notice withdrawing recognition of the traditional leader. S24(1) provides for the suspension of the traditional leader suspected of misconduct pending the finalization of the proceedings instituted in terms of S22 or S23 of the Act. Like section 22; Sections 23 and 24 also do not call for input or a report from the *Umndeni Wenkosi*.

D: **INTERPRETATION OF THE LAW AGAINST THE IMPUGNED PROVISIONS**

[49] As stated in a preceding paragraph, the purpose of S30 and S31 of the Bill of Rights read with S211 and S212 of the constitution were enacted to address the ravages of earlier colonial and apartheid regimes<sup>7</sup>.

[50] The test to be applied when considering an impugned provision is whether the impugned provision is reasonable against S30 and S31 of the Bill of Rights, It will fail to be considered reasonable if it completely ignores the rights contemplated in the Bill of Rights. A law which fails to take into account the persons whose entrenched rights are affected by such law must be considered to be unreasonable<sup>8</sup>.

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<sup>7</sup> Maxwele Royal Family supra fn3 at paragraph 33

<sup>8</sup> Government of Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46

[51] In terms of S36(1) of the constitution, save for general application and determining what is fair and reasonable, no provision in the constitution may limit the *Umnendi Wenkosi's* rights under S30 and S31 to their customary practices which are entrenched in the constitution. Customary laws and practices ought to be enhanced and supported rather than minimized.

[52] The impugned provisions must be interpreted in the spirit of the Bill of Rights in particular, S30, S31, S211 and S212<sup>9</sup>. The impugned provisions must therefore be read in a way that gives effect to the constitution's fundamental values so as to give conformity with the constitution<sup>10</sup>. If no conformity can be achieved, then the impugned sections fall to be declared to be inconsistent with the provisions of the constitution. Where the impugned sections negatively impact on the respondents under S30, S31 and S211 of the constitution, then they must be tested against the criteria for reasonableness. The impugned provision will have to pass a rationality test and not violate the Bill of Rights in order to pass constitutional muster<sup>11</sup>. A court must read the impugned provisions in as far as possible in conformity with the constitution<sup>12</sup>. Where impugned sections cannot be interpreted in an unstrained manner to promote the respondents' rights under S30 and S31 of the bill of rights, read with S211 of the constitution, then such sections fall to be declared invalid on the basis of such inconsistency with the constitution. A court is required to promote the spirit and objects of the Bill of Rights and a court has no discretion in this regard<sup>13</sup>.

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(CC) at paragraph 44

<sup>9</sup> Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors

(Pty) Limited and Others In Re: Hyundai Motor Distributors (Pty) Limited and Others v Smit NO and Others 2001 (1) SA 545 (CC) at paragraph 21

<sup>10</sup> Investigating Directorate: Serious Economic Offences and Others supra fn39 at paragraphs

22 to 23

<sup>11</sup> South African Diamond Producers Organization v Minister of Minerals and Energy and Others

2017 (6) SA 331 (CC) at paragraph 65

<sup>12</sup> Democratic Alliance v Speaker of the National Assembly and Others 2016 (3) SA 487 (CC) at

paragraph 36

<sup>13</sup> Phumelela Gaming and Leisure Limited v Grundlingh and Others 2007 (6) SA 350 (CC) at

paragraph 27

[53] The royal family is now firmly entrenched in statute and serves as a primary source of knowledge on prevailing customary law and the customs on the succession of traditional leadership. The royal family is not only tasked with finding suitable successors to act as traditional leader but also is responsible for removal of traditional leaders<sup>14</sup>. Likewise whenever the position of an *Inkosi* is to be filled, it is the *Umndeni Wenkosi* who acts as *custos mora* and must identify the person who is qualified in terms of customary law to assume the position of an *Inkosi*. S19 of the KZN Act sought to preserve this practice contained in the Khoi-San Leadership Act.

[54] S19(4) and S19(5) of the KZN Act interpreted purposively are constitutionally permissive and they reflect the obligations to uphold customary law and practices which were imposed on the legislature by the provisions of S30 and S31 of the constitution. In terms of the KZN Act neither the executive council, the Premier nor the MEC has the unilateral discretion to appoint an *Inkosi* without recommendations from the *Umndeni Wenkosi*. Any disagreement by the Premier only results in the decision being remitted to the *Umndeni Wenkosi* for reconsideration in terms of S19 of the Act. Where a decision has to be taken on issues for the removal of an *Inkosi* on customary practices, a constitutionally permissive interpretation of the impugned sections ought to be imposed on the applicants to refer the decision to the *Umndeni Wenkosi* or at least seek their opinion. This makes sense and is reasonable because S19 places reliance on the *Umndeni Wenkosi* in appointing an *Inkosi* so there is no reason why reliance and counsel at the very least, ought not to be sought in relation to the removal of the *Inkosi*.

E: **APPLICATION OF THE FACTS TO THE LAW**

[55] The complaints against Mr Luthuli are in respect of traditional customary practices if one has regard to the charge sheet and the judgment delivered by

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<sup>14</sup>

Maxwele Royal Family and Another at paragraph 34

the being the presiding officer after his enquiry. The report of LSA was also concluded and recommendations were made with the investigators stating that they had no knowledge of what the customary practices were of the eMathulini Community. No expert witnesses' evidence was adduced by the applicants to deny the customary practices of the community at any level from the time the charges were being investigated. Any decision taken on whether there was misconduct on the part of Mr Luthuli, in my view, could only be decided if the presiding officer had sufficient information on what the prevailing cultural practices were. It then follows that if conclusions regarding the conduct of Mr Luthuli were reached without reference to the *Umndeni Wenkosi* regarding how these practices are performed or whether Mr Luthuli has contravened the practices, a rational and sound decision could not have been reached by the applicants<sup>15</sup>.

[56] S21(4), S22, S23 and S24 of the Act confer absolutely no provisions for deference to the *Umndeni Wenkosi* in the hearing for the removal of an *Inkosi*. Any participation by the *Umndeni Wenkosi* is at best, only as a witness if the *Inkosi* elects to call them. The *Umndeni Wenkosi* therefore does not participate in the decision-making process nor deal with the decision which the MEC must take in imposing an appropriate sanction. I have already dealt with the omission of the *Umndeni Wenkosi* in considering the provisions of S21(4) and S22 of the Act. In my view, the *Umndeni Wenkosi* have an entrenched right under S30 and S31 of the constitution to participate in matters relating to the removal of the *Inkosi* and not to have a decision taken by the MEC which ignores or undermines customary laws and practices. To do otherwise, would be to erode customary and cultural practices.

[57] The applicants represented by *Mr De Wet SC* and *Ms Mbonane* argued that the *Umndeni Wenkosi* in seeking the relief in the constitutional challenge seek to ensure that the misconduct complained of by members of community

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<sup>15</sup> Mamone v Commission on Traditional Leadership Disputes and Claims 2015 (3) BCLR268 (CC) at paragraphs 79 to 80

will be dealt with by members of Mr Luthuli's own family and not an independent person. In the process, the constitutional rights of members of the community will be trampled and this will undermine their right to equality and fair administrative action. The applicants relied on the case of *Mogale and Others v Speaker of the National Assembly (2023) ZACC 14*. The applicants further submitted that past cultural practices may continue only where such practices are consistent with the constitution and that the impugned provisions are not in any way unconstitutional. It was submitted that where a traditional leader is charged with misconduct and he believes his conduct to be permissible, he has the right to call his *Umndeni Wenkosi* to support his version and the *Umndeni Wenkosi* is therefore not excluded from proceedings relating to the traditional leader's misconduct. I have already dealt with the provisions of S9 of the Khoi-San Leadership Act which demonstrates that neither the President nor the Premier may act on their own accord to remove a King or Queen or traditional leader, as the case may be. Even where it comes to light that any recommendation was made in bad faith, the President or the Premier is still enjoined in terms of S9(6)(b) of the Khoi-San Leadership Act to refer the report to the royal family or traditional council for their comment and thereafter taking into account the comments, make a decision.

[58] The KZN Act falls short of the aforementioned in relation to S21(4), S22, S23 and S24. There have been no cogent reasons advanced by the applicants for why the *Umndeni Wenkosi* ought not to be involved in the removal of an *Inkosi* in similar terms as stipulated in S9 of the Khoi-San Leadership Act. The submission by the applicants that as Mr Luthuli is part of the *Umndeni Wenkosi*, there may be an element of bias on the part of the *Umndeni Wenkosi* when input is sought from them simply cannot pass muster. It is still open for community members to approach the MEC with their complaints like they did in the present matter. Likewise to say that nothing precludes the *Umndeni Wenkosi* from being called as witnesses at a hearing by a presiding officer is not the answer. In my view, the impugned sections which do not make provisions for recommendations or deference to the *Umndeni Wenkosi* goes

against the grain of S30, S31, S211 and S212 of the constitution. The impugned section are accordingly unconstitutional and therefore must be declared invalid in terms of S172(1)(a). Where a declaration of invalidity is made, the court has a wide discretion to implement a remedy which is just and equitable<sup>16</sup>. An appropriate remedy must be an effective remedy for without an effective remedy for a breach of values underlying the right entrenched therein, the constitution cannot be properly upheld or enhanced<sup>17, 18</sup>. The just and equitable remedy under S172(1)(b) would be to allow the KwaZulu-Natal Provincial Parliament to re-enact the impugned sections in a manner which is consistent with the constitution.

### **THE MAIN APPLICATION AND MR LUTHULI'S CONDITIONAL COUNTER-APPLICATION**

[59] The applicants submitted that in respect of the main application, Mr Luthuli contended that his conviction of misconduct should not be set aside. The applicants were of the view that the only opportunity that Mr Luthuli must be given is the opportunity to make representations on the sanction which needs to be implemented. I am not in agreement with same as if the impugned sections are unconstitutional and invalid, the finding of misconduct must equally be set aside. The main application is dismissed and the Rule *Nisi* granted on 19 November 2020 is confirmed.

[60] It follows from my findings that as the impugned sections are contrary to the provisions of the constitution and invalid, that the decision to remove Mr Luthuli on the basis that the decision was inconsistent with the constitution and equally falls to be declared to be set aside. For clarity, there will be no order in respect of costs in respect of the conditional counter-application.

### **COSTS**

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<sup>16</sup> State Information Technology v Gijima Holdings (Pty) Ltd 2018 (2) SA 23 CC at paragraph 53

<sup>17</sup> Fose v Minister of Safety and Security 1997 (3) SA 786 CC at paragraph 69

<sup>18</sup> S v Bhulwana, S v Gwadiso 1996 (1) SA 388 CC at paragraph 32



A: **THE MAIN APPLICATION.**

[61] During November 2020, Mr Luthuli launched the urgent application to suspend the implementation of the sanction pending an application for review to be brought by him. Mathenjwa AJ in granting the order on 19 November 2020 directed the Mr Luthuli to institute the review application within ninety days of the granting of the order. *Mr Luthuli* ought to have launched the review application on or before 1 April 2021. This was not done and necessitated the applicants launching the main application. The applicants acted as prudent litigants in this regard.

[62] Generally, costs must follow the result and inasmuch as I have dismissed the main application, I am of the view that neither of the respondents are entitled to the costs of the main application as Mr Luthuli failed to launch his review application in compliance with the order of 19 November 2020. Accordingly each party must pay their own costs in respect of the main application.

B: **CONSTITUTIONAL CHALLENGE**

[63] The first and third respondents have been successful in the constitutional challenge and therefore the costs of the counter-application must follow the result.

[64] The constitutional challenge has been of great importance on a provincial level and warranted a great deal of work and research. I am therefore satisfied that the costs of three counsel must be allowed.

[65] In the circumstances, the applicants are directed to pay the costs of the counter-application, jointly and severally the one paying the other to be

absolved, such costs to include the costs consequent upon the employment of three counsel.

## **CONCLUSION**

[66] In circumstances, I make the following order:-

[a] In respect of the main application, I make the following order:-

[i] the application is dismissed;

[ii] the Rule Nisi granted on 19 November 2020 is hereby confirmed;

[iii] each party is directed to pay their own costs.

[b] In respect of the counter-application being the constitutional validity challenge, I make the following order:-

[i] The provisions of S21(4), S22, S23 and S24(1) of the KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005 (“the impugned sections”) be and are hereby declared inconsistent with the Republic of South Africa Constitution Act, 1996 and are invalid;

[ii] The KwaZulu-Natal Provincial Parliament is to re-enact the impugned sections in a manner which is consistent with the constitution.

[iii] During the period that the KwaZulu-Natal Parliament is re-enacting the impugned sections, the applicants are interdicted from withdrawing the recognition given to any traditional leader in terms of the KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005.

[c] The decision of the ninth respondent taken on 30 October 2018 in terms of S23 of the KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005, in terms of which the first respondent was found guilty of misconduct, is reviewed and set aside;

[d] The decision of the first applicant taken on 9 October 2019 in terms of the provisions of S23(11) of the Act, in terms of which the first respondent's recognition as traditional leader was withdrawn, is reviewed and set aside.

[e] The applicants are directed to pay the costs of the counter-application, jointly and severally the one paying the other to be absolved, with such costs to include the costs consequent upon the employment of three counsel.

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R. SINGH, AJ

DATE OF HEARING: 4 AUGUST 2023

DATE OF JUDGMENT: 4 OCTOBER 2023

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