CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 167/17

In the matter between:

WEZIZWE FEZIWE SIGCAU	First Applicant
LOMBEKISO MAKHOSATSINI MASOBHUZA SIGCAU	Second Applicant
and	
MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	First Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Second Respondent
COMMISSION ON TRADITIONAL LEADERSHIP DISPUTES AND CLAIMS	Third Respondent

Neutral citation:	*Wezizwe Feziwe Sigcau and Another v Minister of Cooperative Governance and Traditional Affairs and Others* [2018] ZACC 28
Coram:	Zondo DCJ, Cachalia AJ, Dlodlo AJ, Froneman J, Goliath AJ, Jafta J, Khampepe J, Madlanga J and Petse AJ.
Judgments:	Zondo DCJ (majority): [1] to [66] Froneman J (dissenting): [67] to [90]
Heard on:	20 February 2018
Decided on:	11 September 2018

Summary: Customary law — Traditional Leadership and Governance Framework Act — Commission on Traditional Leadership Disputes — statutory interpretation — the steps the President is required to take in order to immediately implement the decision of the Commission on Traditional Leadership Disputes.

ORDER

On appeal from the Supreme Court of Appeal:

1. The application for leave to appeal is granted.
2. The appeal is dismissed.
3. There is no order as to costs.

JUDGMENT

ZONDO DCJ (Cachalia AJ, Dlodlo AJ, Goliath AJ, Jafta J, Khampepe J, Madlanga J and Petse AJ concurring):

Introduction

[1] Before the Traditional Leadership and Governance Framework Act[1] was amended by the Traditional Leadership and Governance Framework Amendment Act,[2] it created the Commission on Traditional Disputes and Claims (Commission).[3] The Commission's functions included deciding any traditional leadership dispute or claim arising out of any province in terms of section 25(2) of the unamended Act. Disputes or claims under section 25(2) included a dispute or claim relating to "*a traditional leadership position where the title or right of the incumbent is contested*". This appears

[1] 41 of 2003 (unamended Act).

[2] 23 of 2009.

[3] Section 22 of the unamended Act.

in section 25(2)(a)(ii). Section 25(2)(a) provided that "[t]he Commission has authority to investigate, either on request or of its own accord" a number of disputes or claims which include a dispute concerning a traditional leadership position where the title or right of the incumbent is contested. Section 25(4) provided: "The Commission has authority to investigate all traditional leadership claims and disputes arising from 1 September 1927, subject to subsection (2)(a)(iv)".[4] Section 26(2)(a) of the unamended Act provided that "[a] decision of the Commission must, within two weeks of the decision being taken, be conveyed to the President for immediate implementation in accordance with section 9 or 10 where the position of a king or queen is affected by such a decision".

[2] In this matter, if we grant the applicants leave to appeal, we will be required to determine the steps that the President was obliged to take under the unamended Act to ensure an "immediate implementation in accordance with section 9 or 10" of a decision of the Commission concerning a dispute or claim relating to a traditional leadership position affecting the position of a king or queen. The question will be: was the President obliged to take all the steps in section 9 or 10 or was his obligation no more than to publish in the Government Gazette the notice announcing the decision of the Commission in terms of section 9(2)(a) and to issue a certificate of recognition in favour of the person identified by the Commission as entitled to be king or queen? The applicants contend that the President was obliged to follow the whole process in terms of section 9 or 10 whereas the President contends that all he was required to do was to publish the notice contemplated in section 9(2)(a) and to issue the certificate of recognition in terms of section 9(2)(b).

Background

[3] In 2008 the Commission made a decision that the paramountcy of amaMpondo aseQaukeni constituted a kingship. This meant that that paramountcy was entitled to

[4] Subsection 2(a)(iv) is not relevant to the present matter. This means that a dispute concerning a traditional leadership position where the title or right of the incumbent is contested fell within the jurisdiction of the Commission by virtue of section 25(4) as well.

have a king. At that time Paramount Chief Mpondombini Justice Sigcau occupied the position of Paramount Chief of amaMpondo aseQaukeni in Lusikisiki, Eastern Cape.

[4] In April 2006 Mr Zanozuko Sigcau lodged with the Commission a claim that he was the one entitled to be the king of amaMpondo aseQaukeni. That meant that he was challenging the title of Paramount Chief Mpondombini Justice Sigcau and wanted to be the king of amaMpondo aseQaukeni. Since both disputants bear the same surname, I shall refer to the one as Zanozuko and the other as Mpondombini. No disrespect is meant to either of them. I do so purely for convenience and to ensure a distinction between them. Mpondombini contested Zanozuko's claim. He maintained that he was entitled to occupy the position he was occupying and to be the king of amaMpondo aseQaukeni. The Commission held public hearings into the dispute. Each side was allowed to lead evidence and to cross-examine the witnesses of the other. Mpondombini was represented by counsel. Zanozuko had no legal representation. In January 2010 the Commission made a decision to the effect that Zanozuko was the one entitled to be the king of amaMpondo aseQaukeni. That decision was conveyed to the President in terms of section 26(2)(a) of the unamended Act.

[5] The President sought to implement the decision of the Commission by issuing a notice and a certain certificate under the amended Act. The notice was a notice of recognition published in the Government Gazette. It recognised Zanozuko as the king of amaMpondo aseQaukeni. The certificate was a certificate of recognition in terms of section 9(2)(b). This led to a legal challenge in *Sigcau 1*[5] that reached this Court in 2013. That challenge related to, among others, the questions of whether the notice and certificate that had been issued and published by the President to implement the decision of the Commission were valid and whether the decision of the Commission fell to be reviewed and set aside. The legal challenge took the form of a review application that was brought by Mpondombini in the North Gauteng High Court, Pretoria (High Court) to have the notice, the certificate and the Commission's decision reviewed and set aside.

[5] *Sigcau v President of the Republic of South Africa* [2013] ZACC 18; 2013 (9) BCLR 1091 (CC) (*Sigcau 1*).

[6] The High Court dismissed that review application. On appeal before this Court, this Court limited its decision to the notice and certificate that had been issued by the President. This Court held that the notice and certificate were invalid, upheld Mpondombini's appeal, set aside the decision of the High Court and set aside the notice and certificate. The basis for that outcome was that the President had acted under the amended Act when he should have acted under the unamended Act.

[7] A month or so before this Court handed down its judgment, Mpondombini passed away. We were later to explain in *Nxumalo* that the effect of this Court's decision in *Sigcau 1* was in part that the Commission's decision stood as it had not been set aside and that it was, therefore, still pending in the High Court.[6] It would seem that, since the handing down of this Court's judgment in *Sigcau 1*, nothing has been done by anybody to pursue the application to review and set aside the Commission's decision. That is assuming that, despite Mpondombini's passing on, somebody would have *locus standi* (standing) to pursue the application to have the Commission's decision reviewed and set aside. A period of five years has lapsed since this Court's decision in *Sigcau 1*. This case must be decided on the basis that the decision of the Commission that Zanozuko is entitled to be the king stands.

[8] Subsequent to the judgment of this Court in *Sigcau 1*, Mpondombini's family held a meeting on the basis that they are the royal family for amaMpondo aseQaukeni and they nominated Wezizwe Feziwe Sigcau, a daughter of Mpondombini, to succeed her father as the queen. The nomination was conveyed to the Premier of the Eastern Cape and the President. The President was then called upon to recognise Wezizwe as the queen of amaMpondo aseQaukeni and issue a certificate of recognition in her favour.

[6] *Nxumalo v President of the Republic of South Africa* [2014] ZACC 27; 2014 JDR 1943 (CC); 2014 (12) BCLR 1457 (CC).

[9] The President did not see his way clear to recognising Wezizwe as he believed that he was required to implement the earlier decision of the Commission. He thought that all that the decision entailed was that he should publish the requisite notice of Zanazuko's recognition in the Government Gazette and issue a certificate of recognition in favour of Zanozuko under the unamended Act. Wezizwe and her mother, the second applicant, disagreed with this view.

High Court

[10] The President brought an application in the High Court of South Africa, Gauteng Division, Pretoria for an order clarifying his legal obligations once the decision of the Commission had been conveyed to him. The High Court upheld the President's interpretation. It, accordingly, granted an order to the effect that all the President was required to do was to publish the notice and issue the certificate contemplated under section 9(2)(a) and (b) of the unamended Act.

Supreme Court of Appeal

[11] An appeal to the Supreme Court of Appeal failed. The Supreme Court of Appeal also adopted the interpretation favoured by the President and upheld the decision of the High Court.

In this Court

Jurisdiction

[12] With regard to jurisdiction, this Court has jurisdiction in this matter for the same reasons upon which this Court relied in *Sigcau 1* to support its conclusion that it had jurisdiction in respect of that matter.[7] In this case, this Court also has jurisdiction

[7] *Sigcau I* above n 5 at para 15:

> "From the discussion of the constitutional and legal framework it is apparent that the institution of traditional leadership and the determination of who should hold positions of traditional leadership have important constitutional dimensions. Resolution of this festering dispute troubling the amaMpondo needs to be constitutionally clarified. It is in the interests of justice to do so."

because the matter raises an arguable point of law of general public importance which ought to be considered by this Court. That point is: what steps was the President required to take under the unamended Act, in order to immediately implement the decision of the Commission that Zanozuko was the person entitled to be the king of amaMpondo aseQaukeni?

Leave to appeal

[13] The applicants have applied to this Court for leave to appeal against the decision of the Supreme Court of Appeal. The President does not oppose the application. The matter raises an issue of great importance on traditional leadership. The issue goes beyond the parties before the Court. The prospects of success are reasonable. In the circumstances, leave to appeal should be granted.

Appeal

[14] The applicants contend that, after the Commission had made its decision, the President was required to allow the whole section 9 process to take place and effect a removal of Mpondombini as king after the Commission had conveyed its decision to him. The President disputes this contention and argues that all that he was required to do was to publish the section 9(2)(a) notice in the Government Gazette announcing the Commission's decision and issue a certificate of recognition in favour of Zanozuko as king in terms of section 9(2)(b).

[15] In this matter the Commission made a decision on who should be the king of amaMpondo aseQaukeni and conveyed it to the President. Its decision was that Zanozuko, and not Mpondombini, was entitled to be the king. The Commission concluded that Mpondombini was not, in terms of customary law and the customs of the community, entitled to be the king.

[16] Section 26(2)(a) of the unamended Act reads as follows:

"(2) A decision of the Commission must, within two weeks of the decision being taken, be conveyed to—

(a) the President for immediate implementation in accordance with section 9 or 10 where the position of a king or queen is affected by such a decision."

Section 10 governs the requirements and process for the removal of a king or queen from office. In the present case it is not necessary to consider section 10 because it is common cause that the position of king or queen of amaMpondo aseQaukeni is vacant and this means that there is no king or queen who needs to be removed. However, it is necessary to consider the provisions of section 9.

[17] The heading to section 9 is "Recognition of kings and queens". Section 9(1)(a) reads:

"(1) Whenever the position of a king or a queen 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 a king or a queen 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 a king or a queen, as the case may be, after taking into account whether any of the grounds referred to in section 10(1)(a), (b) and (d) apply to that person; and

(ii) through the relevant customary structure—

(aa) inform the President, the Premier of the province concerned and the Minister, of the particulars of the person so identified to fill the position of a king or a queen;

(bb) provide the President with the reasons for the identification of that person as a king or a queen; and

(cc) give written confirmation to the President that the Premier of the province concerned and the Minister have been informed accordingly."

[18] Section 9(1)(b) then reads:

"The President must, subject to subsection (3), recognise a person so identified in terms of paragraph (a)(i) as king or queen, taking into account—

(i) the need to establish uniformity in the Republic in respect of the status afforded to a king or queen;

(ii) whether a recognised kingship exist—

(aa) that comprises the areas of jurisdiction of a substantial number of senior traditional leaders that fall under the authority of such king or queen;

(bb) in terms of which the king or queen is regarded and recognised in terms of customary law and customs as a traditional leader of higher status than the senior traditional leaders referred to in subparagraph (aa); and

(cc) where the king or queen has a customary structure to represent the traditional councils and senior traditional leaders that fall under the authority of the king or queen; and

(iii) the functions that will be performed by the king or queen."

[19] It seems appropriate to also quote section 9(2). It reads:

"(2) The recognition of a person as a king or a queen in terms of subsection (1)(b) must be done by way of—

(a) a notice in the [Government] Gazette recognising the person identified as king or queen; and

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

It is also appropriate to quote section 9(3) and (4) because, although section 9(1)(b) requires the President to recognise as a king or a queen the person identified by the royal family, it subjects such recognition to section 9(3). Subsections (3) and (4) read:

> "(3) Where there is evidence or an allegation that the identification of a person referred to in subsection (1) was not done in terms of customary law, customs or processes, the President—
>
> (a) may refer the matter to the National House of Traditional Leaders for its recommendation; or
>
> (b) may refuse to issue a certificate of recognition; and
>
> (c) must refer the matter back to the royal family for reconsideration and resolution where the certificate of recognition has been refused.
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> (4) Where the matter that has been referred back to the royal family for reconsideration and resolution in terms of subsection (3) has been reconsidered and resolved, the President must recognise the person identified by the royal family if the President is satisfied that the reconsideration and resolution by the royal family has been done in accordance with customary law."

[20] Section 26(2)(a) provides that the Commission conveys its decision to the President for "immediate implementation in accordance with section 9 or 10 where the position of king or queen is affected by such a decision". The dispute between the parties now is what it is that the President must do to ensure the "immediate implementation" of the Commission's decision in accordance with section 9 or 10 when the position of a king or queen is affected. This requires that we determine the meaning of the phrase "immediate implementation in accordance with section 9 or 10 where the position of a king or queen is affected by such a decision".

[21] We must interpret the phrase purposively, paying due regard to the language of the statute, its objects, the purpose of section 26 and the context in which the phrase is used. The unamended Act's objects included the provision for:

"the recognition of traditional communities; the establishment and recognition of traditional councils; a statutory framework for leadership positions within the institution of traditional leadership; recognition of traditional leaders and the removal from office of traditional leaders; houses of traditional leaders; the functions and roles of traditional leaders; *dispute resolution and the establishment of the Commission on Traditional Leadership Disputes and Claims.*"

[22] The preamble to the unamended Act reflects the following in part:

"Whereas the State, in accordance with the Constitution, seeks—

- to set out a national framework and norms and standards that will define the place and role of traditional leaderships within the new system of democratic governance;
- to transform the institution in line with constitutional imperatives; and
- to restore the integrity and legitimacy of the institution of traditional leadership in line with customary law and practices;

…

And whereas—

- the State must respect, protect and promote the institution of traditional leadership in accordance with the dictates of democracy in South Africa;
- the State recognises the need to provide appropriate support and capacity building to the institution of traditional leadership;
- the institution of traditional leadership must be transformed to be in harmony with the Constitution and the Bill of Rights so that—
  - democratic governance and the values of an open and democratic society may be promoted; and
  - gender equality within the institution of traditional leadership may progressively be advanced."

[23] The unamended Act had seven chapters. Chapter 1 dealt with the "interpretation and application". Chapter 2 dealt with the recognition of traditional communities, establishment and recognition of traditional councils, functions of traditional councils,

partnerships between traditional councils and municipalities, support to traditional councils and withdrawal of recognition of traditional communities. Chapter 3 dealt with the recognition and removal of different traditional leaders, including regents, deputy traditional leaders and persons acting as traditional leaders. Chapter 4 dealt with houses of traditional leaders. Chapter 5 dealt with the roles and functions of traditional leadership. Chapter 6 was devoted to dispute resolution and the Commission on Traditional Leadership Disputes and Claims. Chapter 7 contained general provisions.

[24] Chapter 6, which dealt with dispute resolution and the Commission, comprises sections 21 to 26. This means that the phrase which we are called upon to interpret, namely, "for immediate implementation in accordance with section 9 or 10 where the position of a king or queen is affected" in section 26(2)(a) appears in the chapter that deals with dispute resolution.

[25] The Cambridge International Dictionary of English reflects the meaning of the verb "implement" as being "to put (a plan or system) into operation." The South African Concise Oxford Dictionary gives the verb "to implement" the meaning "to put into effect". If one accepts that this is the correct meaning of the verb "to implement" and that the noun "implementation" in section 26(2)(a) means the act of putting into effect or of putting into operation, then the phrase "for immediate implementation in accordance with section 9 or 10 where the position of a king or queen is affected by such a decision" in that provision means that the President must put the Commission's decision into effect or put it into operation in accordance with section 9 or 10 where the position of a king or queen is affected by such a decision.

[26] If the President were to wait for a process in terms of which the royal family would identify a person who they think is entitled to be the king or queen in circumstances where the Commission has already identified and decided upon such a person, the President would be failing immediately to put the Commission's decision into effect or into operation as required by section 26(2)(a). In this regard I point out that the dispute resolution process in section 9(3) which would have to be followed if,

after the royal family had identified the person to assume the position of king, there was a dispute, may involve the referral of the matter to the House of Traditional Leaders. That process could take long before there was finality. If the President were to wait for the invocation of the entire section 9 process, he would be failing in his section 26(2)(a) duty immediately to implement the Commission's decision. This is so because the invocation of the whole process may lead to the identification by the royal family of a different person from the one decided upon by the Commission.

[27] Invoking the entire section 9 process is inconsistent with the Commission's decision. That is so because what the royal family is enjoined to do in terms of section 9(1) is to identify the person who is entitled in terms of customary law to be the king or queen and to be recognised as such under section 9(2)(a) and to be issued with a certificate of recognition in terms of section 9(2)(b) by the President. Likewise, the purpose of the Commission's process under sections 25 and 26 is precisely the same. In terms of this process the Commission also identifies and decides upon the person entitled to be the king or queen in terms of customary law. It is difficult to understand the proposition that, where the Commission has already identified and decided upon such a person in respect of a kingship or queenship and its decision has not been set aside, the royal family may or must open the section 9(1) process to identify the person entitled to be king or queen. One would understand a proposition that the royal family should first invoke the section 9(1) process and identify the person entitled to be the king or queen and that, if, thereafter, there arises a dispute, the Commission should then come in and resolve the dispute. However, to say that, after the Commission has resolved the dispute, the royal family must still invoke the whole section 9 process and identify the person to be the king is difficult to understand.

[28] Section 25 dealt with the functions of the Commission. The heading of the section was "Functions of Commission." Section 25(1) provided that the Commission operated nationally and had "authority to decide on any traditional leadership dispute and claim contemplated in subsection (2) and arising in any province." Subsection (2)(a) listed the types of disputes or claims that the Commission had

authority to decide. Subsection (2)(b) reflected what had to be done to lodge a claim or dispute with the Commission.

[29] Section 25(3)(a) provided: "When considering a dispute or claim, the Commission must consider and apply customary law and the customs of the relevant traditional community as they were when the events occurred that gave rise to the dispute or claim." This provision meant that, when the Commission had to decide a dispute that fell under section 25(2)(a), such as the one that the Commission decided in this matter, the Commission was enjoined to apply not just customary law but customary law and the *customs* of the traditional community concerned as at the time of the events that gave rise to the dispute or claim. Section 25(3) must be contrasted with section 9(1)(a)(i). The relevant part of the latter provision reads:

> "The royal family must, within a reasonable time after the need arises for the position of a king or a queen 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 a king or a queen, as the case may be, after taking into account whether any of the grounds referred to in section 10(1)(a), (b) and (d) apply to that person."

[30] The purpose of contrasting section 25(3) with section 9(1)(a) is to highlight the fact that both the Commission process and the section 9(1) process have a provision that requires that customary law be used to determine who qualifies to be the king or queen. The question that arises is: if, in deciding a dispute or claim relating to who should be the king or queen, the Commission has used or applied customary law and the customs of the traditional community concerned, why would a process be necessary which requires the identification by the royal family of a person to be the king or queen to be on the basis of customary law? That is effectively a duplication. Is the better interpretation not one that implies that the Commission's decision has resolved the dispute and, if any interested party feels that the Commission did not apply customary law and the customs of the traditional community in question in deciding the dispute or claim, such party should take the decision of the Commission on review? I think that

is the more plausible interpretation than one that says that the whole section 9(1) process must be exhausted because the latter interpretation results in the duplication of processes.

[31] Furthermore, section 9(1) applies to a case where the position of a king or a queen is to be filled and nobody has been identified by a lawful authority as the person entitled to be the king or queen. In this case the Commission has decided who is entitled to be the king or queen and, as long as it is accepted that the Commission had power to make that decision, the section 9(1) process for the identification of a person to be the king or queen is not applicable. In these circumstances the process in section 9(1) has no application in a case where the President is required to ensure an "immediate implementation" of the decision of the Commission.

[32] It seems to me that what should have happened after the Commission had conveyed its decision to the President is captured in the phrase "for immediate implementation in accordance with section 9 or 10 where the position of a king or queen is affected" in section 26(2)(a). In my view, this phrase articulates the purpose for which the Commission is required to convey its decision to the President. This must be viewed against the background that there would have been a dispute or claim about who should be the king or queen or some other traditional leader and the Commission would now have arrived at a decision to resolve the dispute or claim. The decision may say who qualifies to be the king or queen and/or who does not qualify to be king or queen.

[33] The purpose of the conveyance of the Commission's decision to the President is that the President must take steps to implement it immediately. That is why section 26(2)(a) contains the phrase "for immediate implementation" soon after the phrase "convey to the President". Part of the effect of section 26(2)(a) is that it places an obligation on the President not just to ensure the "implementation" of the decision of the Commission "in accordance with section 9 or 10" but also to ensure the "*immediate implementation* [of the decision] *in accordance with section 9 or 10 where the position of a king or queen is affected by such a decision*". This necessarily means

that it is not envisaged that anybody or functionary will have any role to play or any decision or step to take between the time when the decision reaches the President and the time when it is implemented by the President. As long as the decision of the Commission stands, the President may also not do anything inconsistent with the notion of "immediate implementation" of the decision of the Commission.

[34] The President's obligation is to ensure the "immediate implementation" of the decision of the Commission "in accordance with section 9 or 10 where the position of a king or queen is affected by such a decision." This phrase does not say: "where a king or queen is affected". It says: "where the position of a king or queen is affected". Accordingly, for purposes of section 26(2)(a) what is relevant is that the decision of the Commission affects "the position of a king or queen". In the present matter the decision of the Commission did affect the position of a king. That being the case, the President's obligation to ensure the immediate implementation of the Commission's decision did arise as soon as he received the decision of the Commission. If, after the royal family had followed the section 9 process and had identified someone as the one entitled to be the king or queen and it gave that name to the President and the President recognised that person and issued a certificate of recognition in his or her favour, the President would have been implementing the decision of the royal family and not that of the Commission despite the fact that section 26(2)(a) obliged the President to implement the decision of the Commission.

[35] Once it is accepted that the decision of the Commission did affect the position of a king or queen, the next question that arises is: what did the section 26(2)(a) obligation on the President to immediately implement the decision of the Commission in accordance with sections 9 or 10 entail in practical terms? This question requires the identification of the steps and decisions that the section 26(2)(a) obligation required the President to take. It seems to me that, since it is clear from section 26(2)(a) that the obligation to implement the decision immediately is placed on the shoulders of the President, we must look at sections 9 and 10 to identify those steps and decisions that

can be taken by the President in those sections and not steps or decisions that may be taken by someone else or by certain groups, such as, in this case, the royal family.

[36] When we go to sections 9 and 10, we must remember that the obligation to implement is that of the President and that it is an obligation to implement immediately. That means that any step or decision or procedure in sections 9 or 10 that falls outside the control of the President cannot be part of the steps or decisions that the President is required by his section 26(2)(a) obligation to take. This is so because, firstly, such a process would not be up to the President and, secondly, if the President has to wait for steps and procedures that must be taken by other people or bodies, he may be unable to fulfil his section 26(2)(a) obligation to implement the decision of the Commission immediately.

[37] To determine whether the President should first go to section 9 or 10 to take those steps or decisions envisaged in those sections that are necessary for him to fulfil his section 26(2)(a) obligation, it is necessary to ascertain what Mpondombini's status or position was before and after the decision of the Commission. Mpondombini was appointed or installed as a Paramount Chief of amaMpondo aseQaukeni in 1978 or thereabout and, therefore, prior to 1994. Section 28(1) of the unamended Act reads as follows:

> "Any traditional leader who was appointed as such in terms of applicable provincial legislation and was still recognised as a traditional leader immediately before the commencement of this Act, is deemed to have been recognised as such in terms of section 9 or 11, *subject to a decision of the Commission in terms of section 26*." (Emphasis added.)

[38] As Mpondombini was appointed Paramount Chief prior to 1994, the question whether section 28(1) applied to him or not depends upon whether it can be said that he was appointed as a traditional leader "in terms of applicable provincial legislation" and whether he "was still recognised as a traditional leader immediately before the commencement" of the unamended Act. If the answers to both questions are in the

affirmative, then in terms of section 28(1) he is deemed to have been recognised by the President as such in terms of section 9.

[39] Was Mpondombini appointed as a traditional leader in terms of "applicable provincial legislation"? The unamended Act does not define what "provincial legislation" or "applicable provincial legislation" means. It seems to me that "provincial legislation" in section 28 bears the same meaning as "provincial legislation" in sections 11(1)(b), 11(2), 26(2)(b) and 28(5). In fact, in section 26(2)(b) there is a reference to "applicable provincial legislation", exactly the same phrase to be found in section 28(1). This suggests that such provincial legislation is legislation for which the relevant provincial government is responsible. That would normally be legislation that has been passed by a provincial legislature. Since Mpondombini was appointed prior to 1994, it is not clear whether the homeland legislation in terms of which he may have been appointed in the Eastern Cape was still operational immediately before the coming into operation of the unamended Act and, if so, whether the phrase "applicable provincial legislation" in section 28(1) can be said to include such homeland legislation.[8]

[40] If Mpondombini cannot be said to have been appointed in terms of applicable provincial legislation as contemplated in section 28(1), then he was not a king in terms of the unamended Act because the definition of "king" in the unamended Act requires, among others, that a king be a person "recognised as such in terms of this Act". However, even if Mpondombini was recognized as king before he died, the fact that he passed away means that the position is presently vacant. That means that there is no need to follow the section 10 removal procedure. This means that the position is that we need to go to section 9 to identify the steps or decisions that fall within the power of the President and which he must take in fulfillment of his section 26(2)(a) obligation.

[8] In *Khohliso v State* [2014] ZACC 33; 2015 (1) SACR 319 (CC); 2015 (2) BCLR 164 (CC); *Mdodana v Premier of the Eastern Cape* [2014] ZACC 7; 2014 (4) SA 99 (CC); 2014 (5) BCLR 533 (CC); and *Weare v Ndebele N.O.* [2008] ZACC 20; 2009 (1) SA 600 (CC); 2009 (4) BCLR 370 (CC) this Court dealt with the question whether certain pre-1994 legislation that applied in so called "independent states" or in certain parts of the country under apartheid constituted provincial legislation.

[41] If Mpondombini was recognised as a king under the unamended Act, then his recognition could only have been in terms of section 28(1). Section 28(1) reads as follows:

> "Any traditional leader who was appointed as such in terms of applicable provincial legislation and was still recognised as a traditional leader immediately before the commencement of this Act, is deemed to have been recognised as such in terms of section 9 or 11, *subject to a decision of the Commission in terms of section 26.*" (Emphasis added.)

It seems to me that the phrase "subject to a decision of the Commission in terms of section 26" in section 28(1) means that the deemed recognition that was conferred upon Mpondombini would come to an end if the Commission's decision was to the effect that he was not entitled to be king. This was, of course, the decision of the Commission.

[42] It also means that, if the decision of the Commission was to the effect that he was entitled to be king, after that decision, he would then enjoy proper recognition as the king as opposed to the deemed recognition provided for in section 28(1). In the light of the decision of the Commission which held him not to be entitled to be king, Mpondombini's deemed recognition as king ceased upon the issuing of the decision of the Commission. Accordingly, it was not necessary to remove him as king as provided for in section 10. The President did not, on the facts of this case, have to either initiate, or wait for, the removal of Mpondombini as king as part of the steps taken to ensure the "immediate implementation" of the Commission's decision. This means that the President could go straight to section 9 when seeking to establish what steps or decisions he was required to take in order to fulfill his section 26(2)(a) obligation.

[43] Although the unamended Act does not say so expressly, it is implied that the first step that the President is required to take after the conveyance of the Commission's decision to him is in turn to convey that decision to the royal family and all concerned. In a case such as this one in which, in my view, section 10 does not apply, the President

would then go to section 9 and take those steps in section 9 that he may take to carry out his section 26(2)(a) obligation of immediately implementing the decision of the Commission. In seeking to identify the steps or decisions in section 9 that the President must take in fulfillment of his section 26(2)(a) obligation I think that the phrase "in accordance with section 9 or 10" in section 26(2)(a) necessarily means in accordance with section 9 or 10 *mutatis mutandis* (subject to necessary changes). In other words, the phrase "in accordance with section 9 or 10" is to be read subject to the necessary changes demanded by the context.

[44] I also do not think that the phrase "immediate implementation" in section 26(2)(a) means the implementation of the whole section 9 process. It seems to me that we must attach to section 26(2)(a) an interpretation that is sensible and most practicable. The interpretation that says only the steps contemplated in section 9(2)(a) and (b) are to be invoked in the implementation of the Commission's decision by the President is the one that is sensible and most practicable.

[45] The foundation for the suggestion that the whole of the section 9 process applies even when the Commission has made a decision such as the one it made in this case is that the Commission's decision is not final. I do not agree with this. In my view, the decision of the Commission is final and stands unless it is set aside by a court of law on review.

[46] Section 25(2) of the unamended Act lists a number of traditional leadership disputes and claims. The one in section 25(2)(a)(ii) is a dispute or claim relating to "a traditional leadership position where the title or right of the incumbent is contested". This case relates to Zanozuko's claim that he lodged with the Commission at the time Mpondombini was occupying the position of Paramount Chief or, maybe, when he was the deemed king. That brings Zanozuko's claim within the ambit of a claim contemplated in section 25(2)(a)(ii).

[47] Section 25(1) conferred upon the Commission the "authority to decide on any traditional leadership dispute and claim contemplated in subsection (2) and arising in any province". If, therefore, it is accepted that Zanozuko's claim or the dispute in this case fell within the ambit of section 25(2)(a)(ii), then it must be accepted that it was a dispute or claim that the Commission had authority to decide under section 25(1).

[48] If the Commission had power to decide the claim, and, if it is accepted that it decided the claim or dispute, that decision cannot be a provisional decision but it is a final decision or determination of the dispute that is only subject to review by a court. The decision contemplated in section 25(1) which the Commission was required to make is a final decision or determination to settle the dispute or claim once and for all. There is nothing in section 25 that suggests that the decision contemplated in section 25(1) is anything other than a final decision. In my view, this alone militates overwhelmingly against the proposition that the decision of the Commission is provisional pending the decisions contemplated under the section 9 process.

[49] In any event, the section 9 process includes an internal dispute resolution process within the royal family as can be seen from the provisions of section 9(3) and (4). That internal dispute resolution process seems to fall within section 21(1)(a). Section 21(1)(a) reads:

> "Whenever a dispute concerning customary law or customs arises within a traditional community or between traditional communities or other customary institutions on a matter arising from the implementation of this Act, members of such a community and traditional leaders within the traditional community or customary institution concerned must seek to resolve the dispute internally and in accordance with customs."

[50] That means that, if there is a dispute within a royal family as to who is entitled in terms of customary law to be king or queen and there are different names, the royal family must try and resolve that dispute. However, section 21(1)(b) provides that "[w]here a dispute envisaged in paragraph (a) relates to a case that must be investigated by the Commission in terms of section 25(2), the dispute must be referred to the

Commission, and paragraph (a) does not apply". Therefore, the scheme of the unamended Act is that disputes that fall under section 25(2) are dealt with by the Commission and not "internally" as contemplated in section 21(1)(a) and as would happen if the whole of the section 9 process were to be applied in this matter. Section 9(3) and (4) would entail that the royal family resolves the dispute internally if the President refers it back to the royal family for reconsideration.

[51] The above considerations fortify me in the view that the provision in section 26(2)(a) that the decision of the Commission "be conveyed to the President for immediate implementation in accordance with section 9 or 10 where the position of a king or queen is affected by such a decision" does not mean the implementation of the whole process in section 9. What it means is this: section 9 has provisions which must be used to implement a decision of the royal family under section 9(2)(b) to recognise a king or queen who has been identified by a royal family. Those are the provisions that must be invoked by the President to implement a decision of the Commission about who is entitled to be the king or queen. In other words, when section 26(1)(a) refers to a decision of the Commission being conveyed to the President for immediate implementation in accordance with section 9, it simply means that, for purposes of implementing a decision of the Commission, the President must use the same provisions that he or she would otherwise use when seeking to implement the royal family's decision to recognise a king or queen under section 9 and those provisions are section 9(2)(a) and (b). The same provisions are used to implement the decision, whether the decision is that of the royal family or that of the Commission.

[52] This makes sense when one considers that, prior to the unamended Act, the statutory power to appoint kings and queens was vested in the President and the unamended Act took that decision away and conferred it on the royal family when there is no dispute but on the Commission when there is a dispute. The amended Act has reversed the situation and conferred the power on the President when a dispute has been to the Commission and the Commission only makes a recommendation. Nothing turns on this amendment.

[53] Furthermore, by virtue of section 23(1), members of the Commission are required to be "knowledgeable regarding customs and the institution of traditional leadership". By virtue of section 25(3), "[w]hen considering a dispute or claim, the Commission" is required to "consider and apply customary law and the customs of the relevant traditional community as they were when the events that gave rise to the dispute or claim" occurred. If the whole of the section 9 process applies when there is already a decision of the Commission, under section 9(1)(a)(i), (3)(b) and (4) the royal family would be obliged to apply customary law to resolve the dispute. Under section 9(1)(a)(i), the National House of Traditional Leaders would also be similarly obliged.

[54] It seems to me that the approach that says that, once the Commission has resolved the dispute or claim applying customary law, the position is that the immediate implementation of the decision by the President means invoking the steps provided for in section 9(2)(a) and (b) is more plausible. Section 9(2)(a) relates to the publication of a notice in the Government Gazette recognising the person decided upon. Section 9(2)(b) relates to the issuing of a certificate of recognition to the person decided upon.

[55] Understanding section 26(2)(a) in the way described above would mean that the reference to "the person identified as king or queen" in section 9(2)(a) would be read as "the person favoured by the decision of the Commission to be king or queen". Viewed in this way, the section 26(2)(a) obligation on the President to implement the decision of the Commission *immediately* in accordance with section 9 *mutatis mutandis* would entail that the President, must publish a notice in the Government Gazette recognising the person favoured by the decision of the Commission as king or queen[9] and issue a certificate of recognition to such person.[10]

[9] Section 9(2)(a).

[10] Section 9(2)(b).

[56] There are difficulties with the proposition that, subsequent to the conveyance of the Commission's decision to the President, the royal family would still need to identify "a person who qualifies in terms of customary law to assume the position of a king or queen as the case may be" as contemplated in section 9(a). The one difficulty is that the section 9(1) process is to be initiated by the royal family and not by the President. That means that that process is out of the control of the President and can, therefore, not be a step or process that the President may take in fulfillment of his section 26(2)(a) obligation. Another difficulty is that there could be a long delay before that process is initiated or completed and that is inconsistent with the notion of an "immediate implementation" of the Commission's decision by the President as contemplated in section 26(2)(a).

[57] Another difficulty is that the section 9 process could lead to the identification by the royal family of a person other than the one favoured by the decision of the Commission as the person who is entitled to be king or queen. If that were to happen, the President would be put in an untenable and invidious position where the statute would place two conflicting obligations upon him to carry out at the same time in regard to the same subject matter. The one obligation would be the President's section 26(2)(a) obligation to implement the decision of the Commission immediately. The other would be the President's obligation in section 9(1)(b) to recognise the person identified by the royal family as the person entitled to be king or queen in terms of customary law. So, while, on the one hand, section 26(2)(a) obliges the President to implement the Commission's decision in favour of Zanozuko immediately, if the President were to follow the whole section 9 process in this case, section 9(1)(b) would oblige him to recognise the person identified by the royal family. The result would be that section 26(1)(a) would be requiring the President to implement the decision of the Commission and, therefore, recognise Zanozuko whereas section 9(1)(b) would be requiring him to recognise somebody identified by the royal family and that person might not be Zanozuko. If the President were to allow the whole section 9 process to be complied with and the royal family identified somebody to be the king or queen who

is different from the one identified by the Commission and the President gave effect to the decision of the royal family, he will not be effecting the Commission's decision.

[58] As far as possible, a statute should not be construed in a manner that produces such a result. In my view, the President would be precluded from recognising the person identified by the royal family as long as the decision of the Commission stands because section 26(2)(a) places an obligation upon him to implement that decision immediately. Accordingly, a construction of section 26(2)(a) which contemplates that the whole section 9(1) process is applicable after the Commission's decision may lead to a stalemate between the royal family and the President whereas the construction that only section 9(2)(a) and (b) can be applied in fulfillment of the President's section 26(2)(a) obligation will not lead to such a stalemate or deadlock.

[59] Another difficulty with applying the whole section 9(1) process after the decision of the Commission relates to section 9(3). Section 9(3) reads as follows:

> "Where there is evidence or an allegation that the identification of a person referred to in subsection (1) was not done in accordance with customary law, customs or processes, the President—
>
> (a) may refer the matter to the National House of Traditional Leaders for its recommendation; or
>
> (b) may refuse to issue a certificate of recognition; and
>
> (c) must refer the matter back to the royal family for reconsideration and resolution where the certificate of recognition has been refused."

Section 9(3) governs a situation where someone complains that the section 9(1) process of identifying a person to assume the position of a king or a queen, as the case may be, was not done "in accordance with customary law, customs or processes". So the royal family could expedite the section 9(1) process as best they can, but, once there is such an allegation about that process, there is bound to be a delay because section 9(3) gives the President the discretion to refer the matter to the National House of Traditional Leaders or to refuse to issue a certificate of recognition in which case he is then obliged

to refer the matter back to the royal family "for reconsideration and resolution". Whichever route the President takes, a delay is bound to occur and the President will not be able to fulfill his section 26(2)(a) obligation to implement the decision of the Commission immediately. If the statute is construed in a manner which does not include following the whole section 9(1) process as part of the "immediate implementation" of the decision of the Commission, this difficulty will not arise.

[60] Furthermore, section 9(4) requires that, in a case where there was a complaint about the identification contemplated in section 9(1) and the President referred the matter back to the royal family for reconsideration and resolution and the royal family does resolve the matter, the President is only obliged to recognise the person identified by the royal family if he is satisfied that the reconsideration and resolution of the matter was done in accordance with customary law. Part of the difficulty here is that invoking the section 9(1) process after the decision of the Commission takes us back to square one, namely, when there is a dispute about who should be the king or queen – something that the whole process and decision of the Commission were meant to put to an end.

[61] It is necessary to point out that, whereas in a section 9(1) process that leads to section 9(3) and (4) the President is only obliged to recognise the person if he is satisfied that the reconsideration and resolution by the royal family were done in accordance with customary law, when it comes to a decision of the Commission it is not a condition precedent that, before he can recognise the person favoured by the decision of the Commission, he should first satisfy himself that the Commission's decision is in accordance with customary law. Instead, he is simply required to immediately implement the decision of the Commission. That this is not a condition precedent in regard to a decision of the Commission is understandable because one of the requirements for the appointment of members of the Commission is that they should be knowledgeable about customs and the institution of traditional leadership.

[62] I have read the judgment prepared by my Colleague, Froneman J (second judgment). I only wish to make two or three points in regard to the second judgment. The first is that the interpretation adopted in this judgment does not deny customary law its rightful place. The statute itself requires customary law to be applied in identifying and deciding upon the person entitled to be the king or queen. This judgment simply says that there is no need to repeat that process through invoking the entire section 9 process in a case where customary law has already been applied by a legitimate and lawful body to resolve precisely this issue.

[63] Second, as explained elsewhere in this judgment, the interpretation adopted by the second judgment could potentially have resulted in a situation where, after the Commission had decided upon the person entitled to be the king or queen, the whole section 9 process was invoked and the royal family identified a different person as the one entitled to be the king or queen. This would have meant that the royal family and the Commission would have made conflicting decisions on who was entitled to be the king or queen. The Commission's decision would have been an administrative decision which would have been binding on the President and the royal family's decision would also have been binding on the President by virtue of section 9.

Conclusion

[64] In conclusion I want to make this point. Sometime after the Commission had announced its decision that amaMpondo aseQaukeni met the requirements to be a kingship or queenship, Zanozuko lodged with the Commission a claim that he was entitled to be the king of amaMpondo aseQaukeni. The whole royal family got to know about the claim. Mpondombini certainly got to know about it because he subsequently contested Zanozuko's claim and maintained that he was the one entitled to be the king. This dispute about who was entitled to be the king of amaMpondo aseQaukeni was then resolved by the Commission after it had heard evidence adduced by both sides.

[65] The decision of the Commission, after it had taken into account customary law and customs, was that Zanozuko was the one entitled to be the king and in effect that

Mpondombini was not entitled to be the king. That decision of the Commission has not been set aside. That being the case, as long as the decision of the Commission stands, the first applicant cannot be entitled to be king or queen either. In the circumstances the appeal must fail. No costs order should be made against the applicants in the light of *Biowatch.*[11]

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

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. There is no order as to costs.

FRONEMAN J:

Introduction

> "The world changes, revolutionaries die, and the children forget . . .
> Nizilibel'uba nizalwa ngobani?"[12]

[67] The question that arises in this matter is whether the President, when implementing the Commission's decision in terms of section 26(2)(a), is required to comply with the entirety of sections 9 and 10 or whether he merely has to issue the notice and certificate in terms of section 9(2) of the unamended Act.

[68] In the main judgment the Deputy Chief Justice concludes that the latter course is the correct one. I disagree. The text is reasonably capable of a different reading. The context and place of customary law under our Constitution then assumes great

[11] *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

[12] Lyrics from Thandiswa Mazwai's song *Nizalwa Ngobani*. Thandiswa Mazwai is a black woman, renowned for bringing traditional isiXhosa music into the mainstream.
"Nizilibe'uba nizalwa ngobani?" literally translates as "Have you forgotten who your forefathers are?"
The full lyrics can be found at: https://genius.com/Thandiswa-mazwai-nizalwa-ngobani-lyrics.

importance. The main thrust of the applicants' argument before us was that we should allow customary law to take its own course and not repeat the historical mistake of imposing it in distorted form from above. There is force in that argument, as I will attempt to show.

[69] The facts are not in dispute. I gratefully adopt the main judgment's exposition.

Historical context and constitutional redress

[70] This Court has recognised the deeply harmful effects that the distortion of custom by colonial and apartheid authorities has had on a community based development of customary law. In *Alexkor*,[13] affirmed in the minority judgment in *Bhe*,[14] the Court said that:

> "[A]lthough customary law is supposed to develop spontaneously in a given rural community, during the colonial and apartheid era it became alienated from its community origins. The result was that the term 'customary law' emerged with three quite different meanings: the official body of law employed in the courts and by the administration (which . . . diverges most markedly from actual social practice); the law used by academics for teaching purposes; and the law actually lived by the people."[15] (Footnotes omitted.)

[71] The Constitution seeks to redress the previous distortions of customary law. Sections 211 and 212 elevate the status of customary law to a system that works alongside the common law and international law, subject only to the Constitution:

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

[13] *Alexkor Ltd v Richtersveld Community* [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (*Alexkor*) at footnote 51.

[14] *Bhe v Khayelitsha Magistrate (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC).

[15] Id at para 151.

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

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

Role of traditional leaders

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

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

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

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

[72] While these sections are the starting point for the protection of custom, they should be read with sections 30 and 31(1) of the Constitution which protect the right to participate in all aspects of cultural life. These sections hold that:

"Language and culture

Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

Cultural, religious and linguistic communities

(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community—

(a) to enjoy their culture, practise their religion and use their language; and

(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society."

[73] The Court recognises customary law as being a form of "living law". It has held that a flexible and fluid approach to interpretation that is alive to the changing traditions of the particular people who practice the specific custom must be favoured over one that views customary law as fixed. *Shilubana* established that the starting point for interpreting customary law should be the history and long standing traditions of the community. Courts must "consider the traditions of the community concerned"[16] and it was emphasised that this means that courts must look at "the practice of a particular community [that] is relevant when determining the content of a customary-law norm".[17]

[74] In *Shilubana* it was further held that:

> "It is important to respect the right of communities that observe systems of customary law to develop their law. This is the second factor that courts must consider. The right of communities under section 211(2) includes the right of traditional authorities to amend and repeal their own customs. As has been repeatedly emphasised by this and other courts, customary law is by its nature a constantly evolving system. Under pre-democratic colonial and apartheid regimes, this development was frustrated and customary law stagnated. This stagnation should not continue, and the free development by communities of their own laws to meet the needs of a rapidly changing society must be respected and facilitated."[18]

[75] The flexible nature of customary law, while profoundly different to other legal systems, has been lauded as an enriching factor in our law. In *Bhe,* the Court held that:

> "The positive aspects of customary law have long been neglected. The inherent flexibility of the system is but one of its constructive facets. Customary law places much store in consensus-seeking and naturally provides for family and clan meetings which offer excellent opportunities for the prevention and resolution of disputes and disagreements. Nor are these aspects useful only in the area of disputes. They provide a setting which contributes to the unity of family structures and the fostering of

[16] *Shilubana v Nwamitwa* [2008] ZACC 9; 2009 (2) SA 66 (CC), 2008 (9) BCLR 914 (CC) at para 44.

[17] Id at para 46.

[18] Id at para 45.

> cooperation, a sense of responsibility in and of belonging to its members, as well as the nurturing of healthy communitarian traditions such as *ubuntu*. These valuable aspects of customary law more than justify its protection by the Constitution."[19]

[76] If we are serious about giving customary law its rightful place under the Constitution, it would be prudent to allow it to develop in its own intrinsic way in accordance with the fundamental values and rights protected in the Constitution.

Relevant provisions of the unamended Act

[77] The unamended Act created a Commission of Inquiry which was tasked with addressing conflicts over claims to traditional leadership positions.[20] Section 25 established the powers of the Commission. The following subsections are relevant:

> "(2)(a) The Commission has authority to investigate, either on request or of its own accord—
>
> . . .
>
> (ii) a traditional leadership position where the title or right of the incumbent is contested;
>
> . . .
>
> (3)(a) When considering a dispute or claim, the Commission must consider and apply customary law and the customs of the relevant traditional community as they were when the events occurred that gave rise to the dispute or claim."

[78] Section 26(2)(a) of the Act provides that:

> "A decision of the Commission must, within two weeks of the decision being taken, be conveyed to—
>
> . . .

[19] *Bhe* above n 14 at para 45.

[20] Section 22 reads:

> "(1) There is hereby established a commission known as the Commission on Traditional Leadership Disputes and Claims.
>
> (2) The Commission must carry out its functions in a manner that is fair, objective and impartial."

(a) the President for immediate implementation in accordance with section 9 or 10 where the position of a king or queen is affected by such decision."

[79] Section 9 is of importance here.[21] It reads:

"(1) Whenever the position of a king or a queen 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 a king or a queen 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 a king or a queen, as the case may be, after taking into account whether any of the grounds referred to in section 10(1)(a), (b) and (d) apply to that person; and

(ii) through the relevant customary structure—

(aa) inform the President, the Premier of the province concerned and the Minister, of the particulars of the person so identified to fill the position of a king or a queen;

(bb) provide the President and the Minister with reasons for the identification of that person as king or queen;

(cc) give written confirmation to the President that the Premier of the province concerned and the Minister have been informed accordingly;

(b) The President must, on the recommendation of the Minister and subject to subsection (3), recognise a person so identified in terms of paragraph (a)(i) as king or queen, taking into account—

(i) the need to establish uniformity in the Republic in respect of the status afforded to a king or queen;

(ii) whether a kingship or queenship has been recognised in terms of section 2A; and

(iii) the functions that will be performed by the king or queen.

[21] For the reasons given in the main judgment I agree that section 10 is not of application.

(2) The recognition of a person as a king or a queen in terms of subsection (1)(b) must be done by way of—

(a) a notice in the Gazette recognising the person identified as king or queen; and

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

(3) Where there is evidence or an allegation that the identification of a person referred to in subsection (1) was not done in terms of customary law, customs or processes, the President on the recommendation of the Minister—

(a) may refer the matter to the National House of Traditional Leaders for its recommendation; or

(b) may refuse to issue a certificate of recognition; and

(c) must refer the matter back to the royal family for reconsideration and resolution where the certificate of recognition has been refused.

(4) Where the matter that has been referred back to the royal family for recognition and resolution in terms of subsection (3) has been reconsidered and resolved, the President on the recommendation of the Minister must recognise the person identified by the royal family if the President is satisfied that the reconsideration and resolution by the royal family has been done in accordance with customary law."

Discussion and analysis

[80] The main judgment concludes that the "immediate implementation in accordance with section 9 or 10" of the Commission's decision would be undermined if the whole process of referral to the royal family had to be followed.[22] But that begs the question of what the proper process under section 9 is.[23] Textually it can be the full process of referral to the royal family, or merely the notice and certificate procedure of section 9(2).

[22] Main judgment at [56].

[23] I agree that section 10 is not applicable.

[81] One of the arguments in favour of the mere "notice and registration" procedure is that it brings immediate finality to the dispute. Another is that it is inconceivable that it was envisaged that the royal family route could nevertheless, after the Commission's decision, override that decision. While that approach is undoubtedly attractive, some caution is necessary.

[82] First, history warns us that so-called final determinations not grounded in community approval are unlikely to last. This case is a good example. The current dispute has run for some eighty years.[24] What makes us so certain that this Court's determination will be the end of the road?

[83] Second, we should be wary of the assumption that allowing the royal family to be consulted in terms of section 9 will necessarily result in an outcome at odds with the Commission's decision. If a correct understanding of the composition of the royal family and its traditional democratic role of looking after the interests of its subjects is given proper thought and currency by all, that need not be the case. The composition of the royal family should not be determined by a particular faction. It should be inclusive. The royal family must, in its traditionally democratic ways, determine the future king or queen in the interests of its subjects and not in the material interests of a particular faction. None of these important aspects for the development of customary law in accordance with the Constitution have yet been given appropriate attention.

[84] So, there is something to commend making haste slowly. If both current factions understand that they must act as a royal family for the benefit of all their subjects and not merely for themselves or their particular faction, is it not premature for a court to deny customary law the chance to identify a king or queen in its own "living" way?

[24] *Sigcau I* above n 5 at para 3 recorded:

> "That dispute erupted in 1937 after the then *ikumkani*, Mandlonke, died without leaving male issue. This led to competing claims between two of Mandlonke's brothers, Botha and Nelson Sigcau. The dispute was statutorily settled when Botha Sigcau was recognised as the 'paramount chief' of the Eastern Pondo in terms of the Black Administration Act."

[85] In *Bhe*, Langa DCJ held:

> "Quite clearly the Constitution itself envisages a place for customary law in our legal system. Certain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution. . . . It follows from this that customary law must be interpreted by the courts, as first and foremost answering to the contents of the Constitution. It is protected by and subject to the Constitution in its own right."[25]

[86] The constitutional protection of customary law "in its own right" and as a set of norms that "first and foremost answer to the contents of the Constitution" has important implications. It requires the proper investigation of the applicable rules of customary law within its own context. It also means that legislation must not be given broad interpretations over issues that fall within the domain of custom and traditional societies.

[87] In *Shilubana*, it was held that a court must "consider the traditions of the community concerned".[26] Courts must "respect the right of communities that observe systems of customary law to develop their law".[27] But it is a two-way process. Customary law must also "answer to the contents of the Constitution". And the Constitution protects fundamental rights and a system of democratic government that ensures accountability, responsiveness and openness. So, just as the courts and the other arms of government must provide customary law with the space to develop in accordance with its traditions, so must the custodians of customary laws, traditional leaders and their subjects alike, ensure that those fundamental values of the Constitution are given content in customary law. And that should not be difficult to do. Colonialism and apartheid prevented customary law from giving content to its own inherently democratic and participatory processes. Those shackles are no longer there.

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[25] *Bhe* above n 14 at para 41.

[26] *Shilubana* above n 16 at para 44.

[27] Id at para 45.

[88] Not only, then, is an interpretation of section 26(2)(a) of the unamended Act to the effect that the President must comply with the entirety of sections 9 and 10 textually sound, but it also gives due and proper recognition to customary law communities to develop customary law in their own way in accordance with constitutional values. "Living" customary law also means giving life to the Constitution by traditional communities. It is a huge responsibility, but courts and other arms of government should allow time for traditional communities to fulfil it. Section 9(1)(a) seems suitably geared to achieve exactly that.[28]

[89] What if the traditional communities fail to develop their customary law in accordance with constitutional values? Well, then the President must follow the process under section 9(3) and (4). Admittedly that is a longer process than the finality the main judgment favours, but it has the dual virtues of being both consistent with the text of the Act and in keeping with traditional notions of consultation and participation.

[90] I would thus grant leave and allow the appeal with costs, the costs to include those of two counsel.

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[28] A reminder that section 9(1)(a) states that—

> "The royal family must, within a reasonable time after the need arises for the position of a king or a queen 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 a king or a queen, as the case may be, after taking into account whether any of the grounds referred to in section 10(1)(a), (b) and (d) apply to that person; and
> (ii) through the relevant customary structure—
> (aa) inform the President, the Premier of the province concerned and the Minister, of the particulars of the person so identified to fill the position of a king or a queen;
> (bb) provide the President and the Minister with reasons for the identification of that person as king or queen;
> (cc) give written confirmation to the President that the Premier of the province concerned and the Minister have been informed accordingly."

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