CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 285/17

In the matter between:

SITHEMBILE VALENCIA MKHIZE N.O.	Applicant
and	
PREMIER OF THE PROVINCE OF KWAZULU-NATAL	First Respondent
MKHANYISENI MBUYAZI	Second Respondent
UMNDENI WENKOSI	Third Respondent
MEMBER OF THE EXECUTIVE COUNCIL OF THE DEPARTMENT OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS, KWAZULU-NATAL	Fourth Respondent

Neutral citation:	*Mkhize N.O. v Premier of the Province of KwaZulu-Natal and Others* [2018] ZACC 50
Coram:	Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J
Judgment:	Dlodlo AJ (unanimous)
Heard on:	2 August 2018
Decided on:	6 December 2018
Summary:	administrative action — right to seek review — customary law — transmissibility of right to review

res judicata — requirements — finality — decision concerning legal standing is final

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ORDER

On appeal from the High Court of South Africa, KwaZulu-Natal Division, Pietermaritzburg:

1. The condonation applications of both the applicant and the respondents are granted.
2. Leave to appeal is granted.
3. The appeal is upheld and the order of the High Court of South Africa, KwaZulu-Natal Division, Pietermaritzburg is replaced with the following order:
   "(a) The application by Mr Mkhanyiseni Mbuyazi initiated in November 2015 for the order of Van Zyl J, to be rescinded and for ancillary relief is dismissed; and
   (b) The counter-application for consolidation of the application under case number 4862/2015 by Ms Sithembile Valencia Mkhize N.O., and for relief in prayer 2 of her notice of application for consolidation, is granted."
4. The consolidation application of the applicant is granted.
5. The respondents are ordered to pay the costs of the application in this Court, jointly and severally, including the costs of two counsel.

JUDGMENT

DLODLO AJ (Mogoeng CJ, Basson AJ, Cameron J, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J concurring):

Introduction

[1] Before us is an application for leave to appeal against the judgment and order of the High Court of South Africa, KwaZulu-Natal Division, Pietermaritzburg (High Court).

[2] The applicant is Sithembile Valencia Mkhize (Ms Mkhize), the wife of the late Inkosi Zwelibhekile Sibusiso Mbuyazi (deceased) who was the Inkosi[1] of the Mbuyazi Traditional Community (Community) in KwaZulu-Natal (KZN). Ms Mkhize is acting in her capacity as executrix of the estate of the deceased.

[3] The first and fourth respondents are the Premier of KZN (Premier) and Member of the Executive Council (MEC) of the Department of Co-operative Governance and Traditional Affairs of KZN (Department), respectively. The second respondent is Mr Mkhanyiseni Mbuyazi, the deceased's brother from the second wife of the deceased's father. The third respondent is umndeni wenkosi, which is the Royal Family of the Community in KZN.

Background

[4] The deceased's father and the Community's former Inkosi, Inkosi Mtholeni Mthiyane Mbuyazi, had more than one wife as is customary in Zulu tradition. In a Zulu polygamous marriage each wife constitutes a separate house. The house of the first wife is known as "indlunkulu",[2] the house of the second, "ikhohlo",[3] and the house of the third, "iqadi".[4]

[1] "Traditional leader", formerly referred to as "chief".

[2] "First wife" or "chief wife".

[3] Directly translated, "ikhohlo" means "left hand" but also refers to the second wife of a Zulu traditional leader.

[4] "Third wife" or "bride of the first wife".

[5] In succession under Zulu law, the general rule is that the heir to the throne is the first born son in the indlunkulu. There are exceptions to this rule recognised in customary law.

[6] The deceased's father passed away on 22 June 2005. The Premier and the Department were informed that umndeni wenkosi had met for purposes of selecting the successor and had selected the deceased in terms of section 19(1) of the KwaZulu-Natal Traditional Leadership and Governance Act[5] (Act). The Premier resolved to recognise the deceased as Inkosi in terms of the Act and informed the deceased of his decision. The deceased took over as *de facto* Inkosi in September 2006. However, there was a dispute amongst members of umndeni wenkosi regarding who the rightful Inkosi was, and an expert in Zulu law, Professor Langalibalele Mathenjwa, was appointed with the agreement of umndeni wenkosi to investigate and resolve the dispute. Following his investigation, Professor Mathenjwa recommended that the second respondent be appointed as Inkosi. The Premier notified the deceased that his recognition as Inkosi had been withdrawn and issued a certificate of recognition in favour of the second respondent.

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[5] 5 of 2005. Section 19(1) and (2) provides:

> "(1) Whenever the position of an *Inkosi* is to be filled, the following process must be followed—
>
> (a) *Umndeni wenkosi* must, within a reasonable time after the need arises for the position of an *Inkosi* to be filled, and with due regard to applicable customary law and section 3—
>
> (i) identify a person who qualifies in terms of customary law to assume the position of an *Inkosi* after taking into account whether any of the grounds referred to in section 21(1)(a), (b) or (d) apply to that person;
>
> (ii) provide the Premier with the reasons for the identification of that person as an *Inkosi*; and
>
> (iii) the Premier must, subject to subsection (3) and section 3, recognise a person so identified in terms of subsection (1)(a)(i) as an *Inkosi*.
>
> (2) The recognition of a person as an Inkosi in terms of subsection (1)(a)(iii) must be done by way of—
>
> (a) a notice in the *Gazette* recognising the person identified as *Inkosi*; and
>
> (b) the issuing of a certificate of recognition to the identified person."

[7] Aggrieved by this, the deceased launched an urgent application in the High Court on 29 March 2010 seeking a review of the Premier's decision to withdraw his recognition as Inkosi (review application). He also sought an interim order in the form of a rule *nisi* calling on the respondents to show cause why he should not be reinstated and the appointment of the second respondent, suspended pending the outcome of the review (interim relief). The interim relief was granted on 11 May 2010 by Madondo J. On 26 May 2010, upon application by the Premier, Koen J varied the interim relief. Koen J granted the Premier leave to oppose the review and directed the Premier to appoint an appropriate person, being neither the deceased nor second respondent, to function as IbambabuKhosi.[6]

[8] The deceased subsequently supplemented his prayers and introduced a claim seeking the reinstatement of payment of his salary and payment of arrear salary amounts (monetary claim).

[9] The review application was heard in the High Court by Van Zyl J on 23 September 2010 and on 7 June 2011 judgment was handed down (Van Zyl J order). Van Zyl J held that the matters before him were too complex to be decided on the papers and considered that the interests of both the parties and the Community would be best served if the matter was referred to trial. He ordered that the succession dispute go to trial and that the interim relief remain in force pending the finalisation of the review.

[10] In October 2011, the deceased then brought an application seeking funding for the review application and the monetary claim from the Mbonambi Community Development Trust (funding application). He was the founder of that Trust and co-founder of the Mbonambi Community Public Benefit Trust and a trustee in both Trusts. The funding application was heard by the High Court and judgment was reserved.

[6] "Interim Inkosi".

[11] On 7 July 2012, the deceased passed away. Following the deceased's death the second respondent brought an application in the High Court seeking an order: (a) discharging the interim relief granted in the High Court by Madondo J and subsequently varied by Koen J; (b) dismissing the review; (c) confirming the Premier's decision to withdraw recognition of the deceased as Inkosi; and (d) suspending and terminating the appointment of IbambabuKhosi.

[12] The grounds on which these orders were sought can be summarised as follows: The rights of the deceased to be recognised as Inkosi were personal to him; to be recognised as Inkosi he must be alive; and these rights were not transmissible to his heirs or anyone else. It was accordingly submitted by the second respondent that there was no legal basis upon which the executrix or any heir could lay claim to the traditional leadership position in the absence of a declaratory order confirming the deceased as the rightful Inkosi.

[13] On 9 November 2012, the Premier also brought an application seeking the dismissal of both the main review application and the funding application with costs. The basis for the Premier's application was similar to that of the second respondent.

[14] On 12 November 2012, Ms Mkhize filed a notice of opposition to both applications and on 16 November 2012, brought a counter-application seeking to be substituted as the applicant in the review application, monetary claim and funding application in her capacity as executrix of the deceased's estate. She also sought to be joined in the proceedings as mother and legal guardian of the minor son of the deceased, Phathokuhle Mbuyazi. Ms Mkhize also sought an order directing the Premier to pay to the estate the further amounts to which the deceased was entitled as salary from November 2010 until 7 July 2012. The counter-application was opposed by the Premier and second respondent.

[15] The questions before the High Court were whether: (a) the death of the deceased had put to an end his right to review the decision of the Premier; (b) his

minor son had any right to claim that he should be appointed as Inkosi; and (c) the applicant as executrix should be appointed as Regent until such time that the son reached majority.

[16] On 9 July 2013 Booyens AJ dismissed Ms Mkhize's application to be substituted as the applicant in her capacity as executrix in the deceased's review and funding applications and be joined as applicant in her capacity as mother and legal guardian of her minor child (Booyens AJ judgment). Booyens AJ also rescinded the Van Zyl J order referring the succession dispute to trial and discharged the rule *nisi* but made no order as to costs.

[17] Unsatisfied with this outcome, Ms Mkhize appealed to the Supreme Court of Appeal. That Court held that the deceased's right to reinstatement was a personal right and consequently not transmissible to Ms Mkhize.[7] For this reason, the Court held that she could not be substituted for the deceased in the review application.[8] However, the non-transmissibility of this right did not preclude Phathokuhle's claim to succeed the deceased.[9] But the deceased's son would need to be appointed by umndeni wenkosi in terms of section 19(1) of the Act.[10] On this reasoning, the Supreme Court of Appeal upheld the appeal in part and made the following order:

> "2. Save for that part of the order dismissing the appellant's application to be substituted for the deceased in her capacity as guardian of Phathokuhle, the order of the court below is set aside and for it is substituted the following:
>
> (a) The applicant, Sithembile Valencia Mkhize, in her capacity as executrix of the estate of the late Zwelibhekile Sibusiso Mbuyazi, is hereby substituted as applicant in the deceased's damages claim and in his funding application.

[7] *Mkhize v Premier of the Province of KwaZulu-Natal* [2014] ZASCA 204; 2014 JDR 2528 (SCA) (Supreme Court of Appeal judgment) at para 12.

[8] Id.

[9] Id at para 14.

[10] Id.

. . .

(c) The first and second respondents' applications for the discharge of the rule *nisi* and for the rescission of the orders granted on 7 June 2011 are both dismissed, with costs."[11]

[18] Significantly, the Supreme Court of Appeal held that the monetary claim was separable from the review application as it was contingent upon proving that the deceased had been wrongfully removed, and that Ms Mkhize could be substituted for the deceased in the monetary claim.[12] Further, it refused the application to rescind the Van Zyl J order referring the matter to trial or to discharge the interim order made by Madondo J and varied by Koen J.[13]

[19] In January 2015 the Premier approached this Court for leave to appeal against the order of the Supreme Court of Appeal. Ms Mkhize brought a separate application in her capacity as mother and legal guardian of Phathokuhle; she sought to be joined on behalf of Phathokuhle to assert the child's rightful succession to the deceased's position of Inkosi on the basis that the deceased had been wrongfully removed by the first respondent. Both of those applications were refused by this Court, on the basis that it was not in the interests of justice to hear the matter.

[20] Following the judgment of the Supreme Court of Appeal, Ms Mkhize instituted a separate action in the High Court in her capacity as mother and legal guardian of Phathokuhle to assert his claim to succession as Inkosi (succession claim). Simultaneously, and notwithstanding the Supreme Court of Appeal judgment, the second respondent brought an interlocutory application in the deceased's review application for the rescission of the Van Zyl J order. This application was opposed by Ms Mkhize through a counter-application and an application for the consolidation of the monetary claim and the succession claim.

[11] Id at para 19.

[12] Id at paras 16 and 18.

[13] Id at paras 17 and 19.

[21] The High Court, per Sishi J, held that the findings by the Supreme Court of Appeal were incontrovertibly that Ms Mkhize had no claim in law to pursue a review of the withdrawal of recognition of the deceased as Inkosi or appointment of the second respondent and that consequently, there was no applicant to pursue the issue of ubuKhosi[14] as a result of the death of the deceased. Sishi J held that the monetary claim was a separate issue, unrelated to the fact that the deceased may have been unlawfully removed as Inkosi or the validity of the appointment of the second respondent as Inkosi. In the light of the Supreme Court of Appeal judgment, Sishi J concluded that the application for consolidation should also fail, as Ms Mkhize and Phathokuhle could not achieve anything in favour of Phathokuhle in the litigation. Contrary to the Supreme Court of Appeal order, the High Court rescinded the Van Zyl J order of 7 June 2011 and discharged the rule *nisi* granted on 11 May 2010 and subsequently varied on 26 May 2010, in light of the finding that Ms Mkhize could no longer pursue the issue of ubuKhosi (as it related to the deceased) and ordered her to pay costs.[15]

[22] Ms Mkhize applied to Sishi J for leave to appeal to the Full Court but that application was dismissed. Her applications for leave to appeal and for reconsideration suffered the same fate at the Supreme Court of Appeal.

Jurisdiction and leave to appeal

[23] This matter raises issues of constitutional importance, specifically: (a) the interpretation and application of a court order;[16] and (b) the proper boundaries of the

[14] "Traditional leadership".

[15] *Mbuyazi v Premier of the Province of KwaZulu-Natal*, unreported judgment of the High Court of South Africa, KwaZulu-Natal Division, Pietermaritzburg, Case No 2367/2010 (6 October 2016) (Sishi J judgment) at para 42.

[16] Section 165(5) of the Constitution provides:

> "An order or decision issued by a court binds all persons to whom and organs of State to which it applies."

exercise of public power by the Premier and the MEC. These issues plainly engage the jurisdiction of this Court.

[24] There has been protracted litigation in this matter and the judgments handed down have varied immensely in their approach. The applicant has reasonable prospects of success and it would be in the interests of justice to grant leave to appeal expeditiously to secure finality in this matter.

Condonation

[25] The applicant's delay in filing her application was negligible and the explanation for the delay was reasonable. The same applies to the respondents' application. Condonation should be granted.

Issues

[26] In respect of the merits of the appeal, the issues to be decided are:

(a) whether the relief granted by Sishi J in the High Court was competent;

(b) what the correct interpretation of the Supreme Court of Appeal judgment is; and

(c) whether the interim relief should be set aside and the rule *nisi* discharged.

Applicant's submissions

[27] First, counsel for Ms Mkhize submitted that the judgment by Sishi J misinterprets and effectively overrules the judgment of the Supreme Court of Appeal; and second, that that judgment and the two later orders by the Supreme Court of Appeal dismissing her application for leave to appeal failed to apply the principle of *res judicata* (matter already adjudicated).[17] Counsel further submitted that the outcome of the judgment of Sishi J is not only inconsistent with the order of the

[17] *S v Molaudzi* [2015] ZACC 20; 2015 (2) SACR 341 (CC); [2015] JOL 33409 (CC) (*Molaudzi*) at fn 17. On *res judicata*, and its limits, see *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* [2017] ZACC 1; 2017 JDR 0084 (CC); 2017 (6) BCLR 750 (CC) paras 29-31.

Supreme Court of Appeal, but is also unfair and unjust, and breaches the principle of *res judicata.*

[28] During the hearing before us it was also argued, on behalf of Ms Mkhize, that the monetary claim is necessarily contingent upon the question whether the deceased was wrongfully removed from office, as is Phathokuhle's succession claim. Ms Mkhize echoes the Supreme Court of Appeal's sentiments that "convenience" and "the interests of all" require that the question of salary and succession be resolved together and at trial.

Premier's and MEC's submissions

[29] The Premier and the MEC made two main submissions with regard to the impact of the deceased's death on the review of his removal from office and the interim order granted by Madondo J and varied by Koen J. The nub of their submissions in respect of the review application was that the decisions of the Premier are administrative actions and stand until they are set aside by a court on review. They argued that, without a transmissible right and an applicant to step into the deceased's shoes in the review application, there is no one who has standing to bring a review of the removal of the deceased, nor are there grounds upon which to bring it. There is only the monetary claim for loss of income and the succession claim, which would not have the effect of setting aside the Premier's decisions to withdraw recognition of the deceased as Inkosi and appoint the second respondent. Moreover, they submitted that it was actually the review of the removal of the deceased that was referred to trial in the Van Zyl J order, not the issue of the identity of the proper Inkosi. They therefore submitted that the monetary and succession claims are fundamentally flawed as they cannot be decided without a determination of who ought to be Inkosi.

[30] In respect of the interim order, the Premier and MEC submit that its purpose was to prevent prejudice to either party while the review was pending and the review has now fallen away making the interim relief unnecessary. Moreover, because there

can be no review without a proper applicant, this order will continue indefinitely, leaving the community without an Inkosi. It was further argued by the Premier and MEC that all attempts at appointing IbambabuKhosi have failed because of unwillingness among different factions of the community to reach a compromise.

[31] The Community has been without Inkosi since 2010, which has had a detrimental effect on its governance. This, the Premier and MEC submit, is despite the fact that there is a recognised adult Inkosi (the second respondent) who could function as Inkosi if permitted. Counsel relied on these circumstances to argue that even if this Court were to uphold Ms Mkhize's appeal, the rule *nisi* should be discharged on the basis of changed circumstances or as an exercise of this Court's discretion. The Premier and MEC further submit that even if the interests of justice require that the second respondent or Phathokuhle must go through litigation to have one of their claims recognised, until then, the rule *nisi* should be discharged and the second respondent should be allowed to function as Inkosi.

Second respondent's submissions

[32] The second respondent submitted that the right to seek a review of the removal of the deceased was personal to the deceased and therefore non-transmissible. Consequently, when the deceased died, the right to seek a review, and therefore the review application itself, died with him. In the result, the second respondent argues that neither Ms Mkhize nor her son has the right to pursue the review application.

[33] The second respondent also asserted that the monetary claim is separate from the review but contingent on the question of wrongful removal, which must be decided through a trial. However, that trial would not be a review. It flows from this that the judgment of Sishi J was correct in setting aside the Van Zyl J order insofar as it related to the review application. The second respondent conceded, however, that the Sishi J order may have erred in rescinding the Van Zyl J order in its entirety instead of rescinding specifically the part of the order regarding the review application.

[34] Like the Premier and MEC, the second respondent supported doing away with the interim relief. He argued that the Supreme Court of Appeal judgment provided no reasons why the rule *nisi* should not be discharged, and gave no direction in relation to interim relief. He submitted that it therefore could not definitively be said that the Supreme Court of Appeal judgment ordered that the interim relief be kept in place. Moreover the interim relief was granted at a time when the review application was still pertinent and before the deceased brought the monetary claim; however, the review application has since fallen away. Thus the second respondent submitted that there is no longer a reason for the interim relief to persist. Alternatively, it must follow that the Supreme Court of Appeal judgment left the interim relief in place, in which case it must be accepted that the interim relief was granted in respect of the review application alone, which ought to have been, and was, set aside by the Sishi J order.

[35] The second respondent argued that for a defence of *res judicata* to succeed there must have been a final judgment on the merits of a matter. He submits that he did not raise the issue of standing (although the Supreme Court of Appeal determined this issue) in his second interlocutory application before Sishi J. The second respondent sought relief only in respect of: (a) the rule *nisi*, which the Supreme Court of Appeal judgment had not addressed and (b) the dismissal of the review application, which flowed from the Supreme Court of Appeal judgment and on which he submitted the Supreme Court of Appeal had not made a finding. The upshot of that would be that the doctrine of *res judicata* does not apply.

Was the relief granted by Sishi J competent?

[36] Much of this case turns on the question whether Sishi J reconsidered issues already pronounced upon by the Supreme Court of Appeal and whether in so doing, he infringed on the principle of *res judicata*. In *Molaudzi* this Court defined it as "the legal doctrine that bars continued litigation of the same case, on the same issues,

between the same parties".[18] Importantly, the enquiry in respect of *res judicata* is not whether the judgment is correct, but simply whether there is a judgment.[19] The rationale of the doctrine is to bring finality to legal proceedings by limiting repeat litigation on the same issues and to "ensure certainty on matters decided by the courts".[20]

[37] In *Baphalane ba Ramokoka Community*[21] this Court affirmed the Supreme Court of Appeal's decision in *National Sorghum Breweries,*[22] holding that "the plea of *res judicata* may be raised only where the same litigant seeks the same relief on the same cause of action".[23] However, the defence has been extended by the courts, on a case by case basis, over time. This started in *Boshoff* where the Transvaal Provincial Division held that the strict requirements of *res judicata* should not be applied inflexibly.[24] Since *Boshoff* the ambit of the *res judicata* defence has been extended to include cases where the same issue must arise between the same parties. The expanded defence is sometimes referred to as issue estoppel.[25] Broadly stated, the "same issue" enquiry is "whether an issue of fact or law was an essential element of the judgment on which reliance is placed".[26] In its explanation of the expanded defence in *Smith*[27] the Supreme Court of Appeal said: "Each case will depend on its own facts and any extension of the defence will be on a case-by-case basis. Relevant considerations will include questions of equity and fairness not only to the parties themselves but also to others".[28]

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[18] Id at para 14.

[19] Id.

[20] Id at para 16.

[21] *Baphalane ba Ramokoka Community v Mphela Family, In re: Mphela Family v Haakdoornbult Boerdery CC* [2011] ZACC 15; 2011 JDR 0394 (CC); 2011 (9) BCLR 891 (CC) (*Baphalane ba Ramokoka*) at para 31.

[22] *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd* [2000] ZASCA 70; 2001 (2) SA 232 (SCA).

[23] *Baphalane ba Ramokoka* above n 21 at para 31.

[24] *Boshoff v Union Government* 1932 TPD 345 at 346.

[25] Harms "Issue estoppel as part of *res judicata*" in *LAWSA* 3 ed (2015) Vol 18 at para 75.

[26] *Smith v Porritt* [2007] ZASCA 19; 2008 (6) SA 303 (SCA) at para 10.

[27] *Smith* id.

[28] Id .

[38] Importantly, the doctrine of *res judicata* will apply only "where a cause of action has been litigated to *finality* between the same parties on a previous occasion".[29] Where an order does not have final effect, the doctrine cannot apply.[30] It has been held that the doctrine of *res judicata* does not apply to interim interdicts or matters related to those orders.[31] There is a good reason for this. Often interlocutory orders such as interim interdicts are issued with the intention of being revisited, likely by the same court that issued them. A rule *nisi*, by its very nature is an interlocutory order. It is intended to govern a situation in the interim, for a period, until it is discharged or confirmed. Similarly, the Van Zyl J order, although contained in a reasoned judgment, was essentially a case management order. In brief, it provides that: (a) the matter will proceed to trial; (b) the affidavits filed will stand as pleadings; (c) costs will be reserved; and (d) the interim arrangements as per the rule *nisi* will remain in effect.

[39] In considering whether an order is of final effect, Muller JA in *Wanderers* stated:

> "From a reading of the judgment of Howard J, and having regard to the terms of the order made by him . . . I have no doubt but that the learned Judge intended that the issues raised before him would be finally resolved in an action to be instituted by the club and that all that he was called upon to do was to make an order which would operate *pendente lite*. The order made by him was therefore not a final and definitive order."[32]

[29] *Molaudzi* above n 17 at para 16.

[30] *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A) (*Wanderers*) at 47H.

[31] See *Cipla Agrimed (Pty) Ltd v Merck Sharp Dohme Corporation* [2017] ZASCA 134; 2018 (6) SA 440 (SCA) at para 19, where the Supreme Court of Appeal confirmed that the doctrine of *res judicata* does not apply to interlocutory orders. Specifically, the Court held that matters decided for purposes of granting an interim interdict do not become *res judicata*.

[32] *Wanderers* above n 31 at 47F-H.

[40] There is little difference between what was contemplated in the order in *Wanderers* and the Van Zyl J order. There is no doubt that Van Zyl J envisioned that his order would operate only while the main matter – the review application – was pending. The order was not determinative of the issues between the parties nor did it determine the rights of the parties. The Van Zyl J order merely set out the path to be followed in order to have the issues between the parties finally determined. It served to govern the status quo until the main application had reached finality following the trial. For this reason, the Van Zyl J order cannot itself be considered final.

[41] The orders of Booyens AJ, the Supreme Court of Appeal and Sishi J all concerned the rule *nisi* and the Van Zyl J order. The pertinent question is therefore whether an order can be considered final when it is concerned with dismissal or discharge of interim or interlocutory orders.

[42] In *Cohn*, the finality of a dismissed matter was considered and the Court stated:

> "In dealing with the position where an action is dismissed, Spencer Bower says that the answer to the question whether anything can be said to have been decided, so as to conclude the parties, beyond the actual fact of the dismissal depends upon whether . . . the dismissal itself is seen to have *necessarily involved a determination of any particular issue or question of facts or law*, in which case there is an adjudication on that question or issue; if otherwise, the dismissal decides nothing, except that in fact the party has been refused the relief which he sought.'"[33] (Own emphasis.)

[43] Also instructive is the more recent case of *Cipla*, which dealt with the finality of court decisions in the context of whether or not they could be appealed.[34] In that case, the Supreme Court of Appeal listed the following attributes: "it must be final in

[33] *Cohn v Rand Rietfontein Estates, Limited*, 1939 TPD 319 at 324. See also *Cipla* above n 31.

[34] *Cipla* id.

effect; it must be definitive of the rights of the parties; and it must have the effect of disposing of at least a substantial part of the relief claimed". [35]

[44] It appears that the question is whether Booyens AJ made a determination of "any particular question of fact or law" with the result that his order was final. I believe that he did. In his judgment, Booyens AJ stated:

> "The issue that falls to be decided is whether the death of the [deceased] would put an end to his rights of review of the decision of the Premier and whether his minor son has got any right to claim that he should be appointed Inkosi and the executrix be appointed as Regent until such time as he reached majority."[36]

[45] Booyens AJ then held that "the right [of the deceased to be Inkosi] is a purely personal right of his. He cannot in any way deal with this right by transferring it in any way whatsoever."[37] On this basis, Booyens AJ held that Ms Mkhize did not have legal standing to pursue the review of the deceased's removal and dismissed her application for substitution. Does this satisfy the *Cipla* criteria? Yes. The decision was final in effect as Booyens AJ made a final determination of Ms Mkhize's legal standing with the consequence that she was barred from pursuing a review of the deceased's removal from office – indeed, the Booyens AJ order went so far as to bar anyone besides the deceased from pursuing a review. It defined the rights of the parties, specifically Ms Mkhize's rights, and legal standing. And the result was that the relief sought by Ms Mkhize was disposed of entirely. In light of the above, I must conclude that the Booyens AJ order was final and fell within the purview of the doctrine of *res judicata*.

[46] On the same reasoning, the Supreme Court of Appeal's decision was also substantively definitive in respect of Ms Mkhize's legal standing and was final. A

[35] Id at para 18.

[36] *Mbuyazi v Premier of the Province of KwaZulu-Natal*, unreported judgment of the High Court of South Africa, KwaZulu-Natal Division, Pietermaritzburg, Case No 2367/2010 (9 July 2013) at para 11.

[37] Id at para 13.

final determination of a legal issue is relevant to the application of the doctrine of *res judicata,* but also to that of precedent. The doctrine of precedent is a cornerstone of the rule of law. It requires that where a legal issue has been authoritatively decided by a higher court, later issues arising from similar facts must be resolved on the authority of the precedent set by the higher court. [38] In *Camps Bay*, Brand AJ noted that the doctrine of precedent "is . . . not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution".[39] Unlike issue estoppel, in the application of the doctrine of precedent it hardly matters who the parties in the subsequent litigation are. A court is bound by the *ratio decidendi* (rationale for the decision) of a higher court's decision on the relevant legal issue.

[47] Irrespective of whether we apply the doctrine of precedent or issue estoppel, the crucial question is whether the Supreme Court of Appeal made a final determination on the legal issue that subsequently came before Sishi J. If it did not, neither precedent nor *res judicata* – even in the extended form of issue estoppel – can assist Ms Mkhize. If it did, then Ms Mkhize must succeed on the basis of issue estoppel and the doctrine of precedent, which overlap in this case.[40]

[48] Before Sishi J, the second respondent sought the same relief that he had sought before Booyens AJ in the High Court and which was decided on appeal by the Supreme Court of Appeal, namely a rescission of the Van Zyl J order and the discharge of the rule *nisi*. The case advanced by the respondents was that in the light of the Supreme Court of Appeal decision there was no longer an applicant in the review application, and consequently the circumstances had changed. On this basis, the respondents contended that the application for the discharge of the rule *nisi* and the

[38] *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] ZACC 19; 2011 (4) SA 42 (CC); 2011 (2) BCLR 121 (CC) (*Camps Bay*) at para 28. See also *Afrox Healthcare Ltd v Strydom* [2002] ZASCA 73; 2002 (6) SA 21 (SCA).

[39] *Camps Bay* id at para 28.

[40] *Prinsloo N.O. v Goldex (Pty) Ltd* [2012] ZASCA 28; 2014 (5) SA 297 (SCA) at para 23. See also *Pratt v FirstRand Bank Limited* [2014] ZASCA 110; 2014 JDR 1827 (SCA) at para 8.

rescission of the Van Zyl J order application ought to be reconsidered. According to the Supreme Court of Appeal in *Mostert*, although the general rule is that a court's final judgment may not be altered or supplemented, there are some exceptions to this rule. One exception is that—

> "a court may clarify its judgment or order if, on a proper interpretation, the meaning remains uncertain and it is sought to give effect to its true intention. Even then the sense and substance of the order must not be altered."[41] (Citations omitted.)

[49] The question that arises is whether, in considering and deciding the second respondent's new application, Sishi J went beyond a mere interpretation of the Supreme Court of Appeal decision and breached the constraints imposed by the doctrines of precedent and *res judicata*. To answer this, it is necessary first to determine the correct interpretation of the Supreme Court of Appeal judgment.

What is the correct interpretation of the Supreme Court of Appeal judgment?

[50] The respondents argued that the Supreme Court of Appeal judgment held that the right to seek a review of the withdrawal of recognition of Inkosi and the recognition of the second respondent as Inkosi perished with the death of the deceased. Consequently, they argue, there is no one who has the legal standing to bring a review application and the review application cannot proceed. Is this interpretation of the Supreme Court of Appeal judgment correct? I think not.

[51] In *Fohlisa*, this Court held that an order must be considered in the context in which it was given.[42] When interpreting a judgment or order, one must consider the "manifest purpose" of the judgment or order and the court's intention must be ascertained primarily from the language of the judgment or order which must be read

[41] *Mostert N.O. v Old Mutual Life Assurance Co (SA) Ltd* [2001] ZASCA 101; 2002 (1) SA 82 (SCA) (*Mostert*) at para 5.

[42] *National Union of Metalworkers of SA obo Fohlisa v Hendor Mining Supplies (A Division of Marschalk Beleggings (Pty) Ltd)* [2017] ZACC 9; (2017) 38 ILJ 1560 (CC); [2017] 6 BLLR 539 (CC) (*Fohlisa*) at para 12.

as a whole.[43] The Supreme Court of Appeal judgment must be considered with this injunction in mind.

[52] The relevant paragraph of the Supreme Court of Appeal judgment states:

> "I propose to consider first the appellant's application to be substituted as applicant in the review application. I agree with the finding of the court below that the deceased's claim, in the review application, that the Premier's withdrawal of his recognition as Inkosi of the Mbuyazi Community be set aside; that the Premier be directed to do all things necessary to withdraw the appointment of the second respondent as Inkosi of the Mbuyazi Community and to reinstate him (the deceased) as such, was personal to him and therefore not transmissible to anyone else. *He was the only one, were he to be successful, who could be reinstated as Inkosi*. However, since he has died, an order setting aside the Premier's withdrawal of the deceased's recognition as Inkosi and directing the Premier *to reinstate him* as Inkosi can no longer be made. That claim, therefore, could no longer be pursued after the death of the deceased. It terminated upon his death. (See the relevant authorities referred to by Holmes JA in *Government of the Republic of South Africa v Ngubane* . . .). In my view, the claim for reinstatement could not be ceded, even after *litis contestatio* [pleadings are closed], and is thus not transmissible to the deceased's heirs. It follows that the appellant cannot be substituted as applicant in the review application proper."[44] (Citation omitted.)

[53] Notably, the discussion of the nature of the right and its transmissibility focuses specifically on the relief that was originally sought by the deceased – his reinstatement as Inkosi. It is with regard to the question of his reinstatement that the Supreme Court of Appeal remarked that "the claim . . . could not be ceded, even after *litis contestatio*, and is thus not transmissible to the deceased's heirs".[45]

[43] Id at para 11.

[44] Supreme Court of Appeal judgment above n 7 at para 12. (Emphasis added.)

[45] Id.

[54] *Ngubane* concerned the cession by one party to another of a delictual claim for damages arising from an assault.[46] The Appellate Division held that—

> "claims for pain and suffering and the like are of so personal a nature that they should be regarded as being *extra commercium* [outside commerce and not susceptible to being traded]. It seems to me desirable as a matter of public policy to have some curb against the risk of trafficking in essentially personal claims."[47]

That case therefore concerned the narrow issue of ceding personal claims under the common law, like claims for pain and suffering. It did not deal with the transmissibility of the right to review the exercise of public power which is at issue in these proceedings. And as was argued by the Premier and MEC in their papers, the recognition or withdrawal of recognition of an Inkosi is manifestly administrative action and thus amounts to an exercise of public power.

[55] It appears that the Supreme Court of Appeal classified specifically the deceased's claim for reinstatement, which his widow sought to pursue, as a personal and non-transmissible right. This conclusion is bolstered by a consideration of subsequent paragraphs of the judgment. For example, the Supreme Court of Appeal stresses its "finding that the deceased's claim for his *reinstatement* as Inkosi was not transmissible upon his death".[48] Similarly in paragraph 16, which is possibly the clearest instance of the Court's distinguishing between the non-transmissibility of the claim for reinstatement and a review application, the Supreme Court of Appeal held that—

> "[i]t is true that the claim for payment of arrear salary is included in the review application, but that does not detract from the fact that it is a claim separate from the one for reinstatement of the deceased as Inkosi."

[46] *Government of the Republic of South Africa v Ngubane* 1972 (2) SA 601 (A); [1972] All SA 489 (A) (*Ngubane*).

[47] Id at 609A.

[48] Supreme Court of Appeal judgment above n 7 at para 14.

[56] By parity of its reasoning on the non-transmissibility of the reinstatement claim, the Supreme Court of Appeal held that the applicant's son Phathokuhle would not "have been able to obtain an order directing the Premier to appoint him as Inkosi".[49] In other words it is because Phathokuhle, like Ms Mkhize, was not entitled to the relief sought in the review application, that he could not be substituted for the deceased as the applicant in the review.

[57] However, it does not follow from this that Phathokuhle would lack standing in a review to declare the decisions unlawful, set them aside, or remit them to the Premier for reconsideration. Nor is it a consequence that Phathokuhle does not have a claim for succession. The Supreme Court of Appeal says as much in paragraph 14 of its judgment.[50]

[58] The Supreme Court of Appeal judgment goes on to reason that the monetary claim would succeed only on the basis of a finding that the decision to withdraw recognition of the deceased as Inkosi was wrongful and unlawful, and that Ms Mkhize could be substituted in the monetary claim.[51] The Supreme Court of Appeal therefore distinguished between the review application, which sought to declare the decisions unlawful, and the application that sought to secure reinstatement of the deceased.

[59] Ms Mkhize could thus not be substituted in the review application insofar as it related to the claim for the deceased's reinstatement because she has no standing to claim the relief that could be sought only by the deceased.[52] However, the Supreme Court of Appeal pointed out that the monetary claim on behalf of the

[49] Id at para 13.

[50] This is what the Supreme Court of Appeal said in respect of Phathokuhle's succession claim:

> "It must be stressed, however, that it does not follow from the finding that the deceased's claim for his reinstatement as Inkosi was not transmissible upon his death, that Phathokuhle has no claim to the position of Inkosi of the Mbuyazi Community. Section 19(1)(a)(i) of the Act enjoins the umndeni wenkosi (royal family) to identify a person who qualifies in terms of customary law to assume the position of an Inkosi."

[51] Id at para 17.

[52] This is dealt with in further detail below.

deceased could be based on the same premise – his unlawful removal – but it would seek a different relief, namely monetary fulfilment and not reinstatement. That, the Supreme Court of Appeal concluded, remained open to the applicant.

[60] The Supreme Court of Appeal was considering an appeal against a decision by Booyens AJ to rescind the interim relief and Van Zyl J referral to trial. The Court overruled the order Booyens AJ granted because it held – plainly and unequivocally – that the applicant had standing to take the matter to trial. This it seems to me was a final decision on whether the Van Zyl J order should be rescinded – and it was based on a final determination that the applicant had standing in the impending review proceedings. The correct interpretation of the Supreme Court of Appeal judgment is therefore that the applicant was barred from being substituted in the review application that the deceased brought solely insofar as that application sought to reinstate the deceased as Inkosi. The reason for circumscribing her standing was that only the deceased was entitled to be reinstated as Inkosi, and not the applicant. The Court held that the substitution, seeking that the applicant be recognised as Inkosi, is not possible.

[61] However, as the Supreme Court of Appeal held, it does not follow from this that the applicant does not have standing to bring a review application. It only means that she could not seek the same relief the deceased sought. She was fully entitled to seek different relief like a declarator that the deceased was unlawfully removed from office. The Supreme Court of Appeal judgment equally recognised that Phathokuhle's succession claim was also not extinguished.[53]

[62] The Supreme Court of Appeal made a final determination on a legal issue. An interpretation of that Court's judgment shows that the Court did not dispose of the merits of the review. What the Supreme Court of Appeal finally decided was that Ms Mkhize could not be substituted because she could not be reinstated as Inkosi in

[53] Supreme Court of Appeal judgment above n 7 at para 14.

the place of the deceased.[54] By overturning the rescission of the Van Zyl J order by Booyens AJ, the Supreme Court of Appeal also finally decided that the review application, in which the traditional leadership dispute was central, encompassed Ms Mkhize's monetary claim and Phathokuhle's succession claim and that those legal questions ought to be decided under the Van Zyl J order.

[63] This can only lead to one conclusion: Sishi J was bound and constrained by the Supreme Court of Appeal's holding that the lawfulness of the traditional leadership question was to be decided under the Van Zyl J order, based on both precedent and issue estoppel.

[64] It is clear that Sishi J's decision did not give effect to the Supreme Court of Appeal decision and in effect altered the substance of that decision. Moreover, Sishi J's decision, in interpreting the Supreme Court of Appeal judgment in the manner that it did, had the effect of overruling it. In deciding afresh questions that the Supreme Court of Appeal had already decided, Sishi J flouted the injunctions of issue estoppel; and in disregarding the plain injunction of the Supreme Court of Appeal that the interim order persist and that the matter be determined at trial, the constraints of the doctrine of precedent. Indeed, the public purposes of issue estoppel or *res judicata* and the doctrine of precedent are related. They are to secure finality in litigation. Consequently, the decision of Sishi J fell outside the bounds of proper interpretation as well as the prescripts of precedent and must be set aside. The final issue for determination is what Sishi J's decision ought to have been.

[65] Before the last issue, it is desirable to linger briefly on the common law interpretation of rights at customary law employed by Booyens AJ and the Supreme Court of Appeal, although these decisions are not before us. In *Alexkor*, this Court held that customary law rights should be "considered in their own terms and not

[54] Id.

through the prism of the common law".[55] As was the case in *Alexkor* the customary law issues for determination are not before this Court, however, the *obiter dicta* in that judgment are of significance here:

> "While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution."[56] (Citations omitted.)

And:

> "In 1988, the Law of Evidence Amendment Act provided for the first time that all the courts of the land were authorised to take judicial notice of indigenous law. Such law may be established by adducing evidence."[57] (Citations omitted.)

[66] When adjudicating matters concerning rights in customary law, courts must do so through a customary law and not a common law lens. If the courts lack clarity on the position taken by the relevant customary law, it is open to them to establish its position by inviting the parties to adduce evidence. This would apply, amongst other things, to legal standing and transmissibility of rights.

[67] Both the High Court, per Booyens AJ, and the Supreme Court of Appeal applied the common law principles of legal standing to the issues that came for determination before them. It is, however, common cause that the dispute before those courts concerned traditional leadership. The law governing traditional leadership is customary law. Why do courts attempt to resolve traditional leadership disputes by employing the common law? Perhaps, if the High Court had resolved the issues before it through the application of Zulu customary law, the matter would not have even reached the Supreme Court of Appeal.

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[55] *Alexkor Ltd v Richtersveld Community* [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (*Alexkor*) at para 55.

[56] Id at para 51.

[57] Id at para 52.

[68] In terms of Zulu customary law, Ms Mkhize could have been substituted as the applicant, not only because of her role as executrix but also by virtue of being the deceased Inkosi's wife. She had a substantial interest in the matter pursued by the deceased Inkosi. Her substitution would not have presented any difficulty at all. If the review application succeeded, all that the court would do is to make a declarator that the deceased Inkosi was wrongfully removed. The court would not make an order as to who must be recognised as Inkosi. The matter would simply be referred back to umndeni wenkosi to identify and appoint the correct person whose name would be forwarded to the Premier for recognition in terms of section 19 of the Act.

[69] Beyond this, however, the review application was brought by the deceased in terms of the Promotion of Administrative Justice Act[58] (PAJA), in terms of which anyone may institute proceedings for the judicial review of an administrative action.[59] A review under PAJA determines, finally, whether an administrative action is lawful or not. It is an objective exercise, the outcome of which binds not only the litigating parties, but everyone else.[60] The review of administrative action attaches therefore not to the party bringing the review, but to the exercise of public power itself. It stands to reason then, that Ms Mkhize had standing both to bring and be substituted in the review application by virtue of her position as executrix of the estate and status as the legal guardian of her minor son, Phathokuhle. This is not only because she has a direct and substantial interest in the matter, but also because she was entitled to review the Premier's administrative action under section 6(1) of PAJA. The Supreme Court of Appeal did not have explicit regard to the nature of a PAJA review, but the outcome it reached is compatible with previous decisions of this Court. Additionally, the Constitution provides broad scope for legal standing in section 38 and this has

[58] 3 of 2000.

[59] Section 6(1) of PAJA provides:

> "Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action."

[60] *Ferreira v Levin N.O.; Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (4) BCLR 441 (CC) (*Ferreira*) at para 26

been applied to grant standing in a number of cases. As Chaskalson P held in *Ferreira*:

> "I can see no good reason for adopting a narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled."[61]

[70] Given that this Court has held that the review of public power is a constitutional matter,[62] it follows that a broad approach to standing must be taken in such reviews. That PAJA was enacted to give effect to the constitutional right to just administrative action in section 33 of the Constitution, and so reviews under PAJA are a way of enforcing the right in section 33, also implies that the broad standing requirements in section 38 should apply to the review of administrative action.

[71] For these reasons, the respondents' submission that there can be no review application for the reason that there is no one with standing to bring a review application cannot stand. The first and fourth respondents conceded as much in oral argument before us. The determination sought in the review application is also of importance to the second respondent. If, following the trial, the High Court finds that the deceased's recognition was correctly withdrawn and the second respondent correctly recognised and appointed, such a finding will only serve to legitimise the second respondent's ubuKhosi. It was conceded by the respondents during oral argument that the determination of the succession dispute at trial would be in everyone's best interests.

[72] The correct interpretation of the Supreme Court of Appeal judgment is that it allows the determination of the review application and the monetary claim; and that

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[61] Id at para 165.

[62] *Pharmaceutical Manufacturers Association of SA: In re ex parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 51.

the referral to trial by Van Zyl J of the succession dispute was reinstated, but that Ms Mkhize could not seek the relief that the deceased alone could seek. The review application is therefore remitted to the High Court for determination.

[73] The interests of justice and convenience to all involved, as well as the need to bring finality to this matter expediently, dictate against having the review application, monetary claim and succession claim run separately but concurrently. Ms Mkhize's consolidation application is therefore granted.

Should the interim relief be discharged?

[74] The respondents collectively made the argument that the effect of the interim relief has left the Community without an Inkosi since 2010. They submitted that should the matter be remitted to the High Court, the interim relief should be set aside in order to let the second respondent govern until the rightful Inkosi is determined. In oral argument, however, they conceded the implausibility of their argument that a neutral IbambabuKhosi could not be appointed. In any event, the Supreme Court of Appeal judgment ordered that the interim relief remain in place pending the outcome of the review application. This is a sensible state of affairs and I see no reason why it should be altered.

Order

[75] The following order is made:

1. The condonation applications of both the applicant and the respondents are granted.
2. Leave to appeal is granted.
3. The appeal is upheld and the order of the High Court of South Africa, KwaZulu-Natal Division, Pietermaritzburg is replaced with the following order:

"(a) The application by Mr Mkhanyiseni Mbuyazi initiated in November 2015 for the order of Van Zyl J, to be rescinded and for ancillary relief is dismissed; and

(b) The counter-application for consolidation of the application under case number 4862/2015 by Ms Sithembile Valencia Mkhize N.O., and for relief in prayer 2 of her notice of application for consolidation, is granted."

4. The consolidation application of the applicant is granted.

5. The respondents are ordered to pay the costs of the application in this Court, jointly and severally, including the costs of two counsel.

For the Applicants:	G Goddard SC and M Z F Suleman instructed by Schreiber Smith Inc. Attorneys
For the First and Fourth Respondents:	A J Dickson SC instructed by PKX Attorneys
For the Second Respondent:	I Topping SC and S Mlondo instructed by Pretorius, Mdletshe & Partners Inc