REPUBLIC OF SOUTH AFRICA

# *THE SUPREME COURT OF APPEAL OF SOUTH AFRICA*

Case number 11/05

Reportable

In the matter between:

**TLP NWAMITWA SHILUBANA**
**FIRST APPELLANT**
**WM MBHALATI**
**SECOND APPELLANT**
**DISTRICT CONTROL OFFICER** **THIRD APPELLANT**
**THE PREMIER OF LIMPOPO PROVINCE** **FOURTH APPELLANT**
**MEC FOR LOCAL GOVERNMENT & HOUSING** **FIFTH APPELLANT**
**HOUSE OF TRADITIONAL LEADERS** **SIXTH APPELLANT**
**CS NWAMITWA** **SEVENTH APPELLANT**
**MTN NWAMITWA** **EIGHTH APPELLANT**
**B SHIPALANA** **NINTH APPELLANT**
**E RISABA** **TENTH APPELLANT**
**S NGOBENI** **ELEVENTH APPELLANT**

and

**SIDWELL NWAMITWA** **RESPONDENT**

CORAM: FARLAM, MTHIYANE, NUGENT, MLAMBO et MAYA JJA

HEARD: 29 AUGUST 2006

DELIVERED: 1 DECEMBER 2006

SUMMARY: Customary law – whether election of first appellant as Hosi constituted an *ad hoc* decision to re-establish family line *ex post facto* not in accordance with customs and traditions of tribe.

**Neutral citation: This judgment may be referred to as *Nwamitwa Shilubana v Nwamitwa* [2006] SCA 174 (RSA).**

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# *JUDGMENT*

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**FARLAM JA**

**INTRODUCTION**

[1] This is an appeal from a judgment of Swart J, sitting in the Pretoria High Court, in terms of which the respondent was declared to be the heir to the Valoyi tribe and entitled to succeed his father, the late Hosi (Chief) Mahlathini Richard Mwamitwa, as Hosi of the tribe and the first appellant was declared not to be entitled so to succeed.

[2] It was also declared that the term of office as Acting Hosi of the second appellant (who had been appointed Acting Hosi of the tribe after the death of the respondent's father Hosi Richard) expired on 7 January 2002. He was ordered to cease acting as such and to hand over the reins, books, documents and other material relating to his appointment or to the acting chieftainship of the tribe to the respondent.

[3] The third appellant, (the District Control Officer for the Limpopo Province), cited in his capacity as the liaison officer between the traditional authorities and the Limpopo Provincial Government in the Provincial Department of Local Government and Housing, the fourth appellant (the Premier of the Limpopo Province), the fifth appellant (the Member of the Executive Council for Local Government and Housing of the Limpopo Province), cited in his capacity as the member of the Executive Council responsible for traditional affairs in the province, and the sixth appellant (the House for Traditional Leaders for the Limpopo Province), cited as the

Commission responsible for traditional affairs in the province, were ordered to withdraw all letters of appointment of the first appellant as Hosi of the tribe and to issue the letters of appointment as Hosi of the tribe to the respondent. The judgment of the court *a quo* is reported: see *Nwamitwa v Phillia and Others* 2005 (3) SA 536(T).

**FACTS**

[4] The two contenders for the chieftainship of the tribe, the first appellant and the respondent, are cousins. The first appellant's father, Hosi Fofoza Nwamitwa, and the respondent's father, Hosi Richard Nwamitwa were brothers. (In what follows I shall refer to them as 'Hosi Fofoza' and 'Hosi Richard' respectively.) Before the evidence and contentions in the court below are summarized it will be helpful for the understanding of what follows if I refer briefly to what may be called the genealogical background to the case.

[5] It was common cause in the court *a quo* that for five generations the chieftainship of the tribe descended patrilineally and according to the system of male primogeniture. The first Hosi mentioned in the evidence was Hosi Nwamitwa, who had four wives. With his first wife he had four children, two daughters and two sons. It is not known what became of the sons. He was succeeded in 1919 by Hosi Mahwahwa Nwamitwa, his eldest son born from his second wife. Hosi Mahwahwa had four wives. Six children were born from his first wife, four daughters, the first, third, fourth and sixth children and two sons, the second and fifth. He was in due course succeeded by his elder son Mahlabezulu Nwamitwa, the grandfather of the respondent and the first appellant, as Hosi in 1922. Hosi Mahlabezulu Nwamitwa also had four wives. With his first wife he had four children, two daughters, Rose (the first born) and Grace (the third born), and two sons, Fofoza (the second born) and Richard (the fourth born). On the death of Hosi Mahlabezulu in 1930, his brother, Rufus Nwamitwa, took over as regent until 1948 when Fofoza came of age and took over the chieftainship. With his first wife he had a daughter, the first appellant. He had four daughters with his second wife and no children with his third. Shortly before his death, when he was ill, his brother, Hosi Richard, was appointed acting chairman of the Valoyi Tribal Authority. After

Hosi Fofoza died on 24 February 1968, Hosi Richard was appointed Acting Hosi. Subsequently he was appointed Hosi on 24 October 1968. He remained Hosi until his death in October 2001, after which the second appellant was appointed Acting Hosi. The respondent is Hosi Richard's first born son from his first wife.

[6] After the Interim Constitution came into force in April 1994 certain meetings and discussions (to which reference will be made later in this judgment) took place in which Hosi Richard was involved, relating to the first appellant's claim to entitlement to be the Hosi of the tribe. On several occasions Hosi Richard indicated that the first appellant was entitled to the chieftainship and that he was willing to stand down and transfer his powers as Hosi to her. She indicated, however, that she wanted him to continue until she was ready to take up the chieftainship: the reason for this request was apparently the fact that she was not yet ready to take over as Hosi because she had recently taken up a position as a member of the National Assembly.

[7] After the death of Hosi Richard the tribe's Royal Family, Royal Council and Tribal Council supported the first appellant's claim to be appointed Hosi. The respondent on the other hand claimed the right to succeed his father as Hosi. According to a letter dated 3 July 2002, (one of those which the third, fourth, fifth and sixth appellants were ordered by the court *a quo* to withdraw) written by the Senior Manager, Traditional Affairs of the Provincial Department of Local Government and Housing, the Provincial Executive Council took a decision approving the first appellant's appointment as Hosi of the tribe with effect from 22 May 2002. On 16 September 2002 the respondent brought an application against the appellants for the relief which was ultimately granted to him by the court *a quo.* Subsequently the Provincial Department of Local Government and Housing arranged for the first appellant to be inaugurated as Hosi at a ceremony to be held at the Valoyi Traditional Offices on 29 November 2002, but the respondent obtained an order interdicting the inauguration.

**RESPONDENT'S FOUNDING AFFIDAVIT**

[8] In his founding affidavit the respondent averred that by Tsonga-Shangaan custom (the Valoyi tribe belongs to the Tsonga-Shangaan group) a female successor cannot become a Hosi. As a result, so he said, his father, Hosi Richard, had succeeded his uncle, Hosi Fofoza, on the latter's death in 1968. At this stage, he pointed out, the first appellant, who as I have said was the only child born of Hosi Fofoza's first wife, was already 28 years old. She participated in the nomination and appointment of Hosi Richard as Hosi and did not claim at that stage that she was entitled to succeed her father. He contended further: 'as soon as my father became Hosi, it meant that his eldest son, was going to succeed him as Hosi'. He also made the point that 'if the first [appellant] did not qualify for the position of Hosi in 1968 she cannot qualify now.'

After dealing with the discussions which took place during his father's lifetime he stated that his father had written a letter on 25 February 1999 which reads as follows in the translation placed before the Court:

'Transfer of chieftainship from chief Richard [Nwamitwa] to Tinyiko Lwandlamuni Shilubane [the first appellant]. I withdraw.
I chief Richard [Nwamitwa] (announce that) all the issues we have been discussing.
Concerning chieftainship failed, I withdraw, I am no longer interested.
My letters of chieftainship do not say I am a regent as they alleged, I disagree.
Yours

Richard [Nwamitwa].'

[9] While this letter is not as clear as it might be, it is, I believe, a fair inference that what he was saying was that he withdrew his previous consent to stand down as Hosi and to allow his niece, the first appellant, to take his place. He also rejected any suggestion that he was merely a regent and not a Hosi.

[10] In his affidavit the respondent referred to a meeting held at the Nwamitwa Headkraal to inform the families of Hosi Fofoza and Hosi Richard that the first appellant was the Hosi. After the letter from the Provincial Government dated 3 July 2002, to which I have already referred, was read out, the respondent stood up and said:

'I am the Chief of the Valoyi Tribe, I am the successor to my late father, I don't know anyone who will succeed my father except me.'

**FIRST APPELLANT'S ANSWERING AFFIDAVIT**

[11] In her answering affidavit the first appellant, after taking some technical

points which are no longer relevant, set out what she described as the 'Principles Governing the Appointment of a Chief in a Tsonga-Shangaan Nation' as follows:

'6.1 With the Tsonga-Shangaan Nation a hosi is not democratically elected but is born as a hosi.

6.2 The institutions which are responsible for the appointment of a hosi are:-

6.2.1 the Royal Family which is composed of all the members of the royal family irrespective of gender. The members are introduced into the institution of the Royal Family gradually as they develop to maturity in age. It is the Royal Family which, in a meeting called for that purpose, chooses the hosi or the acting hosi. It then sends the name of the chosen person to the Royal Council.

6.2.2 the Royal Council which is composed of both members of the Royal House and the senior indunas of the Nation and some chosen persons in accordance with their skills needed to advise the hosi or the acting hosi. The Royal Council receives the name of the chosen person from the Royal Family and deliberates on it in a meeting called for that purpose. If it is not satisfied with the character of the person chosen it sends the name back to the Royal Family for reconsideration. The Royal Family reconsiders the name and may send the same name back to the Royal Council or, if there are substantial reasons, choose another person to be the Chief. The primary responsibility of choosing the suitable person is the Royal Family('s) and at no stage in the history of the Tsonga-Shangaan nation has the decision of the Royal Family [been] overruled. Indeed, the Royal Council can only refer back the name and cannot overrule the decision of the Royal Family.

6.2.3 the Tribal Council or Authority which is composed of the representatives of the Nation in various stages. This institution is only informed by the Royal Council of the decision of the Royal Family. It has no power to overrule the decision nor to refer the name back for reconsideration.

6.3 A hosi is born of a candle wife, i.e a wife married by the nation for the purpose of bearing a hosi. She forms a Senior House. A candle wife can only bear one hosi.

6.4 A hosi is the first-born son or daughter of the Senior House.

6.5 If no-one can be chosen as a hosi from the Senior House due to various reasons ranging from incapacity, absence of children, etc, an acting hosi is chosen from other houses in accordance with the seniority of the houses.

6.6 The acting hosi . . . has, in most cases, a responsibility of bearing a hosi from a candle wife married by the nation.

6.7 It must be emphasised that the reason why the acting hosi has to bear the hosi from a candle wife is that the chieftainship belongs to the Senior House and the candle wife is married to the Senior House. She raises the seed of the last hosi to die without an heir.

6.8 It is thus after a person has been [borne] by a candle wife and has been chosen by the Royal Family, recommended to the Royal Council and made known to the Tribal Authority that the person's name is forwarded to the Third Respondent who must forward it to the Fourth and Fifth Respondent[s] for appointment as a chief in terms of section 2(7) of the Administration Act No. 38 of 1927.

6.9 The chosen name is sent to the Executive Council for deliberation and for a decision to appoint the person named: the premier is member of the Executive Council.

6.10 The Executive Council respects the customs of the Tsonga-Shangaan Nation and if it finds that the customs have been complied with, makes a decision to appoint the person recommended.

6.11 The Premier of the Province i.e, the Fourth Respondent makes the appointment accordingly.

6.12 The above process obtains also with the Valoyi Royal Family.

6.13 It is my case that the Applicant does not qualify to be a hosi for the following reasons:-

6.12.1 he is not born of the candle wife;

6.12.2 he is not born from a Senior House;

6.12.3 he has not been chosen by the Valoyi Royal Family.'

[12] She denied specifically that by Tsonga-Shangaan custom a woman could not become a Hosi. She said that females had been Hosis 'especially in Mozambique where the nation originates'. She also stated that 'with the Valoyi Royal Family there never existed a situation wherein there was no male to ascend the throne but that is a far cry from the allegation that it is a Tsonga-Shangaan custom not to have a female hosi.'

She continued:

16.6 Be that as it may, it will be argued at the hearing that to deny females a right to be hosis is unfairly discriminatory and is in contravention of section 9 of the Constitution of the Republic of South Africa Act No 108 of 1996.

16.7 Further, it will be argued that any custom which is in conflict with the provision(s) of the Constitution is null and void and should not be followed.'

[13] Later in her affidavit she stated that, in accordance with Tsonga-Shangaan custom, 'as a hosi, I am entitled to marry a candle wife.' She said that the royal family would decide 'who the seed raiser of my father Fofoza will be.'

'In other words', she continued, 'it will not be my natural child who will succeed me but a sociological child who will be born of the candle wife and a chosen member of the Valoyi Royal Family. A candle wife has already been married for me during June 2002 and the seed raiser has already been chosen by the Valoyi Royal Family and is not the Applicant [the present respondent].'

[14] She denied that Hosi Richard was lawfully appointed to be a hosi. 'It was an administrative mischief', she said, 'on the part of the erstwhile apartheid government which in some cases disregarded the customs of the Black nations. In terms of the Tsonga-Shangaan custom the [respondent's] father was supposed to be appointed as an acting hosi; was regarded as an acting hosi by Valoyi Royal Family and he, himself, knew that he was an acting hosi. *It was due to that knowledge* by the [respondent's] father and the Valoyi Royal Family that on 22 December 1996 the Valoyi Royal Family held a meeting in which it was resolved, *inter alia,* that I, as the first born of Hosi Fofoza Nwamitwa, should ascend the throne'. (The emphasis is mine.)

[15] Further on in her affidavit she said that 'the custodians of chieftainship in the Valoyi Royal Family nation *chose* me to be their hosi.' (My emphasis.) She further stated that 'the matter of choosing the hosi rested (with) and belonged to the custodians of chieftainship on the Valoyi Royal Family'. Referring to Hosi Richard's 'withdrawal' contained in his letter of 25 February 1999 she denied that his withdrawal had any effect on the resolutions taken by the Royal Family. In this regard she said that he was not 'the custodian of chieftainship' and that 'only the Valoyi Royal Family could withdraw.'

[16] She made it clear that her case was that she had been appointed following the resolution of the Valoyi Royal Family of 22 December 1996 but that as she was, as she put it, 'still new in the National Parliament' she had requested Hosi Richard 'to continue acting as a hosi' until she was 'ready to take over as a hosi.'.

**REFERENCE FOR ORAL EVIDENCE AND INTERVENTION BY *AMICUS CURIAE***

[17] On 8 April 2003 Motata J postponed the matter *sine die* and referred it for oral evidence, without, however, formulating the issues so referred. This was rectified on 4 March 2004 when Webster J made an order in the following terms:

'That oral evidence be heard to determine the following questions:-

1.1 whether in terms of the customs and traditions of the Tsonga-Shangaan tribe, more particularly the Valoyi tribe, a female can be appointed as Hosi of the Valoyi tribe?

1.2 Whether the applicant's father, the late Mahlathini Richard Nwamitwa, was appointed as Hosi or acting Hosi since October 1968?

1.3 Whether when appointing first respondent as a Hosi of the Valoyi tribe the royal family acted in terms of the customs and traditions of the Valoyi tribe i.e. of the Tsonga-Shangaan nation?

1.4 Whether the decision no 32/2002 by the Executive Council of Limpopo Provincial Government dated 22 May 2002 appointing first respondent as chief of the Valoyi tribe, is in accordance with the practices and customs of the Valoyi Tribe within the meaning of the Constitution of the Republic of South Africa Act 108 of 1996?'

[18] On 29 June 2004 Swart J made an order admitting the Commission for Gender Equality to intervene in the proceedings as *amicus curiae* with the right to present written submission and oral argument.

**JUDGMENT OF COURT *A QUO***

[19] The court *a quo* gave answers on all four issues referred for trial in favour of the respondent. In answering the first question Swart J confined his answer to the position before the Interim Constitution came into force in 1994, because the question whether that position was changed after 1994 could, he held (at 539J-540A), more conveniently be considered under the fourth issue referred to oral evidence.

[20] The first issue, so qualified, was answered in the negative. This answer was inevitable in view of the first appellant's concession in evidence that before 1994 a female successor could not become a chief. 'This entails', the learned judge said (at 539I-J), 'that the essence of her case is not that in terms of the customs and traditions of the Tsonga-Shangaan and Valoyi tribes a female can be appointed as Hosi, but that the position has changed with the advent of the Constitution.'

The judge continued (at 540A-B): 'As far as custom and tradition are concerned, I think the concession is fair and in accordance with the evidence. Mr *Semenya* [who appeared for the appellants] did not really argue the contrary as far as the successor to the chieftainship is concerned.' He added (at 540E-F):

'. . . as far as the Valoyis are concerned there was no evidence of a female appointed as a Hosi, even if first born.'

[21] The answer given in respect of the second issue, was that Hosi Richard was appointed as Hosi and not merely as acting Hosi. Again the answer was inevitable as the first appellant eventually, after the contrary position had been strongly contended for right up to the pre-trial conference, conceded that her uncle was appointed Hosi after her father's death.

[22] In respect of the third issue, the court *a quo* found that in appointing the first appellant as Hosi the Royal Family did not act in terms of the customs and traditions of the Valoyi tribe, ie, of the Tsonga-Shangaan nation.

[23] The factual findings made by the court *a quo* on this issue have been accepted as correct by counsel for the appellants. They are set out in the judgment at 541H to 544E.

[24] In particular reference was made to meetings which took place over the period from 22 December 1996 to 25 November 2001 and to the letter dated

25 February 1999 signed by Hosi Richard, which has been quoted in para [8] above.

[25] The first meeting to which reference was made took place on 22 December 1996. It was a meeting of the Royal Family attended by 15 people, including Hosi Richard, the first appellant and the respondent. Matthews Nwamitwa, who was a member of the committee which co-ordinated the activities of the Royal Council under the leadership of the second appellant, stated that the first appellant was, as it was put, 'the owner of the chieftainship of the Valoyis'. This was 'because she [was] the firstborn of Chief Fofoza Nwamitwa with his first wife Queen Favazi'. The Council unanimously accepted this. The reason for this decision was explained as follows:

'though in the past it was not permissible by the Valoyis that a female child be heir, in terms of democracy and the new Republic of South African Constitution it is now permissible that a female child be heir since she is also equal to a male child.'

It was also said that 'the matter of Chieftainship and regency would be conducted according to the Constitution'.

[26] As I have already said the first appellant indicated that she wanted Hosi Richard to continue as Hosi until she was ready to take up the chieftainship.

[27] The second meeting referred to by the judge took place on 17 July 1997 when Hosi Richard in the presence of the local chief magistrate and 26 other people acknowledged that the first appellant was the heiress to the Valoyi chieftainship and said: 'she must be given the position.' On the same day the Valoyi tribal authority sent a letter to the commission for tribal leaders stating that the Royal Family had reached consensus that the chieftainship should go to 'its rightful owner' the first appellant. This letter was signed by Hosi Richard and the second appellant.

[28] At the third meeting, on 5 August 1997, the Royal Council accepted and confirmed that Hosi Richard agreed to transfer power to the first appellant and resolved that he should continue with the chieftainship and his duties until

the first appellant took over. On the same date in the presence of Hosi Richard and 20 members of the tribe 'in accordance', as it was put, 'with the usage and customs of the tribe', it was resolved by the Tribal Authority that the first appellant be appointed Hosi. Among those who signed the resolution were Hosi Richard, the respondent and the first and second appellants.

[29] Some eighteen months later, on 25 February 1999, Hosi Richard wrote the letter quoted in para [8] above.

[30] The fourth meeting took place on 4 November 2001, that is to say after Hosi Richard's death. It was a meeting of the royal family of Mahwahwa, Mahlabezulu, Rufus and Jackson Nwamitwa. The judge recorded that it was not clear whether this was the Royal Family referred to earlier. The meeting which was attended by 29 people, confirmed that the first appellant would take the chieftanship.

[31] The fifth meeting referred to by the judge took place on 25 November 2001. It was a meeting of the Royal Family, the Tribal Council, local government, civic structure and stakeholders of various organizations, attended by 89 people. At the meeting the following resolution was passed:

'. . . the meeting aligns itself with the resolution of the Royal Family and the Royal Council [that the first appellant is the Hosi] . . .'

[32] The judge said that the stated aim of the decision taken by the Royal Family at its meeting on 22 December 1996 and of the resolutions adopted at the other meetings thereafter before Hosi Richard's death was to restore the chieftainship to the Fofoza line, which had failed in terms of the then prevailing customs and traditions of the tribe in 1968 for lack of legitimate male issue. He held, however, (at 544 H-I) that 'custom and tradition made no provision for such action, particularly by appointing a female. Hosi Richard was not an acting Hosi and I have heard no evidence or [seen] in any of the documentation precedent in custom and tradition for the transfer of the chieftainship to someone who does not qualify for it. It ran like a golden thread through the evidence including that of the first [appellant] that a Hosi is born not democratically elected.'

[33] He held that this question was totally disregarded. He pointed out that the respondent was not held to be disqualified. '[The first appellant] was simply elected by the Royal Family.' He suggested that this was probably due in part to a misapprehension at some stage that Hosi Richard was acting.

[34] He went on to hold that Hosi Richard's acquiescence in the appointment of the first appellant took the case no further because it had 'nothing to do with custom and tradition'. There was no precedent for the transfer of the throne and in any event he did not vacate the throne but remained Hosi until his death.

[35] He also rejected an argument that the Royal Family, 'whatever the custom and tradition had been', changed or adapted the custom by appointing the first appellant. He said the Royal Family's function was not to elect a Hosi but to recognise and confirm one, unless there was not a Hosi or the candidate was not suitable, in which case it might play a more direct role but that was not the case here. By electing the first appellant as Hosi the Royal Family had gone beyond its functions and powers. The position might have been different if the Constitution had applied in 1968 when Hosi Fofoza died but, he said, 'the clock cannot now be turned back.'

[36] He answered the fourth question, viz whether the Executive Council's decision to appoint the first appellant as Hosi was in accordance with the practices and customs of the Valoyi tribe within the meaning of the Constitution, in the negative.

[37] Counsel for the appellants had argued on this part of the case that the first appellant's right to succeed as Hosi was sought to be attacked purely on the ground of her gender and that as the Constitution upholds the right to equality and prohibits discrimination on the ground of gender it followed that the respondent had to fail as he had failed to show that the customary practice of male primogeniture could be regarded as a justifiable limitation of the right to equality entrenched in section 9 of the Constitution. The court *a*

*quo* rejected this submission holding (at 548E-H) that the first appellant's right to succeed to the chieftainship was not being attacked on the ground of her gender. He stated that he made no finding that in the Valoyi tribe there could never, when the Constitution is taken into account, be a female successor to the throne. He made it clear that he was not

'seeking to disqualify [the first appellant] on the basis of her gender or the custom of primogeniture [by which he clearly meant male primogeniture] but rather on the ground (see the third dispute) that there is no basis in custom for the Royal Family to re-establish the Fofoza line *ex post facto* by assuming a right to elect [the first appellant] as Hosi, whatever may have been the motivation at that stage.

That would in my opinion, not be a proper balancing of the various requirements of the Constitution. I do not think that the application of customary law in this sense is in any way in conflict with the Constitution.'

**APPELLANTS' SUBMISSIONS**

[38] Counsel for the appellants contended in the written heads filed in this court that the court *a quo* erred in law in finding that the application of the principle of male primogeniture in determining the chieftainship of the Valoyi tribe is consistent with the Constitution. It was also submitted that the appointment of the first appellant was in accordance with the customs of the tribe because the Royal Family, the Royal Council and the Tribal Council were able, as it was put, to align custom with the Constitution, by acting as they had done in the present case. In this regard they relied, *inter alia,* on what was said by the Constitutional Court in *Alexkor Ltd v The Richtersveld Community* 2004 (5) SA 460 (CC) at para [53], which was cited by Ngcobo J in his dissenting judgment in *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae)* 2005 (1) SA 580 (CC) at para [153], namely that indigenous law 'has evolved and developed to meet the changing needs of the community' and that 'it will continue to evolve within the context of its values and norms consistently with the Constitution.'

[39] Counsel for the appellants approached this part of the case somewhat differently when presenting oral argument in this court. It was submitted that after 1994 the customs and practices of the Valoyi tribe had been altered by what were called the instruments of authority in the tribe, viz the Hosi, the Royal Family, the Royal Council and the Tribal Council. What precipitated the change was the coming into operation of the Constitution, which was the

backdrop against which discussions took place in the Royal Family, the Royal Council and the Tribal Council which led to the decision to change the custom to do away with discrimination based on gender. The resulting new rule was formulated as follows by the appellants' counsel: nobody will be disqualified from succeeding to the chieftaincy on the ground of gender. When the question was asked 'who inherits under the new rule?' the answer given was: 'the eldest child (son or daughter) of the late chief.'

[40] Counsel contended further that there had been a second rule change, in order to appoint the first appellant. When asked to formulate the second new rule Mr *Semenya* first said that the second new rule was to the following effect: the person to ascend the throne would be the most suitable person whom the Royal Family proposes and who receives the endorsement of the Royal Council and thereafter the Tribal Council. Subsequently the second rule change contended for was re-formulated as follows: that the Fofoza lineage would be re-established.

[41] Mr *Semenya* also argued that the court *a quo* erred in substituting its own finding for that of the Executive Council of the Limpopo Province and appointing the respondent as Hosi. He contended further that the court *a quo* misdirected itself in not finding that the respondent failed to establish that his purported appointment was in accordance with the custom and practices of the tribe in that he did not prove that his appointment was supported by the Royal Family or the Royal Council.

## **SUBMISSIONS BY *AMICUS CURIAE***

[42] In the heads of argument filed on behalf of the *amicus curiae,* the Commission for Gender Equality, which were drafted by Ms K Pillay, it was submitted that an analysis of the judgment of the court *a quo* indicated that underlying its reasoning and determination of the matter was its finding that in terms of the applicable customary law a woman could not be appointed as a Hosi. In making this finding, so it was contended, the court failed to follow the correct approach to determining the applicability of a customary law rule which is self-evidently inconsistent with the Constitution. It was submitted further that in identifying the rule at issue the court erred in not recognizing that the rule had already been adapted by the community concerned so as to make it relevant to present times. Finally, it was argued, even if it is found that the rule has not been so adopted by the community concerned, the court erred in not developing the rule so as to promote the spirit, purport and objects of the Bill of Rights.

[43] Counsel who appeared before us on behalf of the *amicus curiae,* Ms De Vos, argued that the decisions by the Royal Family, affirmed by the Royal Council and the Tribal Council (which, she submitted, brought about a change

in the customary law of the Valoyi tribe) had, as she put it, two ‘legs’. The first amounted to a new rule to the effect that the rule regulating succession to the chieftainship should not be based on male primogeniture. The second involved a restoration of the Fofoza line with the concomitant restoration of the surviving child who would have been the chief but for the discriminatory principle which applied in 1968 when Hosi Fofoza died and Hosi Richard was appointed to succeed him.

**RESPONDENT’S SUBMISSION**

[44] Counsel for the respondent submitted that the court *a quo* was correct both in fact and in law in respect of all four issues referred to trial.

**DISCUSSION**

[45] I proceed now to consider whether the answers the court *a quo* gave to the four questions arising from the issues referred for trial were correct.

[46] On the first question it is clear that the court *a quo* correctly held that certainly up to 1994, when the Interim Constitution came into effect, a female could not in terms of the customs and traditions of the Tsonga-Shangaan tribes, more particularly the Valoyi tribe, be appointed as Hosi. (The statements to the effect that a female could be so appointed contained in the affidavit filed on behalf of the first appellant were clearly incorrect as she conceded in oral evidence at the trial.) Apart from the fact that this was eventually conceded by the first appellant, this finding is buttressed by the important evidence, which the court *a quo* accepted, that at Hosi Richard’s installation, Rufus Nwamitwa, the uncle of Hosi Fofoza and Hosi Richard, who had acted as regent after the death of his brother Hosi Mahlabezulu until Hosi Fofoza came of age, stood up before all the Nwamitwas and said that Hosi Richard was put on the throne because Hosi Fofoza did not have a male child. Despite the fact that potential objectors were repeatedly called for, and the first appellant was present, no-one came forward to object. Whether that is still the position under the customs and traditions of the tribe is a matter I shall consider later in this judgment.

[47] I think it is also clear that the court *a quo* correctly held that the

contention that Hosi Richard was merely a regent, acting as Hosi until his death, was incorrect. Again this point, despite vigorous denials at an earlier stage, was conceded by the first appellant. Apart from the evidence of what happened at Hosi Richard's installation, to which I have already referred, a copy of Hosi Richard's letter of appointment signed by the State President on 24 October 1968 was placed before the court. As the learned judge commented later in his judgment, there appears to have been a misapprehension at an earlier stage of the dispute, when the decisions of the Royal Family, the Royal Council and the Tribal Council were taken, that Hosi Richard was merely a regent. This may explain, in part at least, the Royal Family's decision to the effect that the first appellant would take the chieftainship. If there had not been a genuine but mistaken belief that Hosi Richard was only the regent, it is difficult to see why the contention to this effect (which was only abandoned at a relatively late stage) was advanced.

[48] In order to answer the third question, whether the Royal Family acted in terms of the customs and traditions of the Valoyi tribe, ie, of the Tsonga-Shangaan nation, it is necessary, as the court *a quo* did, to consider the legal effect of the resolutions passed by the Royal Family on 22 December 1996, the statement made by Hosi Richard at the meeting held on 17 July 1997, the letter sent by the tribal authority to the Commission for Tribal Leaders on the same day and the decisions of the Royal Council and the resolution of the Tribal Authority on 5 August 1997.

[49] I am prepared to assume (without deciding) for the purposes of this case that the effect of these resolutions, decisions and statements was to alter the customs and traditions of the tribe so as to abolish the discrimination between males and females in relation to succession to the chieftainship. This assumption renders it unnecessary for me to consider the interesting and difficult questions regarding the ascertainment of what has been described, as the 'living customary law' (which were touched on by the judge in the court *a quo)* and also the question, which was not considered by the Constitutional Court in *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae), supra,* at para [94], as to the constitutionality of the rule of

male primogeniture insofar as it relates to traditional leaders. I also express no opinion as to the correctness of the contention (which, as I see it, is relevant in regard to the issue left open by the Constitutional Court) that as a chief must always be fathered by a chief, a female who marries would bear children who would not be fathered by a Valoyi chief and not be members of the royal family and this would lead to confusion and uncertainty. Nor do I express an opinion on the first appellant's assertion in reply that this presents no problem because she had married a candle wife from her mother's line, who would in due course bear a child fathered by a close relative chosen by the royal family.

[50] In my opinion what Ms De Vos described as the second 'leg' of the resolutions, which she correctly conceded amounted to an *ad hoc* decision to give the chieftainship to the first appellant, cannot be regarded as having been in accordance with the customs and traditions of the tribe. As Swart J pointed out a Hosi is born not elected. It was not suggested that the custom of succession from a deceased Hosi to his children falls foul of s 9 of the constitution. The argument was only that succession that excludes females is unconstitutional. Therefore the Royal Family, according to the customs and traditions of the tribe, had no power to elect a person to the position of the new Hosi. In 1968 the Fofoza line failed because Hosi Fofoza did not leave a legitimate son to succeed him. A decision in 1996 to give the chieftainship to his eldest daughter because (on the assumptions I have made) the disqualification which operated in 1968 has now been done away with amounts to a decision to elect a Hosi other than the person entitled to succeed, which is in conflict with the customs and traditions of the Valoyi tribe, and ignores the rights of the respondent. The facts of this case therefore do not bring us to the gender equality claim which the first appellant seeks to vindicate.

[51] Even if it were possible to put the clock back and to undo the effect of a disqualification which operated because of the customs of the tribe at the relevant time (which I do not think can be done), the decision relied on cannot be regarded simply as a logical or necessary consequence of the first 'leg' of

the resolutions. It will be remembered that on several occasions in the history of the tribe the application of the rule of male primogeniture had disqualified females from succession to the chieftainship. When Hosi Mahlabezulu, the father of Hosi Fofoza and Hosi Richard, died his eldest living child, Rose, the aunt of the first appellant and the respondent, was disqualified by the rule of male primogeniture from succeeding her father. This further reinforces the view that the second 'leg' of the resolutions was an *ad hoc* decision which cannot be regarded as in accordance with the customs and traditions of the tribe. It follows, in my view, that the court *a quo* gave the correct answer to the third question. The fourth question was, in my opinion, correctly answered by the court *a quo* for the reasons given by it.

[52] It remains to consider the contention advanced by counsel for the appellants that, even if the four questions referred for trial had to be answered in favour of the respondent and the respondent was entitled to the declarations he sought as well as an order setting aside the first appellant's letters of appointment, the court *a quo* should not have ordered the third, fourth, fifth and sixth appellants to issue letters of appointment as Hosi of the tribe to the respondent.

[53] The matter is governed by s 8(a)(c)(ii) of the Promotion of Administrative Justice Act 3 of 2000, which reads as follows:

'(1) The court or tribunal, in proceedings for judicial review in terms of sections 6 (1), may grant any order that is just and equitable, including orders-

. . . .

(c) setting aside the administrative action and-

(i) remitting the matter for reconsideration by the administrator, with or without directions; or

(ii) in exceptional cases-

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action, or

(bb) directing the administrator or any other party to the proceedings to pay compensation.'

[54] I do not think that this case can be regarded as 'exceptional' within the meaning of the section. Although it has not been suggested that the respondent is not a fit person to be appointed Hosi (with the consequence, that the Royal Family would not be entitled to refuse to recognize and confirm him as Hosi) it appears on the evidence that the Royal Family has at least a

formal ceremonial role to play in the appointment process. It would, in my view, not be appropriate for the court to order the appointment of the respondent without the formal, ceremonial part of the process having taken place. To that extent the order given in the court *a quo* must be varied.

[55] I do not think that the success enjoyed by the appellants in this minor degree is sufficient to justify any costs order in their favour.

**ORDER**

[56] The following order is made.

Save that the reference to prayer 4 is deleted from paragraph 3 of the order made by the court *a quo,* the appeal is dismissed with costs.

……..

IG FARLAM

JUDGE OF APPEAL

CONCURRING

MTHIYANE JA
NUGENT JA
MLAMBO JA
MAYA JA