THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 160/09

In the matter between:

N N MADZHADZHI
FIRST APPELLANT
N M MUDALAHOTHE
SECOND APPELLANT

R R SUMBANA
THIRD APPELLANT

R A RAMUGONDO
FOURTH APPELLANT

v

PRESIDENT OF THE RSA
FIRST RESPONDENT
PREMIER OF THE LIMPOPO PROVINCE **SECOND RESPONDENT**
MEMBER OF THE EXECUTIVE COUNCIL OF LIMPOPO CHARGED WITH LOCAL GOVERNMENT AND HOUSING **THIRD RESPONDENT**
MINISTER OF PROVINCIAL AND LOCAL GOVERNMENT **FOURTH RESPONDENT**
INDEPENDENT COMMISSION FOR THE REMUNERATION OF PUBLIC OFFICE BEARERS **FIFTH RESPONDENT**
MINISTER OF FINANCE
SIXTH RESPONDENT

Neutral citation: *Madzhadzhi v President of the RSA* (160/2009) [2010] ZASCA 57 (1 April 2010).

Coram: Mpati P, Cloete, Cachalia, Malan et Tshiqi JJA

Heard: **11 March 2010**

Delivered: 1 April 2010

Summary: Section 5 (2) of the Remuneration of Public Office Bearers Act 20 of 1998 prohibits traditional leaders from being paid two incomes for holding two 'public offices' simultaneously, but it does not prohibit them from being paid a salary as a traditional leader if they are also employed in the public service – Section 219 (1) of the Constitution recognises that national and provincial governments have concurrent legislative and executive competence over traditional leaders, but their salaries must be determined by national framework legislation. Where such salaries are determined by a provincial statute, the provincial determination is valid in the absence of a constitutional challenge to the statute. – Application for declaratory relief. Declaratory order not affecting the consequences of an invalid decision, which remains valid until set aside – Declarator refused.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Phatudi AJ sitting as court of first instance).

The following order is made:

(1) The appeal is dismissed.

(2) The cross-appeal is upheld to the extent that the order of the high court is amended as follows:

'The application is dismissed, each party to pay its own costs.'

JUDGMENT

CACHALIA JA (Mpati P, Cloete, Malan and Tshiqi JJA concurring):

[1] This is an appeal against a judgment of the Northern Gauteng High Court (Phatudi AJ) refusing declaratory relief to the appellants. It concerns a dispute over the remuneration of headmen and headwomen, who are traditional leaders, in Limpopo Province. It is convenient to refer to them as headmen. There are several hundred headmen who have an interest in the outcome of these proceedings. The four appellants were selected to bring test cases. The second and third respondents oppose the relief sought. It would be convenient to refer to them together as the respondents or the provincial government. The first, fifth and sixth respondents elected to abide the decision of the court. No relief is sought against the fourth respondent.

[2] The four appellants fall into three categories – the first and fourth appellants are in the first. The first appellant is, in addition to being a headman who is paid from the public purse, employed by the province as a public servant under the Public Service Act 1994 (the PSA).[1]The second, who is a headman, was, but no longer is, a public servant. Their dispute with the provincial government arose after their salaries as headmen were terminated on the ground that s 5(2) of the Remuneration of Public Office Bearers Act 20 of 1998 (REPOB)[2]precluded their being paid salaries. In the high court they

[1] Proclamation 103 published in GG 15791, 3 June 1994.
[2] Quoted in para 18.

sought a declaratory order to the effect that the section did not debar them from receiving salaries as traditional leaders even though they were also being employed and paid as public servants.

[3] The second and fourth appellants fall into the second category. (The fourth appellant falls into both the first and second categories). The second appellant was recognised as a headman after 1 October 2002. His complaint is that the provincial government determined his earnings at R13 000 per annum, which is lower than the R30 000 per annum paid to headmen appointed before this date. The relief he seeks is to secure the higher salary of R30 000. I mention at this stage that the fourth appellant retired from the public service on 31 March 2005. His salary as a headman was then reinstated, but at the newly determined rate of R13 000. His grievance is that his salary ought to have been reinstated at R30 000, which is what he was earning before 1 October 2002. I deal with his case in paras 30 and 31.

[4] The third appellant became a headman before 1 October 2002. He earned R30 000 annually and falls into the third category. His complaint is that he is entitled to salary increments, which the President has determined periodically for kings and chiefs (whose status is higher than that of headmen) – a grievance shared by the other appellants who earn R13 000.

<u>The present dispute</u>

[5] In 2001 the provincial government undertook an investigation into the appointment and remuneration of headmen in the province. It emerged that some were being employed as public servants under the PSA. They were thus receiving two incomes – as headmen and as public servants. So, on 29 July 2002, the Senior Manager for Traditional Affairs took steps to stop this. He addressed a letter to the first appellant in these terms:

'1. In terms of our records, you are earning a salary as a Traditional Leader and also as a government employee.

2. According to the Public Office Bearers Act 20 of 1998[3], section 5(2) a "traditional leader, member of a Provincial House of Traditional Leaders or a member of the National House of Traditional Leaders who holds different public offices simultaneously, is only entitled to the salary, allowance and benefits of the public office for which he or she earns the highest income." This implies that Traditional Leaders who are employed in the Public Service must only get a salary which is the [higher] of the two to avoid dual remuneration.

3. . . . [You] are requested to indicate to this office on or before 30 August 2002 which salary should be stopped failing which [your] salary as a Traditional Leader will be terminated with effect from 30 September 2002 . . . '

[6] Similar letters were addressed to other headmen who fell into this category. Neither the first appellant nor any of the other headmen to whom the letters were sent responded. So on 30 September 2002 the provincial government terminated the salaries they were earning as headmen as it had threatened to do.

[7] The investigation also revealed that most of the functions and

[3] This is obviously a reference to REPOB, quoted below in para 18.

responsibilities of headmen have been reduced – and are being performed by government authorities and local councillors. And so, after consulting with traditional leaders, the provincial government decided to reduce the salaries of headmen from R30 000 per annum to R13 000 per annum with effect from 1 October 2002. However, headmen appointed before this date would continue to receive R30 000. The appellants claim to be unaware of this decision, but nothing turns on this. There were no further developments for more than three years after these decisions were implemented.

[8] On 14 December 2005 attorneys representing all these headmen wrote to the Premier. They complained that the termination of their clients' salaries was unlawful and should be reinstated with retrospective effect – from 1 October 2002. They also demanded the termination of 'the discriminatory system' of remunerating headmen and the initiation of 'a process in terms of which the salaries and allowances of all traditional leaders will be determined by the President in terms of s 5 of [REPOB]'.

[9] On 25 January 2006 the provincial government, by letter, requested the appellants' attorneys to provide details of all the headmen they represented, their current status and copies of the letters received by their clients purporting to terminate their remuneration as headmen. The attorneys provided the information on 14 March 2006, but not the letters. The province then undertook a verification exercise of the names that the attorneys had provided – there were several hundred. By 7 August 2006 the matter had not

progressed any further. So, the attorneys gave the province 14 days to respond. They failed to do so and on 1 December 2006 the appellants launched the present proceedings in the high court.

The proceedings in the high court

[10] In the high court the appellants sought declaratory relief in terms of s 19(1)(a)(iii) of the Supreme Court Act 59 of 1959 in these terms:[4]

'(a) that the First and Fourth Applicants (and all other headmen and headwomen who find themselves in a similar position to the First and Fourth Applicants) are and were at all relevant times –

(i) not debarred by the provisions of section 5(2) of the Remuneration of Public Office Bearers Act, 1998 (Act 20 of 1998), from receiving remuneration as headmen and headwomen;

(ii) entitled to [their remuneration, together with] increments at such times as increments were granted to Kings and Chiefs, as headmen and headwomen;

[notwithstanding their employment as officers or employees in the public service;]

(b) that the Second, Third and Fourth Applicants (and all other headmen and headwomen who find themselves in a similar position to the Second Applicant) are and were at all relevant times entitled to receive in their capacities as headmen or headwomen remuneration, together with increments at such times as increments were granted to Kings and Chiefs, similar to the remuneration that was paid to headmen and headwomen appointed before 2002.

. . .'

[4] The reason for the square brackets appears from para 28 below.

[11] The relief is claimed in two parts: the first and fourth appellants seek an order that s 5(2) of REPOB[5] did not permit the provincial government to terminate their salaries as headmen even though they were also receiving salaries as public servants. Secondly, the second, third and fourth appellants claim an entitlement to be paid a salary of R30 000, which is what headmen who were appointed before 1 October 2002 are being paid (not the R13 000 that some currently receive) together with increments.

[12] The learned judge agreed with the interpretation contended for by the appellants that the reference to 'public office' in s 5(2) of REPOB referred only to elected officials in any of the three spheres of government or to traditional leaders; it did not include public servants. However, he then characterised the dispute as a review under the Promotion of Administrative Justice Act 3 of 2000 (PAJA). And, having done so, he found that because the first appellant had not instituted review proceedings within 180 days after becoming aware of the decision to terminate their salaries as headmen, as required by s 7 of PAJA, she was not entitled to the relief claimed. It appears that the judge inadvertently omitted to deal with the fourth appellant's claim on this aspect.

[13] It seems that the judge also rejected the first and fourth appellants' applications on the merits by finding that they 'would not have been . . . entitled to claim any additional remuneration in respect of their official duty or work (as traditional leaders) without permission

[5] Quoted in para 18.

granted by the relevant executing authority'. There is no indication in the judgment that the judge considered the second part of the relief claimed by the second, third and fourth appellants. In the event, he dismissed the application but ordered the respondents to pay the costs. The respondents cross-appeal the costs order.

Legislative background.

[14] One of the central issues in the dispute, which has a bearing on both parts of the relief claimed, is whether the authority over the remuneration of traditional leaders in the province (and particularly headmen) was vested in the President by virtue of s 5(1) of REPOB,[6] or in the provincial government. It is therefore necessary to examine the legislative history of the remuneration of traditional leaders in the province.

[15] Before South Africa's democratic transition in 1994 the responsibility for regulating the affairs of traditional leaders lay with various 'self-governing territories'. In the Venda territory, which is now part of the Limpopo Province, chiefs and headmen were appointed under legislation administered by the former Venda Government. Their remuneration was determined under s 19 of the Venda Traditional Leaders Proclamation 29 of 1991 (the Venda Proclamation). According to Proclamation 109 of 19 June 1994, under the Constitution of the Republic of South Africa Act 200 of 1993 (the Interim Constitution), the determination of traditional leaders' salaries

[6] Quoted in para 18.

fell within the province's competence in terms of s 126 read with schedule 6.[7]The administration of the Venda Proclamation was assigned to the province, which was then known as the Northern Province. Following the assignment of the Venda Proclamation to the Northern Province, its Executive Council, the Council for National Unity, on 8 April 1994 and by resolution 10/94, determined a uniform salary to be paid to chiefs at R46 311 per annum and to headmen at R30 000 per annum.

[16] The following year the national government was also given the power to determine the remuneration of traditional leaders in terms of s 2 of the Remuneration of Traditional Leaders Act 29 of 1995 – though this law did not remove the provinces' power over remuneration.[8]Remuneration paid by the national government was to be additional to any salaries traditional leaders received from a province.[9]So, while the national government was given authority to determine salaries for traditional leaders, the province's authority to pay the salaries of chiefs and headmen under the Venda

[7] *Ex Parte Speaker of the Kwazulu-Natal Provincial Legislature: In re Kwazulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995; Ex Parte Speaker of The Kwazulu-Natal Provincial Legislature: In re Payment of Salaries, Allowances and Other Privileges to the Ingonyama Bill of 1995* 1996 (4) SA 653 (CC) para 8 and *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) para 433.

[8] Section 2: '**Remuneration and allowances of traditional leaders**
(1) Notwithstanding any other law, a traditional leader may be paid out of the National Revenue Fund such remuneration and allowances as the President may determine after consultation with the Council of Traditional Leaders established by section 184(1) of the Constitution and the Commission on Remuneration of Representatives contemplated in section 207 of the Constitution.
(2) For the purposes of subsection (1), the President may –
(a) on the grounds of the status and powers of traditional leaders differentiate between different categories of traditional leaders; and
(b) determine that the remuneration and allowances payable to traditional leaders in different categories may differ.'

[9] S Woolman et al *Constitutional Law of South Africa* 2 ed (2009) p 26-32.

Proclamation continued. A dual system of remuneration existed. The preamble to Act 29 of 1995 specifically acknowledged this duality by stating:

‘ . . . AND WHEREAS the subjects and followers of particular tribal hierarchies do not necessarily all reside in a single province and the constituencies of traditional hierarchies transcend provincial boundaries;
AND WHEREAS the need for members of traditional hierarchies to be supported, maintained and remunerated in respect of their tribal roles from national governmental level and from national funds as opposed to the provincially administered statutory functions they may fulfil and in respect of which they may be remunerated by provincial or local governments is recognised.’

[17] The final Constitution[10](the Constitution) came into force on 4 February 1997. Traditional leadership is included in Schedule 4 and is subject to Chapter 12. It is thus a function over which national and provincial governments have concurrent legislative and executive competence. However, in the *Certification* ,[11]the Constitutional Court stated that even though the provinces retained most of their powers and functions over traditional leaders in the Constitution, a significant diminution in their authority occurred when the framework for their remuneration was transferred from provincial to national legislation by s 219(1)(a).[12]But this did not mean that there was any constitutional impediment to national legislation retaining the existing dual system of remuneration, which followed the introduction of Act 29 of 1995

[10] Act 108 of 1996.

[11] See above n7 at para 409.

[12] Section 219(1): ‘An Act of Parliament must establish a framework for determining –
(a) the salaries, allowances and benefits of members of the National Assembly, permanent delegates to the National Council of Provinces, members of the Cabinet, Deputy Ministers, traditional leaders and members of any councils of traditional leaders.’

referred to above. Nor did it prevent provinces from implementing national legislation. This much is clear from s 219(4) of the Constitution.[13]

[18] REPOB was the national framework legislation passed to comply with s 219(1)(a) of the Constitution. It commenced operation on 23 September 1998. Section 5 deals with the remuneration of traditional leaders. It provides:

'**5 Salaries, allowances and benefits of traditional leaders, members of local Houses of Traditional Leaders, members of provincial Houses of Traditional Leaders and members of National House of Traditional Leaders.** –

(1) Traditional leaders, members of any local House of Traditional Leaders, members of any provincial House of Traditional Leaders and members of the National House of Traditional Leaders shall, despite anything to the contrary in any other law contained, be entitled to such salaries and allowances as may from time to time be determined by the President after consultation with the Premier concerned by proclamation in the *Gazette*, after taking into consideration –

(a) any recommendations of the Commission;

. . .

(2) Despite the provisions of subsection (1), a traditional leader, a member of a local House of Traditional Leaders, a member of a provincial House of Traditional Leaders or a member of the National House of Traditional Leaders who holds different public offices simultaneously, is only entitled to the salary, allowances and benefits of the public office for which he or she earns the highest income, but –

(a) this subsection shall not preclude the payment of out of pocket expenses for the performance of functions other than those for which such office bearer receives such highest income; and

(b) where only an allowance has been determined in terms of subsection (1) in respect of a traditional leader's membership of a local House of Traditional Leaders, a provincial House of Traditional Leaders or the National House of Traditional Leaders, such a traditional leader shall be entitled to such an allowance in addition to his or her salary, allowances and benefits as a traditional leader.

[13] Section 219(4): 'The national executive, a provincial executive, a municipality or any other relevant authority may implement the national legislation referred to in subsection (1) only after considering any recommendations of the commission established in terms of subsection (2).'

. . .
(4) The amount payable in respect of salaries, allowances and benefits to traditional leaders, members of local Houses of Traditional Leaders, members of provincial Houses of Traditional Leaders and members of the National House of Traditional Leaders shall be paid from monies appropriated for that purpose by Parliament in respect of the National House of Traditional Leaders and by a provincial legislature in respect of traditional leaders, members of local Houses of Traditional Leaders and members of provincial Houses of Traditional Leaders, as the case may be.'

[19] REPOB'S effect is that the authority for deciding the salaries for traditional leaders now vests in the President, who must consult the Premier concerned and consider any recommendations of the Independent Commission for the Remuneration of Office Bearers, envisaged in s 219(2) of the Constitution, before making a decision. REPOB repealed Act 29 of 1995,[14] but not the Venda Proclamation. So while REPOB contemplates that the President will determine the salaries of traditional leaders, the province retained the authority over the remuneration of chiefs and headmen – notwithstanding s 5(1) of REPOB. There is no constitutional challenge to the Venda Proclamation. So we must accept that the province's determination of salaries for headmen in 2002 was valid. This is because s 2(1) of Schedule 6 of the Constitution, which deals with transitional arrangements, provides that all law that was in force when the Constitution took effect continues to remain in force subject to amendment or repeal and consistency with the Constitution.

[20] In 2005 the provincial legislature promulgated the Limpopo Traditional Leadership and Institutions Act 6 of 2005. In terms of s 34 read with Schedule 1 of that Act, the Venda Proclamation was

[14] Section 10: '**Repeal of laws.** – The Payment of Members of Parliament Act, 1994 (Act No. 6 of 1994), the Remuneration and Allowances of Executive Deputy Presidents, Ministers and Deputy Ministers Act, 1994 (Act No. 53 of 1994), and the Remuneration of Traditional Leaders Act, 1995 (Act No. 29 of 1995), are hereby repealed.'

repealed with effect from 1 April 2006.[15]Section 21(1) provides that the salaries of traditional leaders would thereafter be dealt with under REPOB – in other words, by the President. This brought the dual system of remuneration of traditional leaders in the province to an end.

[21] Since then it appears that the President has from time to time determined[16]salaries for kings, chiefs and also chairpersons and deputy chairpersons of the National House of Traditional Leaders, who are all senior leaders in the traditional leader hierarchy, but has not done so for headmen, who are not. Headmen continued to receive the same salary that the province determined on 1 October 2002.

[22] I turn to consider the first part of the relief claimed, which deals with the dispute over the interpretation of s 5(2) of REPOB. It is not in dispute that at the time the province stopped paying salaries, which the first and fourth appellants were receiving as headmen, they were also being paid as public servants. The reason that the province gave for terminating their salaries was that s 5(2) of REPOB prohibited them from receiving salaries both as traditional leaders and as public servants.[17]However, in its answering affidavit, the province gave a different reason – that s 30 of the PSA precluded the payment of salaries to anyone who performed any other remunerative work without the relevant department's permission. In his written argument,

[15] Provincial Gazette 1240, 31 March 2006.
[16] See for example; GN R36, *GG* 19901, 1 April 1999 and GN R23, *GG* 22182, 30 March 2001.
[17] The reason appears from the letter in para 5.

Mr Tokota, who appeared for the respondents, relied on both grounds to justify the decision. As I understand his submission it was that the purpose of s 5(2) of REPOB is to prevent traditional leaders and other public office bearers from earning 'double salaries.' Being employed in the public service constitutes the 'holding of public office' as contemplated by s 5(2). To interpret it in any other way, so the submission went, would defeat the purpose of s 5(2) of REPOB and bring it into conflict with s 30 of the PSA.

[23] Section 5(2) of REPOB and s 30 of the PSA[18] serve different purposes. The former is concerned with preventing persons who hold more than one 'public office' from receiving more than one salary. The latter is aimed at preventing public service employees from performing remunerative work outside their employment in the relevant department if this conflicts with their responsibilities in the public service. The executive authority may, however, grant permission for the employee to do other paid work if this does not interfere with his or her employment or otherwise contravene the public service code of conduct.

[24] It is apparent that even though 'public office', as the term is

[18] Section 30 of the PSA provides: '**Other remunerative work by employees**.
(1) No employee shall perform or engage himself or herself to perform remunerative work outside his or her employment in the relevant department, except with the written permission of the executive authority of the department.
(2) For the purposes of subsection (1) the executive authority shall at least take into account whether or not the outside work could reasonably be expected to interfere with or impede the effective or efficient performance of the employee's functions in the department or constitute a contravention of the code of conduct contemplated in section 41(1)(*b*)(v).
(3) (*a*) The executive authority shall decide whether or not to grant permission, contemplated in subsection (1), within 30 days after the receipt of the request from the employee in question.
(*b*) If the executive authority fails to make a decision within the 30 day period, it would be deemed that such permission was given.'

used in s 5(2) of REPOB, is not defined an ‘office bearer’ referred to in s 5(2)(a) is defined in s 1. It refers only to elected officials and traditional leaders.[19]And from s 5(2) of REPOB it is clear that the reference to ‘holders of public office’ means ‘office bearers’ who are traditional leaders or who hold some office by virtue of their position as traditional leaders such as members of the National or Provincial House of Traditional Leaders. In the PSA an employee is defined and does not include any one of the categories of persons to whom the definition of ‘office bearer’ in REPOB may apply. So a ‘holder of public office’ as envisaged in s 5(2) clearly cannot include a public service employee.

[25] But the most telling explanation for why a ‘holder of public office’ in s 5(2) can refer only to traditional leaders (and not public servants) is because of the mischief at which s 5(2) of REPOB is aimed. From the legislative history which I traced earlier, both REPOB and its predecessor, the Remuneration of Traditional Leaders Act 29 of 1995, contemplated a dual system of remuneration (by national and provincial government) for traditional leaders. This meant that some traditional leaders could be drawing more than one salary – one from national government and the other from a province, or possibly two salaries from the same sphere of government. Section 5(2) of REPOB was probably aimed at preventing this mischief. Its object was not to prevent public servants from being paid

[19] “Office bearer” means a Deputy President, a Minister, a Deputy Minister, a member of the National Assembly, a permanent delegate, a Premier, a member of an Executive Council, a member of a provincial legislature, a traditional leader, a member of a local House of Traditional Leaders, a member of a provincial House of Traditional Leaders, a member of the National House of Traditional Leaders and a member of a Municipal Council.

for their responsibilities as traditional leaders. That problem is adequately provided for in s 30 of the PSA. And if the provincial government is of the view that the remunerative work performed by headmen conflicts with their duties in the public service, it may take steps to end the practice under the relevant provisions of the PSA.[20]The provincial government was therefore not entitled to invoke s 5(2) of REPOB when it stopped paying salaries to headmen in this category. It used this power for an unauthorised purpose.[21]I should add that during oral argument before us Mr Tokota properly conceded that his written submissions to the contrary were not sustainable. It follows that the high court's interpretation of the relevant provisions was correct.

[26] This brings me to the question whether the first and fourth appellants are entitled to the first part of the declaratory relief requested. As I mentioned earlier, the high court characterised the application for a declarator as a review and then dismissed it on the ground that the appellants had unduly delayed their application.

[27] Even though the appellants could have reviewed the decision under PAJA, this does not mean that their application was a review under PAJA. But the fact that a litigant has an alternative remedy is relevant to the exercise of a court's discretion as to whether a declaratory order should be granted.[22]The high court erred in this regard. I turn to consider whether the appellants are entitled to the

[20] See for example s 31 of the PSA.
[21] *Minister of Education v Harris* 2001 (4) SA 1297 (CC) para 17.
[22] *Lion Match Co Ltd v Paper Wood & Allied Workers Union* 2001 (4) SA 149 (SCA) para 25.

order.

[28] During argument it was put to counsel for the appellants, Mr Wessels, that the first part of the relief claimed, in its present form will have the consequence that the appellants receive salaries as headmen and the provincial government will be obliged to continue paying them as public servants notwithstanding s 30 of the PSA, which is aimed at preventing persons undertaking other remunerative work where this conflicts with their work as public servants. In response the appellants applied to amend the terms of the relief claimed by deleting the words in square brackets.[23] We approved the amendment and must consider whether the relief can be granted in its present form.

[29] The first and fourth appellants have established that s 5(2) was no bar their right to receive salaries as headmen. The question now is whether we should grant or refuse the declaratory order they ask for. The major impediment to granting such an order is that it will not validate the decision not to pay them or undo its consequences. No purpose will therefore be served by granting an order.

[30] A part of the fourth appellant's dispute with the respondents is over the reduction of his salary from R30 000 to R13 000, after he resigned from the public service on 31 March 2005. He was appointed as a headman in 1985. In this capacity he earned a salary of R30 000 until 1 October 2002 when it was terminated unlawfully. He remained in the public service. When he retired from the public service his salary as a headman was reinstated – but at the revised amount of R13 000. The respondents do not aver that he ceased being a headman during this period. They, however, deny that he is

[23] See above in para 10.

entitled to a salary of R30 000 because, they say, he was 'reappointed' as a headman after he retired from the public service and was thus only entitled to the revised salary. They provide no details of his alleged reappointment. Their bare denial that his salary was reinstated creates no genuine dispute of fact. He would appear therefore to be entitled to his original income of R30 000, which other headmen who were appointed before 1 October 2002 continued to receive. In his case declaratory relief is sought in the second part of the relief claimed.

[31] However, for the reason given in para 29, the grant of a declaratory order would also be inappropriate for this part of his case. It should be pointed out that the fourth appellant had an opportunity to review two decisions. The first was the decision to terminate his headman's salary of R30 000 on 1 October 2002; the second was the decision to reinstate his salary, but at the reduced amount following his retirement from the public service on 31 March 2005. He failed to institute proceedings in good time on both occasions and cannot complain belatedly that an injustice is being done to him.

[32] I turn to consider the rest of the relief claimed in the second part – that the provincial government unfairly discriminated against the second, third and fourth appellants in this category by determining a salary of R13 000 for headmen appointed after 1 October 2002, but did not reduce the salaries of those appointed before this date – they were still paid R30 000; and that the President unfairly discriminated against them by not determining salary increments for them, as he did for kings and chiefs.

[33] The appellants' allegations regarding where the authority for the

determination of the salaries of headmen lay on 1 October 2002 are contradictory. They allege that this authority was vested in the President by virtue of s 5(1) of REPOB – not the province. But they then contradict this allegation by complaining that the provincial government discriminated against them by making the determination. However, I have pointed out earlier that the dual system of remuneration continued in the province until the Venda Proclamation was repealed with the commencement of the Limpopo Traditional Leadership and Institutions Act 6 of 2005 in April 2006 – a fact of which neither the parties nor their respective legal representatives appear to have been aware. So this means that the province retained the authority to determine salaries of traditional leaders, at least until April 2006 – and had the authority to do so in 2002, notwithstanding s 5(1) of REPOB. The appellants' case in this regard can therefore only be that the provincial government – not the President – unfairly discriminated against them by determining a salary of R13 000 in 2002.

[34] However, the appellants' case discloses no cause of action. The founding affidavit contains no factual or legal basis for the assertion that headmen who were appointed after 1 October 2002 had a right to receive a salary of R30 000, or to be given increments thereafter, either by the provincial government or by the President. And the fact that the President determined increments for senior traditional leaders did not confer any such right on the appellants, or impose any obligation on the provincial government, which remained responsible for their remuneration until April 2006, to grant

increments to them.

[35] The case the appellants make for unfair discrimination is in any event not sustainable. From the equality jurisprudence that the Constitutional Court has developed, differentiation between people or categories of people is permissible if it bears a rational connection to a legitimate governmental purpose.[24]

[36] It appears from the respondents' answering papers, though admittedly not completely clearly, that the province made a policy decision, which I have referred to in para 7, to reduce the salaries of headmen because the diminution of their functions and responsibilities with the advent of the new constitutional order no longer justified a salary of R30 000 – hence its decision to pay headmen appointed after 1 October 2002 a reduced salary of R13 000. If this is so, the decision was rationally made for a legitimate governmental purpose. But it suffices to say that the second, third and fourth appellants have not established that the provincial government discriminated unfairly against them.

[37] It follows that the appellants have failed to establish any basis for the relief claimed. Regarding costs, the judge a quo, as I have mentioned, made the respondents liable for the costs despite having dismissed the application. He did so because, in his view, the respondents had been remiss in failing to resolve the dispute with the appellants amicably, choosing instead to defend the case in court.

[24] *Harksen v Lane & others* 1998 (1) SA 300 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Justice & others* 1999 (1) SA 6 (CC).

That was not a proper exercise of his discretion. Once the respondents had disputed the claims that were advanced by the appellants, there was no way in which the respondents could have resolved the dispute save to agree to the appellants' demands. They were not obliged to do so for the reasons I have given. However, the first and fourth appellants were entitled to go to court because the provincial government had wrongly terminated their salaries. And in the case of the fourth appellant, his salary as a headman was, in addition, unlawfully reinstated at R13 000 instead of R30 000 after he retired from the public service. So the respondents were not blameless. In the circumstances the appropriate costs order, both in this court and the court below, should be that the parties pay their own costs.

[38] I therefore make the following order:

(1) The appeal is dismissed.

(2) The cross-appeal is upheld to the extent that the order of the high court is amended as follows:

'The application is dismissed, each party to pay its own costs.'

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A CACHALIA
JUDGE OF APPEAL

APPEARANCES

APPELLANTS: J K Wessels (with him W T B Ridgard)
Instructed by Mathobo Rambau & Sigogo, Pretoria
Matsepe Attorneys, Bloemfontein

SECOND, THIRD AND
FOURTH RESPONDENTS: B R Tokota SC (with him D T Skosana)
Instructed by State Attorney, Pretoria
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