THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 1128/19

In the matter between:

THEMBA YENDE	**FIRST APPELLANT**
AMAYENDE ASOGENYANENI TRADITIONAL COUNCIL	**SECOND APPELLANT**

and

FELANI YENDE	**FIRST RESPONDENT**
AMAYENDE ASOGENYANENI ROYAL FAMILY	**SECOND RESPONDENT**

Neutral citation: *Themba Yende and Another v Felani Yende and Another* (1128/19) [2020] ZASCA 179 (18 December 2020)

Coram: PETSE DP and MBHA, ZONDI, MOCUMIE and MOLEMELA JJA

Heard: 12 November 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00am on 18 December 2020.

Summary: Customary Law – recognition and appointment of traditional leader –whether provisions of the Traditional Leadership and Governance Framework Act were complied with – whether the living amaYende customary law was proven to the Commission.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Strijdom AJ, Sethosa-Molopa and Potterill JJ concurring, sitting as a court of appeal): judgment reported *sub nom* [2019] ZAGPPHC 237.

The appeal is dismissed with costs.

JUDGMENT

Molemela JA (Petse DP and Mbha, Zondi and Mocumie JJA concurring)

[1] This appeal concerns the application of customary norms and criteria of the traditional community known as the amaYende asoGenyaneni (amaYende) the rightful senior traditional leader[1] of that community.

[2] On 23 October 2012,[2] the Premier of Mpumalanga (the Premier), in his official capacity as the person responsible for making the administrative decision challenged, approved the recognition of amaYende as a traditional community and recognised the fourth appellant, Mr Themba Yende (Themba) as the senior traditional leader of that community. The Premier's notice stipulated that the recognition was pursuant to the recommendation of the third appellant, the Commission on Traditional Leadership Disputes and Claims: Mpumalanga, (the Commission) as contemplated in the provisions of the Traditional Leadership and Governance Framework Act 41 of 2003 (the Framework Act).

[3] Having learnt about Themba's recognition as the senior traditional leader of the amaYende, Mr Felani Yende (Felani) and his two siblings Ntombikayise and Sibongile, (together referred to as the respondents) brought an application for review to the

[1] 'In terms of the Traditional Leadership and Governance Framework Act 41 of 2003, 'senior traditional leader' means a traditional leader of a specific traditional community who exercises authority over a number of headmen or headwomen in accordance with customary law, or within whose area of jurisdiction a number of headmen or headwomen exercise authority'.

[2] The recognition was published in Government Gazette number 2109 on 02 November 2012.

Gauteng Division of the High Court, Pretoria, challenging the Premier's decision to recognise Themba as the senior traditional leader. Asserting that the Premier's decision to recognise Themba was not in compliance with customary laws and practices of amaZulu, the respondents sought an order reviewing and setting aside the decision on the basis that it was unlawful. The review was grounded on s 6 of the Promotion of Administrative Justice Act 3 of 2000. The matter came before Manamela AJ, who dismissed the application with costs. The basis for dismissing the matter was that the respondents had been aware of the process underway at the Commission whose sole purpose was to determine the rightful senior traditional leader of amaYende but had not lodged any claim nor made any representations in that regard. Instead, they had belatedly taken steps after the publication of the Government Gazette recognising Themba as the senior leader of amaYende.

[4] Aggrieved by that decision, the respondents obtained leave of this court to appeal to the Full Court of the Gauteng Division of the High Court, Pretoria (full court) after Manamela AJ had refused leave. On appeal, the full court reversed the decision of Manamela AJ on the basis that the respondents had not been afforded an opportunity to make representations, thus tainting the procedures followed by the Commission. As regards substance, the full court held that the appellants had not adduced evidence showing the existence of any "living" customs that were different from the ordinary customs of amaZulu. The Full Court set aside the Premier's decision recognising Themba as senior traditional leader and directed the Commission to constitute and hold a meeting of the Royal Family within 15 days.

[5] For a better understanding of the context, it is prudent to preface the background facts of this matter with a brief outline of the salient statutory provisions that are applicable. Section 211(1) of the Constitution[3] gives recognition to the institution, status and role of traditional leadership. Section 211(3) enjoins the courts to apply customary law when that law is applicable, subject to constitutional values.[4]

[6] Section 11(1) of the Framework Act provides for recognition of, among others, senior traditional leaders and reads as follows:

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[3] The Constitution of the Republic of South Africa Act 108 of 1996.
[4] *Shilubana and Others v Sidwell Nwamitwa and Others* [2008] ZACC 9; 2009 (2) SA 66 para 42.

‘11. (1) Whenever the position of senior traditional leader, headman or headwoman is to be filled-

(a) the royal family concerned must, within a reasonable time after the need arises for any of those positions to be filled, and with due regard to applicable customary law- (i) identify a person who qualifies in terms of customary law to assume the position in question, after taking into account whether any of the grounds referred to in section 12(1)*(a)*, *(b)* and *(d)* apply to that person; and (ii) through the relevant customary structure, inform the Premier of the province concerned of the particulars of the person so identified to fill the position and of the reasons for the identification of that person; and *(b)* the Premier concerned must, subject to subsection (3), recognise the person so identified by the royal family in accordance with provincial legislation as senior traditional leader, headman or headwoman, as the case may be.’

[7] Section 22(1) of the Framework Act established the Commission on Traditional Leadership Disputes and Claims as a specially constituted body with authority to decide on any traditional leadership disputes and claims contemplated in s 25(2) of the Framework Act.[5] Section 22(2) in turn enjoins the Commission to execute its functions in a manner that is fair, objective and impartial. Section 25(2)*(a)*, inter alia, empowers the Commission to, upon request or of its own accord, decide any traditional dispute or claim in instances where the title or right of the incumbent to a traditional leadership position was contested. In terms of s 25(2)*(b)*, a dispute or claim may be lodged by any person and must be accompanied by information setting out the nature of the dispute or claim and any other relevant information.

[8] I turn now to the facts that serve as the backdrop to the adjudication of this appeal. It is common cause that Felani and Themba are half-brothers, having been fathered by the late chief Leonard Yende (the late chief Yende), who was the last living senior traditional leader of amaYende. Themba was born from a relationship between the late chief Yende and Themba’s mother, Ms Hadebe. It is common cause that the late chief Yende did not marry Themba Yende’s mother and that Themba was raised by his maternal family. Themba assumed his mother’s surname, Hadebe, and only assumed that of his father (Yende) after the latter’s death in 1997. After Themba’s

[5] *Bapedi Marota Mamone v Commission of Traditional Leadership Disputes and Claims and Others* [2014] ZASCA 30; [2014] 3 ALL SA 1 (SCA) para 68.

birth, the late chief Yende paid lobola for Ms Maria Mnisi (MaMnisi) and they entered into a customary law union.[6] Felani and his two siblings were born from that customary marriage. It is common cause that before he died in 1997, the late chief Yende did not officially assume his rightful position as a senior traditional leader of the amaYende and instead worked as a farm labourer. The traditional affairs were handled by one Sidumo. The latter aspect need not detain us any further, as Sidumo did not feature in the litigation that led to this appeal.

[9] It is common cause that Themba lodged the claims for the recognition of the amaYende as a traditional community and for his recognition as its senior traditional leader in or about 2007. It is also undisputed that on 31 August 2010, a relative by the name of Mr Mbulali Joseph Yende (Mbulali) lodged a competing claim alleging that he was the rightful heir to be recognised as that community's senior traditional leader. Both claims were referred to the Commission for investigation and recommendation as contemplated in s 25(2) of the Framework Act. It is common cause that Themba was, on the recommendation of the Commission, ultimately recognised as the senior traditional leader of the amaYende. What was seriously contested in this matter is whether Felani also lodged a claim for recognition as the rightful traditional leader of that traditional community.

[10] The crisp issues for determination before this court are: (i) whether the relevant Royal Family had been afforded the right to make representations to the Commission; (ii) whether the provisions of the Framework Act were complied with; and (iii) whether the living amaYende customary law was proven to the Commission.

[11] In *Mphephu v Mphephu-Ramabulana and Others*,[7] this Court held that it is the members of the Royal Family alone that must identify the senior traditional leader as contemplated in s 11 of the Framework Act. In *Bapedi Marota Mamone v Commission of Traditional Leadership Disputes and Claims and Others* (*Mamone*),[8] the Constitutional Court, interpreting s 11 of the Framework Act, held that there are two

[6] Themba's disputation of the existence of the customary law marriage was not persisted with on appeal.
[7] *Mphephu v Mphephu-Ramabulana and Others* [2019] ZASCA 58; [2019] 3 All SA 51 (SCA); 2019 (7) BCLR 862 (SCA) para 38.
[8] See *Bapedi Marota Mamone v Commission of Traditional Leadership Disputes and Claims and Others* [2014] ZASCA 30; [2014] 3 ALL SA 1 (SCA) para 19.

crucial elements that attach to a proper recognition process: first, the nomination or identification should be done by the Royal Family and, second, the said nomination and recognition must be made after applying and taking into consideration the relevant customary laws and customs of the said traditional community. Although deference is bestowed on the Commission as a specialist body constituted by experts who are knowledgeable regarding customs and the institution of traditional leadership,[9] if the Commission or the relevant administrator fails on the legislative test enunciated in s 11 of the Framework Act, its decision must be set aside.

[12] In their founding affidavit in support of the review application, the respondents averred that they had objected to the nomination of Themba as the senior traditional leader of the amaYende at a public meeting held at the Town Hall of Piet Retief in 2012 with the representatives of the Department of Co-operative Governance and Traditional Affairs or the Commission. They contended that they were informed that another meeting would be convened and that they would in due course be notified about the date thereof. Attached to the respondents' founding affidavit is a letter addressed to the Premier following the publishing of a public notice recognising Themba as the senior Traditional Leader of the amaYende. In that letter, reference is made to the public meeting which the respondents had attended and to the respondents having categorically refused to agree to Themba's nomination. Also attached to the respondents' founding affidavits were affidavits signed by several people who asserted that in terms of the living customary practices and traditions of the amaYende pertaining to succession, Felani was the heir to the late Chief Yende's throne by dint of being the first-born son from the Great Wife, MaMnisi.

[13] The minutes of that public meeting do not form part of the record filed in the proceedings of the review application. Of significance is that the deponent who filed an answering affidavit on behalf of the Premier, the MEC and the Commission did not dispute the occurrence of this meeting nor the respondents' recordal or their objection to Themba's nomination as the senior traditional leader of amaYende. Against that background, there is no basis for not accepting the respondents' version that they did

[9] See s 23(1) of the Framework Act. Also see *Nxumalo v President of the Republic of South Africa and Others* [2014] ZACC 27 para 21.

in fact object to Themba's nomination. The report of the Commission does not show that the respondents' protestations were taken into account. Neither did the Premier state that any views expressed by the respondents were taken into account when he approved Themba's recognition as the senior traditional leader.

[14] As mentioned earlier, s 22(2) of the Framework Act stipulates that the Commission must carry out its functions in a manner that is fair, objective and impartial. It is not disputed that the late Chief Yende's biological children constituted the core members of the Royal Family. It appears from the record of the claim hearing that not only were the respondents absent from the amaYende Royal Family Leadership Dispute Claim Hearing (the claim hearing) but that their absence was a serious concern for the Commission. This unquestionably attests to the fact that the respondents were indeed considered to be important members of the Royal Family, who should have been afforded an opportunity to play a pivotal role in the identification, recognition and ultimate appointment of the senior traditional leader.[10]

[15] The transcript of the claim hearing reveals that two speakers (presumably the officials) were concerned about the absence of the respondents from the proceedings, pointing out that the possibility of the latter showing up later to dispute Themba's claim had to be avoided. The first exchange was as follows:

'Q: I hear you are saying there are two boys and two girls, is there any of your siblings in the house today; I would like to ask [a] few things?

A: Sadly he is not here but working though at some meetings; he would likely to accompany us together with my sisters.'

The second exchange was as follows:

'Q: I am worried about one thing and that your siblings are not here to support you in your aim [presumably claim], what evidence do we have that they support you, we don't want that situation where tomorrow they come and dispute your claim and think that your brother should be chief because your claim is quite big and if they knew they would have excused themselves from work to come and support you. So you are saying their jobs are more important than all of this, I can't understand…'

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[10] *Umndeni (Clan) of Amantungwa and Others v MEC for Housing and Traditional Affairs KwaZulu-Natal and Another* [2019] ZASCA 142; [2011] 2 All SA 548 (SCA) para 23.

A: Answering your first question, regarding Themba's siblings, [they] were not informed by myself and that was "an error" on my side because Themba had asked to inform them, but I had thought since this was going to be [a] community hearing, I should not bother them, and thinking it might not be a great deal if they missed just this one meeting.'

[16] The afore-mentioned exchanges make it clear that the absence of the respondents was on account of not having been invited to the claim hearing. It, therefore, cannot be gainsaid that the respondents were not afforded an opportunity to make any further representations after they had registered their discontent with Themba's nomination. They were thus excluded from participation in a matter that materially affected the Royal Family of the amaYende. These exchanges also cast serious doubt on Themba's assertion that he was unanimously nominated as the representative of the Royal Family of amaYende.

[17] To that extent, the purported nomination of Themba as the senior traditional leader in the absence of other members of the Royal Family was fatally defective and constituted an irregularity. It is trite that denying a party who has an interest in a matter the right of meaningful participation in a hearing renders the proceedings in question procedurally unfair. The respondents' exclusion from meaningful participation in the processes of the Commission clearly violated the provisions of s 22(2) of the Framework Act. Thus, the full court correctly found that the audi alteram partem principle was not observed and that this rendered the claim hearing procedurally unfair.

[18] It is well-established that customary law is, by its nature, a constantly evolving system.[11] Equally trite is that customary law exists not only in the official version documented in legislation and by writers, but there is also 'living' customary law, which denotes law that is actually observed by African communities.[12] The Constitutional Court, in *Shilubana*,[13] had occasion to decide a dispute in terms of which the traditional

[11] *Shilubana* fn 2 para 45 and 81.
[12] *Mabena v Letsoalo* 1998(2) SA 1068 at 1074H-J.
[13] *Shilubana* fn 2.

leadership was contested based on customary law of succession. That court aptly stated as follows:

'It follows that the practice of a particular community is relevant when determining the content of a customary law norm. As this court held in *Richtersveld*,[14] the content of customary law must be determined with reference to both the history and the usage of the community concerned. "Living" customary law is not always easy to establish and it may sometimes not be possible to determine a new position with clarity. *However, where there is a dispute over the law of a community, parties should strive to place evidence of the present practice of that community before the courts, and courts have a duty to examine the law in the context of a community and to acknowledge developments if they have occurred*.'[15] (Emphasis added.)

[19] It is evident from the record that Themba and Mbulali gave parallel versions on the living customs of the amaYende. It is unclear why the Commission ultimately decided to accept the customary practices contended for by Themba when there was no other evidence supporting his version on this aspect. The failure to call for and consider evidence of the customary practices of the amaYende applicable at the time of the determination of the dispute violated the provision of s 25(3) of the Framework Act.

[20] The statement in the Commission's report, that amaYende are of Zulu origin and observe Zulu traditions and customs was not controverted. The customary law and practices of the Zulu nation as espoused in the Natal Code of Zulu Law[16] and many other authorities is that in homesteads that are polygamous, multiple house units are created by each marriage of the family head. The Indlunkulu (Great House) is an indispensable centre of the Zulu household. The Great House is established by the first wife. It is from that house that other houses take their position. The Great House may be supported by affiliated houses on the right and on the left (iQadi and iKhohlo, respectively). From it, derives the heir to the throne, if the family head is a chief. It follows that MaMnisi, being the first wife of the late chief Yende, constituted the Great Wife, and her household the Great House.

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[14] *Alexkor Ltd and Another v Richtersveld Community and Others* [2003] ZASCA 18; 2004(5) SA (SCA) 460 paras 56-7, referring to *Amodu Tijani v The Secretary, Southern Nigeria* [1921] 2 AC 399 (PC) at 404.

[15] *Shilubana* fn 2 para 46.

[16] Published in Government Gazette No 10966 published on 9 October 1987.

[21] A Royal Family, as defined in s 1 of the Framework Act is 'the core customary institution or structure consisting of immediate relatives of the ruling family within a traditional community, who have been identified in terms of custom, and includes, where applicable, other family members who are close relatives of the ruling family'. By virtue of being the late Chief's biological son, Themba unquestionably falls within the definition of the Royal Family. However, the respondents are, as the Full Court correctly found, the core members of the Royal Family and have a say in the identification of a senior traditional leader who should step into their father's shoes.

[22] The full court was correct when it found that on the facts, the respondents are the 'relevant and proper components' of the Royal Family. It did not, by so saying, find that they are the only relevant decision makers, nor did it deny Themba's status as a member of the Royal Family, as the biological son of the late Chief Yende. To the extent that the appellants suggest that the remarks of the full court impliedly exclude Themba as a member of the Royal Family, that suggestion is without merit. The exclusion of the respondents from any meetings in which Themba was recommended for appointment as the senior traditional leader of the amaYende was in contravention of s 11(1)*(a)* of the Framework Act, thus rendering its resolutions unlawful. On this ground alone, the appeal ought to fail, as the Premier's decision was made pursuant to these material procedural defects.

[23] Section 25(3) of the Framework Act delineates the scope of the investigations undertaken by the Commission. It enjoins the Commission apply only customary law and customs of the relevant traditional community when considering a dispute or a claim.[17] Accordingly, the living succession customs of the AmaZulu as practiced by amaYende come into sharp focus in this matter.

[24] Before the Commission, Themba asserted that 'in terms of the customary law, the eldest son of the chief is the heir of the chieftainship irrespective of whether his mother was married to the chief or not.' This version was vehemently denied by Mbulali, who maintained that the generally accepted custom of AmaZulu, which

[17] *Mamone* fn 7 para 19.

stipulates that the heir of the chieftainship was the eldest male of the Great House, was still extant. In the face of these two mutually exclusive versions, it is unclear why the Commission preferred Themba's version over, Mbulali's, without the benefit of any further evidence on this aspect.

[25] It has been held in a plethora of judgments that customary law is not static; it evolves. Courts must acknowledge developments if they have occurred.[18] In this matter, it is undisputed that no evidence of the living practices of amaYende was placed before the Commission. Although the report of the Commission states that its focus area is on 'the research and investigation conducted during the latter part of 2011, no such research was placed before Manamela AJ as evidence. The transcript of the claim hearing makes no allusion to any research that was done.

[26] The appellants contended that the full court erred in failing to accept that amaYende had 'moved on', in other words, had adopted modified principles regarding the customary law of succession. That approach, so contend the appellants, recognises a custom of succession in terms of which the first-born male is the heir to the throne, irrespective of whether his mother is married or not. The difficulty for the appellants is that before the Commission, there was no evidence showing that amaYende had 'moved on' from the generally accepted Zulu traditional practice that the eldest male heir of the Great House is the first in line to the throne.[19] Other than his say-so, Themba did not tender any evidence to support his assertions on the actual living customary law observed by amaYende as at the time when the claim for senior leadership was lodged with the Commission.

[27] In *Mamone*, the majority of the Constitutional Court having noted the need for deference to the Commission, sounded a warning that when considering a claim, the Commission is required by s 25(3) of the Framework Act to consider and apply the living customary law and customs of the relevant traditional community. The court stated as follows:

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[18] *Shilubana* fn 3 para 46.
[19] In terms of s 81(1)*(a)* of the Natal Code of Zulu Law, the eldest son of the Indlunkulu is the first in the line of succession to the status and position of the family head.

'When considering a claim, the Commission is required by section 25(3)*(a)* of the Framework Act to "consider and apply customary law and the customs of the relevant traditional community as they were when the events occurred that gave rise to the dispute or claim." Notably, this provision tasks the Commission not only with applying the relevant customary law to the case before it, but also with determining what that law was at the relevant time. *This latter question depends primarily on historical and social facts, which the Commission must establish through evidence led before it and its own investigation*.'[20] (Emphasis added.)

[28] The record of the proceedings held before the Commission does not reveal any historical or social facts relied upon by the Commission. It is clear that the Commission proceeded in the respondents' absence and made a recommendation without having considered their version of their living customs. The full court correctly found that the customary rules of succession of traditional leadership which were accepted by the Commission and the Premier have not been shown to be the actual living customary law rules of succession of the broader AmaZulu or amaYende. This shortcoming fatally tainted the entire process and thus rendered Themba's appointment unlawful. The full court correctly found that the decision to appoint Themba as the senior traditional leader of the amaYende fell to be reviewed.

[29] The appellants, in their heads of argument, contended that the custom contended for by the respondents is unconstitutional as it discriminates against children born out of wedlock on the basis of their mother's marital status. This contention was not persisted with in oral argument before this court, and rightly so, for the unconstitutionality of the Zulu custom was not frontally challenged in the papers. Consequently, it cannot be challenged at appellate stage.

[30] I consider next the remedy granted by the full court. Having found that Themba's nomination was not in compliance with the Framework Act on account of not having been sanctioned by the Royal Family, it ordered the Royal Family of the amaYende to constitute and hold a meeting within 15 days of its order. Counsel for the appellants urged us that, in the event that we were inclined to dismiss the appeal, we should modify the order of the full court, as there might be a dispute about who are

[20] *Mamone* fn 7 para 80.

the rightful members of the Royal Family. The definition of 'royal family' in the Framework Act clearly sets out the persons who fall within that category. It is self-evident that all the biological children of the late chief Yende are an integral part of that family.

[31] It is clear from the order granted by the full court that instead of directing a substitution, it recognised the important role played by the Royal Family in the nomination of the senior traditional leader as envisaged in *Mamone* and referred the matter back to the Royal Family for that purpose. Although it is the prerogative of the Royal Family to identify the senior traditional leader, it is abundantly clear from the provisions of the Framework Act that where the title to a traditional leadership is contested, it is open to any person to refer a dispute to the Commission. The order granted by the full court is thus just and equitable as it accords with the provisions of the Framework Act. Consequently, there is no need to modify it. It follows that the appeal falls to be dismissed.

[32] For the sake of completeness, it remains to state that the 15-day period within which the meeting of the Royal Family must be convened will now be reckoned from the date of this Court's judgment. As to the costs of appeal, counsel for the appellants correctly conceded that there is no reason to depart from the general rule that costs must follow the result. For the sake of clarity, it bears pointing out that since the Premier and the Commission did not participate in the appeal and filed a notice to abide, they should not be burdened with the costs of the appeal beyond the date on which they filed their notice to abide the decision of this Court.

[33] In the result, the following order is made:
The appeal is dismissed with costs.

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M B MOLEMELA

JUDGE OF APPEAL

Appearances

For Appellants: M S Phaswane SC (with him L X Dzai)
Instructed by: Mketsu and Associates, Pretoria
Matsepes Inc, Bloemfontein

For Respondent: M E Mathaphuna SC
Instructed by : Ndobela Lamola Attorneys Inc, Pretoria
Honey & Partners Inc, Bloemfontein