

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(FUNCTIONING AS: LIMPOPO LOCAL DIVISION, THOHOYANDOU)

CASE NUMBER: 456/2014

In the matter between:

TSHIVULANA ROYAL FAMILY

APPLICANT

And

NDITSHENI NORMAN NETSHIVHULANA

FIRST RESPONDENT

PREMIER OF LIMPOPO PROVINCE

SECOND RESPONDENT

MEC LIMPOPO PROVINCE (COGHSTA)

THIRD RESPONDENT

TSHIMBUPFE TRADITIONAL COUNCIL

FOURTH RESPONDENT

TSHIMBUPFE ROYAL COUNCIL

FIFTH RESPONDENT

JUDGEMENT

TLHAPI J

INTRODUCTION AND BACKGROUND

[1] Rasilingwani Piet Netshlvhulana who died during 1976 was a headman of Tshivulana settlement. He was succeeded by his eldest son born of the great house, Mugoidwa Mutheiwana Wilson Netshivhulana “Mugoidwa”. At the latter’s installation his sister Tshimangadzo Christina Mulaudzi and brother Nthangeni Jack Mulaudzi from the second house were also installed as his “Khadzi” (the reigning “vho- Makhadzi”) and “Ndumi”. The Ndumi predeceased Mugoidwa who died on 8 September 1992.

[2] The primary functions of vho-Makhadzi and the Ndumi are to:

1. “ Identify the successor upon the death of the Headman. Vho-Makhadzi will identify the successor and liaise with the Ndumi and if there is an agreement, the royal family will be

informed accordingly. However, where there is a dispute the Khadzi has the final say;

2. Identify the Headman on matters of governance; and
3. Governing the tribe in between the death of the Headman and the time when an acting Headman is identified."

[3] According to tradition and custom the Headman must have a "Dzekiso" wife (great wife). The Dzekiso was one born of royalty; had to be a virgin at marriage and, the bride wealth that marries her had to come from the father of the headman, particularly paid out of the bride wealth he received upon marriage of one of his daughters who was married into another royal family. The Dzekiso's main purpose was to give birth to an heir to succeed her husband, the Headman. The first respondent was the late Mugoidwa's first born child, born of the union with his first wife Nyadzanga. Although Nyadzanga was the late Mugoidwa's first wife, she was not regarded as a 'Dzekiso' wife (great wife). Vho-Makhadzi averred that this presented a great challenge when an heir to the late Mugoidwa had to be identified.

The first respondent was 22 years old at the time of his father's death. Consequently at a meeting convened by the royal family to identify the successor to the late Mugoidwa, his brother from the same house, Davhana Elias Mulaudzi ("Davhana") was identified as acting headman without a time frame, a position he occupied since 23 October 1992.

#### THE REMOVAL OF DAVHANA ELIAS MULAUDZI

[4] The Netshivhulana Royal Family did not revisit the issue of succession till they were prompted to do so on 31 October 2012, on receipt of a letter from the Netshimbufpe Royal Family informing them of enquiries made by five members of the Netshivhulana family regarding their Headmanship. Among the five was the first respondent, three other children of the late Mugoidwa and one Steven Mulaudzi. They requested the royal family to meet for purpose of identifying a successor to Mugoidwa and for the identification to be communicated to the Netshimbufpe Royal Family before end of November 2012.

[5] The above letter was preceded by a letter of 26 October 2012 to the third respondent

from one Gilbert Netshivhulana, brother of the first respondent from the second house that Davhana's acting appointment had endured for too long, that Chief Netshimbupfe had discussed the issue with Davhana who suggested that the issue be raised with the royal family. The royal family required a period of 18 months to resolve the problem.

[6] The request was rejected by the Netshimbupfe Royal Family who on 27 June 2013 required the identification of the first respondent to be finalized on 30 June 2013. The royal family could not convene such meeting in the three days suggested because they were still in mourning on the passing of Chief Netshimbupfe MA. The meeting was finally convened on 21 December 2013 in which vho-Makahadzi identified the first respondent's brother Oriel headman to take after the late Mugoidwa. Oriel repudiated the designation and on 23 December 2013 another meeting was convened at which vho-Makhadzi identified Davhana.

At these two meetings vho-Makhadzi and the royal family determined that the first respondent was not a suitable candidate to be identified for the position. The identification of Davhana was then communicated to the second and third respondents via the fifth respondent. On 2 June 2014 the fourth respondent informed the Netshivhulana Royal Family that Davhana's acting appointment had been withdrawn and that the second respondent recognized the first respondent as headman of Tshivulana Settlement with effect from 5 May 2014.

THIS APPLICATION

[7] The application was launched because the applicant approved of vho- Makhadzi's choice of Davhana. The first respondent was recognized in total disregard to the customary tradition which regarded vho-Makhadzi as having the final say in matters of succession. Although the late Mugoidwa did not have a Dzekiso wife, vho-Makhadzi considered the children of Nyadzanga and identified Oriel thereby overlooking his older brother, the first respondent. Vho-Makhadzi averred that the choice was based on the good leadership qualities that Oriel possessed which qualities the first respondent did not possess. When Oriel repudiated the designation she identified Davhana.

[8] The report of the process before the Premier filed on behalf of the first respondent stated that at a meeting of the fifth respondent convened on 27 February 2012

senior “Khadzi” Peani Gladys identified the first respondent as headman thereby overruling the identification by vho-Makhadzi Tshimangadzo, deponent to the founding affidavit. According to the report “Khadzi” Peani Gladys had identified the first respondent after the death of the late Muguidwa and because he was a minor and Davhana was appointed as regent This contradicted the version that the first respondent was 22 years old at the death of his father. The affidavits filed reveal disputes of fact regarding the processes engaged involving the applicant and the first, fourth and fifth respondents but this is not for adjudication presently.

[9] It seems that the first respondent was recommended to the second respondents according to a report dated 7 March 2014 from the third respondent. The said report was filed in this application as reason given by the second respondent of his recognition of the first respondent.

[10] In this application the following orders are sought:

- “1. Reviewing and setting aside the second respondent’s (Premiere of Limpopo Province) administrative action of recognising first respondent ...as Headman of Tshivulana settlement
2. Substituting the second respondent’s administrative action of recognising Nditsheni Norman Netshivhulana as Headman of Tshivhulana settlement with the following “The Honourable Premier has with effect from 5 May 2014 approved The recognition of Dhavana Elias Mulaudzi as Headman of Tshivulana village in terms of section 12(1)(b) of the Limpop

Traditional Leadership and Institution Act no.6  
of 2005;"

o3 The certificate of recognition of Headman Davhana Elias Mulaudzi be issued within thirty

(30) days of the making of this order;"

The application was opposed by the first respondent, the second and third respondents filed a notice to abide the decision of the court.

[11] The respondents raised two points *in limine*.

11.1 NON-JOINDER OF DAVHANA

It was argued for the respondents that Davhana was an interested party who had to be joined because the application was for the setting aside of the recognition of the first respondent and that in his stead Davhana be recognized and that a certificate be issued in his favour.

The process to be engaged by vho-Makhadzi and the applicant in the identification of a headman is not disputed by the respondents'. After the Netshimbuofe Royal Family announced the need to identify a permanent headman to take after the late Mugoidwa a customary meeting was convened by the applicant for that purpose.

In the first meeting on 21 December 2012 Oriel was identified after he repudiated his designation, the second meeting was convened on 23 December and Davhana was identified even though he was the brother of the late Mugoidwa and had been acting headman for 22 years. As I see it he is not an interested party in that the issue for adjudication was not about him demanding to be recognized. Having regard to the customary practice mentioned above, this application was about the total disregard of the customary practice which vests the Royal Family of Tshivhulana and vho- Makhadzi, the latter having final say in issues of the identification of a headman. In these circumstances Davhana had no role to play, he did not have a role to play to serve his personal interests in the processes engaged on the 21 and 23 December 2012. The point *in limine* must be dismissed.

#### 11.2 INTERNAL REMEDIES NOT EXHAUSTED

The application was brought in terms of PAJA which requires that before a party subjects administrative action to a review by a court, such party shall exhaust internal remedies. It was argued for the respondents that where there is in existence a law that provides for such internal remedy such procedure shall be exhausted first. The procedure was provided for in section 21 of the Traditional Leadership and Governance Act of 2003 ('the Act').

It was argued for the applicant that exceptional circumstances prevailed and that in these circumstances the decision originated from the second respondent Furthermore that resort to any internal remedy would amount to allowing the second respondent an opportunity of reviewing his own administrative action. It was further argued that section 21 was not relevant to the issues in this matter.

[12] As I see it there are no exceptional circumstances that warrant non- compliance with the internal remedies.

The preamble to the Act states provides that the purposes of the Act was to provide for: “...to provide a statutory framework for leadership positions within the institution of traditional leadership, the recognition of traditional leaders and the removal from office of traditional leaders ...to provide for dispute resolution and the establishment of the Commission on Traditional Leadership Disputes and Claims”

Section 21 of the Act provides for various scenarios of internal dispute resolution for customary institutions or structures, which include disputes relating to headmanship. As I see it the issue to be adjudicated in this application could be resolved by any of the internal remedies mentioned herein below.

“21 (1 )(a) Whenever a dispute concerning customary law or customs arises within a traditional community... or other customary institutions on a matter arising from the implementation of this Act, members of such a community and traditional leaders within the traditional community or customary institution concerned must seek to resolve the dispute internally and in accordance with customs.

(b) Where a dispute envisaged in paragraph (a) relates to a case that must be investigated by the Commission in terms of section 25(2), the dispute must be referred to the Commission, and paragraph (a) does not apply.

(2) (a) A dispute referred to in subsection(1)(a) that cannot be resolved as provided for in that subsection must be referred to the relevant provincial house or traditional leaders, which house must seek to resolve the dispute in accordance with its internal rules and procedures;

25(2)(a) The Commission has authority to investigate, either on request or of its own accord

(i) a case where there is doubts as to whether a  
....headmanship was established in accordance with  
customary law and customs;

(3) (a) When considering a dispute or claim, the Commission must consider and apply customary law and customs of the relevant traditional community as they were when the events occurred that gave rise to the dispute or claim

In my view there were no exceptional circumstances prevailing and, having regard to the above provisions, the application was premature in that the internal remedies were not exhausted. Until such time as the said process has been finalized the applicant is not entitled to approach this court for the relief sought.

[13] In the result the following order is given:

The application is dismissed, and each party to pay his or her own costs.

DATED ON 6 MARCH 2015

V V TLHAPI  
(JUDGE OF THE HIGH COURT)

FOR APPLICANTS: MR MATHIVHA  
FOR RESPONDENTS: MR RAMAANO

ATTORNEYS FOR APPLICANT: MATHIVHA ATTORNEYS ATTORNEYS FOR

RESPONDENTS: ANTON RAMAANO INC