THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 513/09

In the matter between:

UMNDENI (CLAN) OF AMANTUNGWA **First Appellant**

LATU ROBSON HELMON KHUMALO **Second Appellant**

AMANTUNGWA TRADITIONAL AUTHORITY **Third Appellant**

and

THE MEC FOR HOUSING AND TRADITIONAL AFFAIRS; KWAZULU-NATAL **First Respondent**

PATRICK S S KHUMALO **Second Respondent**

Neutral citation: *Umndeni (Clan) of Amantungwa & others v The MEC for Housing and Traditional Affairs, KwaZulu-Natal* (513/09) [2010] ZASCA 142 (23 November 2010)

Coram: MPATI P, MAYA, SHONGWE JJA, BERTELSMANN and EBRAHIM AJJA

Heard: 30 August 2010

Delivered: 23 November 2010

Summary: Customary Law – recognition and appointment of traditional leader – effect of non-compliance with legislative procedure for such recognition and appointment.

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ORDER

On appeal from: KwaZulu-Natal High Court (Pietermaritzburg) (Msimang J sitting as court of first instance):

1. The appeal is dismissed.

JUDGMENT

MPATI P (MAYA, SHONGWE JJA, BERTELSMANN and EBRAHIM AJJA ....):

[1] The issue in this appeal is the validity of the appointment of the second respondent as chief of the Amantungwa tribal community (Amantungwa) of the Utrecht district in KwaZulu-Natal and the concomitant termination of the services of the second appellant, who ruled that community until the impugned appointment of the second respondent. The second appellant is the great-grandson of the late Chief Qomintaba Khumalo, who ruled Amantungwa during his lifetime. Qomintaba's grandson, the late William Khumalo, became chief of Amantungwa after his father's death and ruled until his demise in 1963. Upon his death William left four sons, namely Johan Madende, the eldest, Gadi, Girsten and Mgobo, the youngest. One Enoch Jele Khumalo was appointed as acting chief after the death of William, and he was succeeded, upon his death, by yet another acting chief, namely Cain Khumalo, who ruled until his demise in March 1982.

[2] On 31 October 1984 a meeting was held at the magistrates' office, Utrecht, where the issue of the succession to the chieftainship was discussed. According to the minutes of the meeting, signed by the Commissioner of Utrecht, the gathering was recorded as a meeting of the Khumalo clan ('stamvergadering van Khumalostam'). The following is recorded in paragraphs 11 to 13 of the minutes:

'11 Al die lede van die Khumalo stam nomineer eenparig vir Latu Robson Helmon Khumalo . . . as hulle nuwe Kaptein.

12 Geen ander nominasies as Kaptein word gedoen nie.

13 Die stamvergadering versoek dat Latu Robson Helmon Khumalo as volwaardige kaptein aangestel word en nie slegs as waarnemende kaptein nie.'[1]

[1] '11 All the members of the Khumalo clan unanimously nominate Latu Robson Helmon Khumalo...as their new Chief.
12 No further nominations for the chieftainship are made.
13 The meeting of the clan requests that Latu Robson Helmon Khumalo be appointed as a fully-fledged chief and not only as acting chief.' (My translation.)

[3] Thereafter the second appellant ruled Amantungwa until he received a letter from the Ministry: Local Government Housing and Traditional Affairs, signed by the first respondent on 10 October 2007, informing him, inter alia, that the Executive Council of the Province of KwaZulu-Natal had met on 29 August 2007 and 'decided that your services as Acting Chief of Amantungwa be terminated and that Patrick Sphamandla S'dumo Khumalo, son of Simon Mgobo Khumalo, be appointed as Chief of Amantungwa Tribe.'[2] It was also stated in the letter that the second appellant's acting appointment would come to an end on 31 October 2007.

[4] On 5 March 2008, the appellants instituted motion proceedings against the respondents, seeking an order in the following terms:

'1. That the decision of the First Respondent to remove the second applicant as Chief of the Amantungwa Tribe and the appointment of the Second Respondent as Chief should be reviewed and set aside;

2. That the Second Applicant be reinstated as Chief of the Amantungwa Tribe; . . . .'

The appellant also sought an order for costs, to be paid by the respondents jointly and severally, the one paying the other to be absolved. The respondents opposed the application, the main ground of opposition being that the second appellant had never been appointed as Chief of Amantungwa, but only as acting chief.

[5] The Pietermaritzburg High Court (Msimang J) dismissed the application with costs. It subsequently dismissed the appellants' application for leave to appeal. This appeal is with leave of this court.

[6] The first question to be considered is whether the second appellant was appointed as Chief or Acting Chief of Amantungwa. If he was appointed as a chief the appeal should succeed. If, however, he had been appointed acting chief a second question arises, which is whether the first respondent was obliged to give him a hearing or an opportunity to comment or, to make representations in respect of the intended appointment of the second respondent as Chief of Amantungwa.

[7] In his founding affidavit the second appellant set out the history of his appointment to the chieftainship as follows. He was approached by the Umndeni, which he described as the immediate relatives of an Inkosi (chief or traditional leader), 'to fill the vacant position as Chief'. He initially refused, but later succumbed to the power of persuasion and agreed to fill the position. The meeting of 31 October 1984 (referred to above) then took place at which all the four sons of the late Chief William Khumalo were present, as well as 'all the first sons of the houses of the Khumalo clan'. All the members

[2] The letter was written in the IsiZulu language. The correctness of the English translation, which was prepared by or on behalf of the appellants, has not been placed in issue.

of the Umndeni nominated him 'as the Chief of the Amantungwa Tribe'. There were no other nominations. On 5 November 1985 he was taken to the Head of Traditional Affairs in KwaZulu-Natal, King Zwelithini Zulu, 'to be anointed and prepared to take over as Chief of the Amantungwa Tribe'. He thereafter ruled as such.

[8] The second appellant did not allege in his founding affidavit that what was contained in paragraph 13[3] of the minutes of the meeting of 31 October 1984 was an incorrect record of what transpired at the meeting. He asserted, instead, that '…at item 13 of the minutes, it was recorded that I was appointed as the true and rightful Chief and not just a temporary Chief . . .' The Afrikaans verb used in the text is 'versoek'. The *Pharos* English – Afrikaans Dictionary lists the English translation for it as 'request; pray; desire; ask; invite; solicit; beg;' and 'tempt'. In the context in which the word is used it can, in my view, mean 'request'; 'pray'; 'desire'; 'ask'; or 'beg'. Accordingly, I do not agree with the assertion by the second appellant that what was recorded in the minutes was that he 'was appointed as the true and rightful chief . . .'. The minutes, a copy of which was annexed to the first appellant's founding affidavit deposed to by one Joseph Ncede Khumalo, clearly state that the clan meeting requested that he be appointed as a 'fully-fledged' (volwaardige) chief and not merely as an acting chief.

[9] It is manifest, therefore, that the second appellant was never 'appointed' either as chief or acting chief at the meeting of 31 October 1984. To the contrary, the meeting merely recommended that he be appointed as a chief. The actual appointment was to be made by someone who, in the exercise of his or her authority, would consider the recommendation.

[10] In a verifying affidavit deposed to in support of the respondents' opposition to the order sought by the appellants, Mgobo Khumalo (Mgobo), the youngest of the four sons of the late Chief William Khumalo, made the following averments:

'4.1 . . . I wish to point out that Johan (the first successor in title to the Late Inkosi William, and my eldest brother), was severely incapacitated, and suffered from a debilitating illness. His hands and fingers had been cramped and immobilized into a shrunken claw and he could not move.

4.2 . . .

We believed that Johan had been poisoned to prevent him from taking over as chief. It is for that reason that my brothers and I did not immediately wish to assume office, and were happy to let the Second Applicant act as regent.'

Although his assertion, that the brothers 'did not immediately wish to assume office, and were happy to let the second [appellant] act as regent', is at odds with the minutes of the October 1984 meeting, Mgobo has given an explanation as to why none of the late Chief William Khumalo's issue succeeded him.

[3] Referred to in para 3 above.

[11] At the time of the second appellant's alleged appointment as Chief of Amantungwa the appointment of chiefs and acting chiefs was regulated by section 2 (since repealed) of the Black Administration Act[4]. Section 2(7) read:

'The Governor-General may recognize or appoint any person as a chief of a Black tribe and may make regulations prescribing the duties, powers, privileges and conditions of service of chiefs so recognized or appointed, and of headmen, acting chiefs or acting headmen appointed under sub-section (8). The Governor-General may depose any chief so recognized or appointed.'

Subsection (8) provided:

'The Minister or, if delegated thereto by the Minister, the Secretary for Co-operation and Development, the Under Secretary for Co-operation and Development, or the Chief Commissioner for the area concerned, may appoint any persons as headman over a location or as headman of Blacks in any area and may appoint any persons to act temporarily as a chief or headman in the place of or in addition to the ordinary incumbent of the post or where the post is vacant or there is ordinarily no such post in respect of the tribe, location of Blacks in question, and may depose any headman or acting chief or acting headman so appointed.'[5]

A chief was thus appointed by the Governor-General, while an acting chief was appointed by the responsible Minister or any of his delegates mentioned in subsec (8).

[12] Except for his *ipse dixit* the second appellant provided no evidence of his alleged appointment as Chief of Amantungwa. The deponent to the respondents' answering affidavit, one Gabusile Caroline Gumbi-Masilela, who is the Head of the Department of Local Government for the Province of KwaZulu-Natal, alleged that the reason why the appellants were unable to provide any evidence of the second appellant's appointment as chief was because 'he was in fact appointed as regent . . . or temporary chief under section 2(8) of the Black Administration Act in 1986.' Attached to her affidavit is a document headed 'AANSTELLING', with an English version headed 'APPOINTMENT'. The document (the English version) reads as follows:

'In terms of section 2(8) of the Black Administration Act, 1927 (Act 38 of 1927) I do hereby appoint Latu Robson Helomo Khumalo as temporary Chief of the Khumalo tribe in the Magisterial district of Utrecht.

Dated at Pietermaritzburg this 20 day of March 1986.'[6]

The designation of the person who signed the document is reflected as 'Chief Commissioner'. I shall refer to the document as 'the letter of appointment'.

[13] The letter of appointment was admitted in evidence by the court a quo and that decision was not challenged in this court. In his replying affidavit the second appellant merely said the correspondence

[4] 38 of 1927.

[5] Before its repeal the subsection still referred to the 'Department of Plural Relations and Development', whereas that designation was changed to the "Department of Co-operation and Development' by Proclamation No. R. 179, 1979 in Government Gazette No. 6630 of 24 August 1979, with effect from 20 June 1979.

[6] It was not suggested that the Khumalo Tribe referred to in the letter of appointment is different from Amantungwa.

(including the letter of appointment) that passed between various departmental officials, copies of which were attached to the answering affidavit, and in which he was referred to as 'Tydelike Kaptein' (Temporary Chief) 'was a mistake' and that 'members of the tribe approached the Magistrate's Court on two occasions to rectify this as this was not what the family had agreed upon'. From this statement it is clear, in my view, that the second appellant had been aware of the fact that he had been appointed as acting chief; hence the endeavours by the members of the tribe 'to rectify' the so-called mistake. There is no evidence that the 'mistake' was ever rectified. It follows that the court a quo correctly found that the second appellant was appointed temporary, or acting, Chief of Amantungwa.

[14] Counsel for the appellants contended, however, that because of the effluxion of time and with the advent of constitutionalism in this country, including certain legislative reforms, the appointment of the second appellant as acting chief was altered by operation of law to that of a chief. But counsel was unable to refer us to any legislative provision, or any other law, from which it could be inferred that the status of any person who had been appointed as an acting chief was altered to that of chief, as suggested by him. On the contrary, s 28 (2) of the Traditional Leadership and Governance Framework Act[7] (the Framework Act) provides that a person 'who, immediately before the commencement of this Act, had been appointed and was still recognised as a regent, or had been appointed in an acting capacity . . . is deemed to have been recognised or appointed as such in terms of section 13, 14 or 15, as the case may be'. Section 13 deals with the situation where a successor to a traditional leadership position is still a minor and s15 deals with the appointment of deputy traditional leaders. None of these two sections applies in this case.

[15] In my view, the second appellant falls under s14 (1) (a) which said the following:[8]

'A royal family may, in accordance with provincial legislation, identify a suitable person to act as a king, queen, senior traditional leader, headman or headwoman, as the case may be, where –
'(a) a successor to the position of a king, queen, senior traditional leader, headman or headwoman
has not been identified by the royal family concerned in terms of section 9(1) or 11(1);
. . . .'

Again s 9 (1) does not apply because it deals with the identification of a person as a successor to the position of king or queen. Section 11(1) makes provision for the identification, by the royal family, of a person who qualifies in terms of customary law to assume the position of senior traditional leader, headman or headwoman. In his founding affidavit the second appellant conceded that 'in terms of the customary laws of succession [he] would not have been in line to become chief', but that he was nominated to succeed by 'those who were rightfully supposed to succeed'. There is thus no merit in counsel's submission that the second appellant's status as acting chief was altered to that of chief by operation of law.

[16] The order sought by the appellants is set out in paragraph 4 above. They prayed for an order,

[7] 41of 2003.

[8] At the material time and before it was amended by Act 23 of 2009, which came into effect on 25 January 2010.

inter alia, setting aside the second respondent's decision to remove the second appellant as Chief of Amantungwa and reinstating him as such. The second appellant asserted in his founding affidavit that a traditional leader may only be removed in terms of the grounds outlined in s 21(1) (*a*) of the KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005 (Governance Act).[9] The respondents' case is that the second appellant 'was not removed as chief' and that he had simply acted as regent 'until the chief was recognised, as provided for in s 30 (4) of the [Governance Act]'. That subsection provides that an acting traditional leader (*Ibambabukhosi*) 'must carry out the duties of office on behalf of *Isilo* [king] or *Inkosi* [senior traditional leader], as the case may be, until such time that *Isilo* or *Inkosi* is in a position to assume office'. The respondents accordingly alleged that there was no decision (to remove second appellant) that was capable of being reviewed or set aside.

[17] The Governance Act came into operation on 16 January 2006. As I have mentioned, the second appellant's position as acting chief was governed by s 28 (2), read with s14 of the Framework Act. Section 14 (2) provides that an acting appointment in terms of subsec (1)[10] 'must be made in accordance with provincial legislation . . .'.[11] Section 30 (1) (a) of the Governance Act echoes s 14(1) (*a*) of the Framework Act and directs, inter alia, that *Ibambabukhosi* may only be identified and recognised where 'a successor to the leadership position concerned has not been identified'. I agree, therefore, that where a successor is identified and recognised an acting chief is not 'removed' from office as envisaged in s 21 of the Governance Act. His or her duties come to an end when the successor assumes duty as a chief or traditional leader. That, however, is not the end of the matter.

[18] The appellants also sought an order reviewing and setting aside the second respondent's appointment as Chief of Amantungwa. That order does not depend only on whether or not the second appellant was an acting chief, but also on whether or not the second respondent's appointment was lawful. In his founding affidavit the second appellant asked 'that the decision [of] the First Respondent to remove me be reviewed and set aside as it [was] wrongful and [un]just as I was removed without being given the opportunity to make representations and without the Umndeni [royal family] being consulted'. I have mentioned in paragraph 3 above that in the letter from the Ministry: Local Government Housing and Traditional Affairs, dated 10 October 2007, the second appellant, apart from

[9] Section 21 reads: 'Removal of Traditional leader – (1) A traditional leader may be removed from office on the grounds of-
(*a*) conviction of an offence with a sentence of imprisonment for more than 12 months without an option of a fine;
(*b*) physical incapacity or mental infirmity . . .;
(*c*) wrongful appointment or recognition;
(*d*) a transgression of a customary rule or principle that warrants removal;
(*e*) a breach of the Code of Conduct; or
(*f*) misconduct as contemplated in section 23.'

[10] Subsec (1)(*a*) is quoted in para 15 above.

[11] The provincial legislation in this case is the Governance Act.

being advised that the Executive Council of the Province of KwaZulu-Natal had ‘decided that your services as Acting Chief of Amantungwa be terminated’, was also informed that his ‘removal’ from the position of acting chief ‘will take effect from 31

October 2007'. In view of my finding above that when a successor to a traditional leadership position has been identified and recognised the duties of an acting chief come to an end when the successor assumes duty as chief or traditional leader, I shall accept, for present purposes, that the first respondent was mistaken when he referred to the second appellant's 'removal' from the office of acting chief. But the letter unquestionably reveals that 'a decision' had been taken by the Executive Council that the second appellant's services as acting chief 'be terminated' and that the second respondent 'be appointed as Chief of Amantungwa Tribe'.

[19] Section 19 of the Governance Act says:

'(1) Whenever the position of an *Inkosi* is to be filled, the following process must be followed –

(*a*) *Umndeni wenkosi* must, within a reasonable time after the need arises for the position of an *Inkosi* to be filled, and with due regard to applicable customary law and section 3 –
(i) identify a person who qualifies in terms of customary law to assume the position of an *Inkosi* after taking into account whether any of the grounds referred to in section 21 (1)(*a*), (*b*) or (*d*) apply to that person;
(ii) provide the Premier with the reasons for the identification of that person as an *Inkosi;* and
(iii) the Premier must, subject to subsection (3) of this section and section 3, recognise a person so identified in terms of subsection (1) (*a*) (i) as *Inkosi*: Provided that if the reason for the vacancy is the death of the recognised *Inkosi, Umndeni wenkosi* must, before identifying the person to be recognised as *Inkosi*, consider the content of the testamentary succession document referred to in section 19A.

(2) The recognition of a person as an *Inkosi* in terms of subsection (1) (*a*) (iii) must be done by way of –

(*a*) a notice in the *Gazette* recognising the person identified as an *Inkosi;* and
(*b*) the issuing of a certificate of recognition to the identified person.

(3) The Premier must inform the Provincial House of Traditional Leaders of the recognition or appointment of an *Inkosi.*

. . . .'

The appellants assert in their founding papers that the Umndeni of Amantungwa ought to have been consulted before a decision was taken 'to remove the second appellant as Chief of Amantungwa Tribe'. I have already found that the second appellant was not a chief, but an acting chief. However, the corollary of the assertion made about the Umndeni not having been consulted is that the Umndeni of Amantungwa (*Umndeni wenkosi)*[12] was not consulted in respect of the appointment of the second respondent as Chief of Amantungwa.

[20] It seems to me that the circumstances under which the services of an acting chief (*Ibambabukhosi*) may be terminated are (a) when the *Isilo* or *Inkosi* is in a position to assume office (s 30(4) of the Governance Act), and (b) when the acting chief is removed from office in terms of the

[12] 'Umndeni wenkosi' is defined in the Governance Act as 'the immediate family of an *Inkosi*, who have been identified in terms of custom or tradition, and includes, where applicable, other persons identified as such on the basis of traditional roles.'

provisions of s 21 (see s 30(5)). Only (a) can apply in the present matter, it being common cause that the second appellant could not have been removed on any of the grounds enumerated in s 25. Indeed Ms Gumbi-Masilela testified in the respondents' answering affidavit that the second appellant 'simply acted as regent or acting chief until the chief was recognised, as provided for in s 30(4) of the [Governance Act]'.

[21] Langalibalele Mathenjwa, an erstwhile professor and Acting Head of Department of the University of Zululand, in the department of IsiZulu Namagugu, where he 'dealt with teaching and resource into the Zulu heritage' and presently Provincial Manager of the South African Heritage Resources Agency, set out 'the Zulu laws of hereditary succession' as follows in an affidavit annexed to the respondents' answering affidavit:

'The successor of a deceased Inkosi is appointed on the basis of the Zulu laws of hereditary succession, from within the Royal or Ruling House. That is, the [successor to] the chieftainship is the heir of a deceased chief. In this way succession is retained within the Royal House. In essence the successor to a deceased chief will be the eldest son from the *indlunkulu.* (This means the first or the great house.) If the eldest son is dead or cannot take up the position, then that eldest son's senior male descendant: failing which the second son of the *indlunkulu,* failing him the senior male and so on through the sons of the *indlunkulu* and their descendants. Thereafter the eldest son of the house first affiliated to the *indlunkulu,* failing which the senior male descendant through such house and their descendants in order of seniority, and so on.'

This custom of hereditary succession has not been disputed by the appellants. It must, therefore, be accepted as correct.

[22] It will be recalled that at the meeting of 31 October 1984 none of the sons of the late chief William Khumalo, who could succeed him, wanted to become Chief of Amantungwa. Of the late Chief William's four sons the youngest, Mgobo, still survives him. In terms of the Zulu laws of hereditary succession he is the heir to the chieftainship.

Having given the reasons why he and his older brothers did not wish to succeed their late father as chief[13], Mgobo continued as follows in his verifying affidavit:

'However, my son (the Second Respondent) has now reached majority and we (that is the Umndeni, other members of the royal family and I) wish to regularize the situation and wish a member of the royal family to be appointed as Inkosi, as this would be correct and consistent with applicable laws and customs. We wished the Second Respondent to be appointed as Inkosi and for that reason approached the department which led to his ultimate appointment by the Premier.'

Ms Gumbi-Masilela has deposed in the respondents' answering affidavit that Mgobo 'does not now wish to be appointed as chief as he is over 60 years of age, and does not wish to take up the position due to his frail health'. Clearly, therefore, in terms of the Zulu custom of hereditary succession the second respondent, who, it is common cause, is Mgobo's eldest son, qualifies to assume the position of Chief of Amantungwa.

[23] I agree, however, with counsel for the respondents, that customary law does not override

[13] See para 10 above.

legislative enactments. For the second respondent to be recognised and appointed as Inkosi or Chief of Amantungwa he ought to have been identified by the umndeni wenkosi (s19 of the Governance Act). Before us counsel for the respondents conceded that the second appellant, who testified in his replying affidavit that he 'is a member of the royal/ruling house', qualifies as a member of Umndeni wenkosi. As a member of umndeni wenkosi, and particularly because of his position as acting chief, one would have expected that he would have been part of the process of the identification, recognition and ultimate appointment of the second respondent as Chief of Amantungwa. He has alleged that he has been removed, ie his services have been terminated, without the umndeni having been consulted.

[24] According to Ms Gumbi-Masilela the second appellant was acting as chief from

1986 until 2007 'when the department [of Local Government and Traditional Affairs for the Province of KwaZulu-Natal] received complaints from the Umndeni of the Amantungwa clan that the situation should be regularized, and that an adult male from the rightful house should now be appointed as chief'. In support of these allegations the deponent attached two undated letters to the answering affidavit, one from Mgobo and the other from one Bongani Khumalo, who refers to himself as a 'family member' and 'the son of Mgobo'. In essence, these letters, which were addressed to the head of the department (of Local Government Housing and Traditional Affairs), were calling for the return of the chieftainship to the 'rightful house'. Ms Gumbi-Masilela then continued:

'This led to an investigation by the members of the department. The department has concluded that the umndeni of the Amantungwa Clan have identified the Second Respondent as the person who qualifies in terms of customary law to assume the position of chief.'

Ms Gumbi-Masilela deposed further that the umndeni 'were consulted, and it is they who called for the recognition of the Second Respondent as chief'.

[25] In his replying affidavit the second appellant emphatically denied this assertion and stated:

'I further state that sections 19 and 30 of the [Governance Act] had not been complied with in the following respects.

(a) Umndeni wenkosi never met to appoint the Second Respondent.

(b) We have not been given any reasons by the Premier for the appointment and recognition of the Second Respondent.

. . .

(e) The First Respondent has unilaterally and without reference to customary law and Umndeni consultation recognised and appointed the Second Respondent as Inkosi which recognition is defective . . . .'

In my view, there is no clear and acceptable evidence to show that the Umndeni of Amantungwa ever met to discuss the second respondent's proposed identification as Chief of Amantungwa.

[26] Annexed to the answering affidavit is a geneology of the Amantungwa, which was drawn up by one Favourite Sibongile Mhlongo (Mhlongo), a Deputy Manager: Anthropology in the employ of the Department of Traditional Affairs. According to Ms Masilela-Gumbi the geneology was 'created' by Mhlongo, who advised her that it 'was verified at a meeting with representatives of the Amantungwa clan on 28 September 2006'. (Mhlongo confirmed this in his verifying affidavit.) It is common cause that both deponents to the two founding affidavits were present at that meeting. There was some veiled argument before us that it was at that meeting that the second respondent was identified as the future Chief of Amantungwa. There was no evidence whatsoever in any one of the affidavits before us to

support that argument. The letters from Mgobo and Bongani Khumalo upon which, it appears, the first respondent and the rest of the Provincial Executive Council acted to have the second respondent appointed as Chief of Amantungwa and the second appellant's services as acting chief terminated, are conspicuously silent on any such meeting of Umndeni of Amantungwa. The affidavits of Mgobo and the second respondent, though confirming the contents of Ms Gumbi-Masilela's affidavit (answering) also made no mention of such meeting. Mgobo merely stated that he and other members of the royal family 'wish to regularize the situation, but failed to identify those 'other members'.

[27] In answer to an assertion by the second appellant that the second respondent was at no stage nominated by the Umndeni as Chief of Amantungwa Ms Gumbi-Masilela deposed as follows:

'The Second Appellant is being particularly disingenuous in pretending that he is surprised that the Second Respondent was to be appointed as Inkosi. This had been discussed with him some time ago and indeed [second respondent] lived in the Second [Appellant's] house during 1997 and 1998 for the specific purpose of receiving training to be chief . . . .'

In his verifying affidavit the second respondent confirmed this and said the second appellant 'was well aware of the Umndeni's wishes' that he be appointed as chief and that he specifically resided with the second appellant in the latter's house during 1997 and 1998 to receive training. The second respondent stated further that the idea 'was that I would be so trained until I matriculated'.

[28] It is true that the appellants did not place in dispute the averment that the second respondent lived in the second appellant's house during the period mentioned, but that is not surprising. There was no allegation anywhere in the papers that the Umndeni of Amantungwa ever met to discuss the issue of the second respondent's identification as the next Chief of Amantungwa. A mere expression of wishes by an unknown number of unidentified members of Umndeni of Amantungwa that the second respondent be appointed a chief does not translate into an identification of a successor for recognition and appointment as envisaged by the provisions of s19 of the Governance Act.

[29] In his letter of 10 October 2007 addressed to the second appellant the first respondent said, inter alia:

'Mgobo is the one who wrote a letter to the Department that it is now time that the Chieftainship of Amantungwa Tribe be restored to the rightful house. That was discussed at the meeting of 18th September 2006, at Madadeni Magistrate's Office after a family tree was drawn . . .'[14]

I have already mentioned that Mgobo and Bongani Khumalo made no reference, in their letters, to a meeting where the matter was discussed; nor did Mgobo and the second respondent do so in their verifying affidavits. The source of the information at the disposal of the first respondent that the issue was discussed at the Madadeni Magistrate's Office remains unidentified, while the second appellant was

[14] The date 18 September 2006 might be incorrect. Ms Gumbi-Masilela's affidavit gave the date on which the geneology was prepared as 28 September 2006.

emphatic that no such meeting took place. Mhlongo, who prepared the geneology, also made no mention of a meeting at which the second respondent was identified as the next Chief of Amantungwa.

[29] It is manifest, therefore, that the reason for the termination of the second appellant's services as Acting Chief of Amantungwa had no foundation in that there was no proper identification of a person who qualified to fill the position of chief. The question to be considered next is what order should be made.

[30] Counsel for the respondents submitted that if it is found, as indeed I have, that the second appellant was never appointed as a chief, but rather as an acting chief, the appeal fell to be dismissed precisely because the appellants sought an order that the second appellant be reinstated as a chief. It seems to me, however, that in the event of the appellants being successful on the issue of the validity of the appointment of the second respondent and were that appointment to be set aside, it would follow that the second appellant would continue in his position as Acting Chief of Amantungwa. However, the order sought that the appointment of the second respondent as chief be reviewed and set aside is problematic. The respondent raised a point in limine, in their answering affidavit, that the application be dismissed for failure by the appellants to join the Premier of the Province of KwaZulu-Natal as a respondent. In the respondents' answering affidavit Ms Gumbi-Masilela testified that 'whenever the position of a chief is to be filled the Premier must recognise the person identified by the umndeni wenkosi' and that 'it is evident from [this] that the relevant decision maker is the Premier'. Section 19(1)(*a*)(iii) of the Governance Act provides that the Premier must recognise a person who has been 'identified in terms of subsection (1)(*a*)(i) as *Inkosi'.*[15]

[31] In view of the findings I have made above, counsel were requested to make further written submissions on what an appropriate order would be. I am indebted to them for their very helpful additional submissions.

[32] The appellant sought orders reviewing and setting aside the first respondent's decision to remove the first appellant as Chief of Amantungwa; reviewing and setting aside the appointment of the second respondent as Chief of Amantungwa and reinstating the first appellant as chief. In his letter to the first appellant dated 11 October 2007 the first respondent stated that the Executive Council of the Province of KwaZulu-Natal had decided to terminate the first appellant's services and that the second respondent be appointed as Chief of Amantungwa. The appointment or recognition of a chief in the Province of KwaZulu-Natal, however, is made by the Premier in terms of s 19 of the Governance Act. Ms Gumbi-Masilela confirmed in the answering affidavit that after the Executive Council had considered the matter 'the Premier duly appointed the Second Respondent as chief of the clan'.

[15] The subsection reads:'(a) *Umdeni wenkosi* must within a reasonable time after the need arises for the position of an *Inkosi* to be filled, and with due regard to applicable customary law and section 3-
(i) identify a person who qualifies in terms of customary law to assume the position of an *Inkosi* . . . .'

[33] The Premier has not been cited as a respondent before the court a quo. Nor was he joined after the respondents had raised the non-joinder as a point in limine. His act of appointing the second respondent as chief is sought to be reviewed and set aside in his absence. For his argument that the order prayed can, and should, be granted, counsel for the appellants sought support in the decisions of this court in *Yellow Star Properties 1020 (Pty) Ltd v MEC, Department of Development Planning and Local Government, Gauteng*[16] and *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd.*[17] I find it unnecessary to set out counsel's argument since, in any event, I am of the view that both decisions do not support him; they are in fact against him.

[34] The first case was an application for leave to appeal to this court. The appellant had instituted proceedings against the respondent and the Minister of Land Affairs for an order compelling them to transfer certain fixed property it had purportedly purchased from the respondent. It had transpired, after the conclusion of the purported sale agreement, that the property was owned by national government. And so transfer of the property could only be effected after the respondent had obtained a certain certificate from the Minister of Land Affairs. It turned out, however, that the value of the property was much more than the purchase price and for this reason the Ministry of Public Works, to whom the administration of the property had been assigned by the President of the country, refused to sanction the transfer. When the matter came before Van der Walt J in the Pretoria High Court a copy of the necessary certificate in respect of the property, issued by the Minister of Land Affairs, was handed to the learned judge and he granted an order authorizing the registrar of deeds to effect transfer upon receipt of the certificate (presumably the original). No such certificate was ever issued as the national government persisted in opposing the transfer. When it heard rumours that the property was being subdivided the appellant sought an urgent order against the respondent, the Minister of Land Affairs and the registrar of deeds, restraining them from effecting any subdivision; and a further order directing the registrar of deeds to be satisfied with a copy of the necessary certificate for purposes of effecting transfer. The Ministry of Public Works then successfully applied to intervene as a party. Because of certain developments the interdictory part of the application fell away, but the appellant persisted in claiming transfer of the property. The court (Smit J) dismissed the application on the grounds that the Minister of Public Works had the power, as assigned to her by the State President, to dispose of land owned by

[16] 2009 (3) SA 577 (SCA).
[17] 2010 (3) SA 589 (SCA).

national government; that the respondent had not been authorized in law to sell the property; that the sale of the property to the applicant had been ultra vires and void *ab initio* and that there was thus no *causa* for the transfer.

[35] The applicant thereafter sued the respondent for damages for breach of contract, alleging that the latter had failed or refused to transfer the property to it. In a special plea the respondent pleaded, inter alia, that the issues of the validity of the contract and the absence of a causa for the property to be transferred had been finally decided by Smit J and that it was accordingly not open to the applicant to raise them in its claim. Reliance was thus placed on the defence of *res judicata* or 'issue estoppel'. The applicant, at the trial, also relied on *res judicata* or 'issue estoppel', its case being that the validity of the sale had been finally determined between the parties by Van der Walt J and was *res judicata* when it came before Smit J. The trial court (Gildenhuys J) upheld the respondent's special plea and dismissed the applicant's action. In dismissing the application for leave to appeal in this court Leach AJA said the following[18] after referring to ss 91(2)[19] and 92(1)[20] of the Constitution and s 2(1) of the State Liability Act 20 of 1957[21]:

'While the two different ministers whom the applicant sued in cases 15278/2001 and 4578/2002 are members of the same sphere of government, the President has assigned to them separate and distinct powers and functions. Each can only exercise those powers and functions that were individually bestowed on her. They cannot act on behalf of each other in performing a public function, nor can one be validly sued in circumstances in which the law authorises the institution of proceedings against the other. Therefore, the Minister of Public Works, who was not a party to the proceedings in case 15278/2001 [before Van der Walt J], cannot be bound by a decision on an issue arising in that case and the applicant had failed to establish the necessary requirement of *idem actor.'*

[36] The second case concerned the validity of a paragraph in a notice in a *Gazette* issued by the Minister of Finance in terms of which a council was empowered to estimate the amount of any levy prescribed by the Regional Services Council Act 109 of 1985. Section 12(1)(b) of that Act empowered the Minister of Finance 'to determine the manner in which the regional services levy and regional establishment levy shall be calculated and paid'. The appellant had, on the strength of the notice, sought to recover a certain amount plus interest from the respondent. The amount claimed was alleged to be an estimated assessment of regional services and regional establishment levies owed to the

[18] At para 28.

[19] Section 91(2) reads: 'The President appoints the Deputy President and Ministers, assigns their powers and functions, and may dismiss them.'

[20] Section 92 (1) reads: 'The Deputy President and Ministers are responsible for the powers and functions of the executive assigned to them by the President'.

[21] Section 2 reads: '(1) In any action or other proceedings instituted by virtue of the provisions of section *one*, the Minister of the department concerned may be cited as nominal defendant or respondent.

(2) For the purposes of subsection (1), "Minister" shall, where appropriate, be interpreted as referring to a member of the Executive Council of a province.'

appellant by the respondent in terms of s12 (1) of Act 109 of 1985 read with the Notice. The respondent resisted the claim on the basis that the Minister of Finance had acted ultra vires the empowering provisions of s12 of that Act when he made the regulation contained in the paragraph in issue, with the consequence that the levies claimed on the basis of estimates made under its provisions were unenforceable. On appeal to this court the appellant argued that the respondent's defence should have failed because the Minister of Finance had not been joined and that the validity of the Notice, being a constitutional issue, could not be determined in the absence of the maker of the Notice.

[37] This court rejected this argument and held that –

'. . . the respondent did not ask to have paragraph 11 (1) set aside. It merely contends that its provisions are unlawful for exceeding the powers of the enabling legislation, and cannot found a basis for the collection of the levies sought to be recovered from it. In other words, the respondent seeks to repel the council's coercive action, i.e. the collection of the levies, whose legal force lies in the legal validity of the provisions made by the Minister empowering the council to collect the levies.'[22]

It was thus not necessary to join the Minister of Finance in that case because the regulation he had made in the paragraph concerned was not sought to be set aside.

[38] The issue of joinder does not depend on the nature of the subject-matter of the proceedings before a court, but rather 'on the manner in which, and the extent to which, the Court's order may affect the interests of third parties.'[23] Subsequent to the dismissal of its appeal in the *Cable City* case the appellant sought leave from the Constitutional Court to appeal further to it. In dismissing the application for leave to appeal the Constitutional Court made the following comment:

'It is in general imperative that a party affected by a ruling should be joined in those proceedings.'[24]

In the instant matter the Premier of the Province, being the only member of the Executive Council empowered by the Governance Act to recognise and appoint chiefs, clearly has a direct and substantial interest in the order sought to set aside the appointment of the second respondent as Chief of Amantungwa. He would be directly affected by a ruling to that effect. He should have been joined and failure to do so is fatal to the appellants' case.

[39] I have chosen to deal fully with the facts of the matter and its history so as to show that the appointment of the second respondent as Chief of Amantungwa, which resulted in the termination of the second appellant's services as acting chief, was flawed for want of compliance with the peremptory procedure provided for in s19 of the Governance Act. In my view, the appellants were justifiably aggrieved by the actions of the Executive Council and should not, in these circumstances, be burdened

[22] Per Maya JA, para 16.

[23] *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637(A) at 657.

[24] *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* 2010 (5) BCLR 445 (CC) para 12.

with a costs order against them. It would be fair, in my view, to make no order as to the costs of the appeal.

[40] In the result the appeal is dismissed.

L Mpati

President

APPEARANCES

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