



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 84/12  
[2013] ZACC 18

In the matter between:

JUSTICE MPONDOMBINI SIGCAU

Applicant

and

PRESIDENT OF THE REPUBLIC OF  
SOUTH AFRICA

First Respondent

COMMISSION ON TRADITIONAL  
LEADERSHIP DISPUTES AND CLAIMS

Second Respondent

CHAIRPERSON OF THE COMMISSION ON  
TRADITIONAL LEADERSHIP DISPUTES  
AND CLAIMS

Third Respondent

ZANOZUKO TYELOVUYO SIGCAU

Fourth Respondent

MINISTER FOR LOCAL GOVERNMENT AND  
TRADITIONAL AFFAIRS

Fifth Respondent

PREMIER: EASTERN CAPE PROVINCE

Sixth Respondent

NATIONAL HOUSE OF TRADITIONAL LEADERS

Seventh Respondent

EASTERN CAPE HOUSE OF TRADITIONAL LEADERS

Eighth Respondent

IKUMKANI AMAMPONDO ASE NYANDENI

Ninth Respondent

together with

CENTRE FOR LAW AND SOCIETY

Amicus Curiae

Heard on : 21 February 2013

Decided on : 13 June 2013

---

JUDGMENT

---

THE COURT: Mogoeng CJ, Moseneke DCJ, Froneman J, Jafta J, Mhlantla AJ, Nkabinde J, Skweyiya J, Van der Westhuizen J and Zondo J

*Introduction*

[1] The amaMpondo people have played a significant part in the history of resistance to oppression in this country. Under the leadership of Faku, who ruled from 1824 to 1867, the amaMpondo defended themselves in the Mfecane wars and extended their sphere of influence.<sup>1</sup> Their land was only colonised in 1894.<sup>2</sup> In 1960, during apartheid, the people rebelled in the “Pondoland Uprising”.<sup>3</sup> It is ironic that both the rise of Faku and the uprising in 1960 still resonate, at different levels, in this dispute.

[2] It is a dispute about who the rightful *ikumkani*, or king, of the amaMpondo aseQaukeni is. The relevance of Faku’s kingship lay in his manner of accession and the split of the kingdom into the amaMpondo aseQaukeni (referred to as the Eastern

---

<sup>1</sup> Kepe and Ntsebeza (eds) *Rural Resistance in South Africa: The Mpondo Revolts after Fifty Years* (Brill, UCT Press, Cape Town 2011) at 116.

<sup>2</sup> Pieterse *Traditionalists, traitors and sell outs: the roles and motives of ‘amaqaba’, ‘abangcatshi’ and ‘abathengisi’ in the Pondoland Revolt of 1960 to 1961* (unpublished Master’s thesis, University of Pretoria, 2007) at 34-5.

<sup>3</sup> Mbeki *South Africa: The Peasants’ Revolt* (Penguin Books, Harmondsworth 1964) at 116. See also Pieterse above n 2 at 52ff.

Pondo) and the amaMpondo aseNyandeni (referred to as the Western Pondo). The relevance of the uprising is that some say that its cause lay in the disputed kingship of the amaMpondo aseQaukeni.<sup>4</sup>

[3] That dispute erupted in 1937 after the then *ikumkani*, Mandlonke, died without leaving male issue. This led to competing claims between two of Mandlonke's brothers, Botha and Nelson Sigcau. The dispute was statutorily settled when Botha Sigcau was recognised as the "paramount chief" of the Eastern Pondo in terms of the Black Administration Act.<sup>5</sup> We say "statutorily settled", because it was not settled customarily. The dispute re-erupted when Botha Sigcau died, this time between his son (applicant) and Zwelidumile Sigcau, the son of Nelson and the father of the fourth respondent. The applicant won this statutory battle and was appointed paramount chief in his father's footsteps under the Traditional Leadership and Governance Framework Act<sup>6</sup> (old Act). Now, some seventy-five years after the death of Mandlonke, the dispute flared up again, this time between the applicant and the fourth respondent. It is necessary to explain why and how.

#### *Constitutional and legal framework*

[4] The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution. Sections 211 and 212 of the Constitution provide:

---

<sup>4</sup> Mbeki above n 3 at 118.

<sup>5</sup> 18 of 1927.

<sup>6</sup> 41 of 2003.

“211 **Recognition**

- (1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
- (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.
- (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

212 **Role of traditional leaders**

- (1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.
- (2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law—
  - (a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and
  - (b) national legislation may establish a council of traditional leaders.”

[5] The old Act provided the framework envisaged in section 212(1) of the Constitution. It was amended in 2009 by the Traditional Leadership and Governance Framework Amendment Act<sup>7</sup> (new Act).

[6] The old Act provided for the recognition of traditional communities,<sup>8</sup> the establishment, and recognition of traditional councils and withdrawal of recognition of

---

<sup>7</sup> 23 of 2009.

<sup>8</sup> Section 2 of the old Act.

traditional communities,<sup>9</sup> and for the functions of traditional councils.<sup>10</sup> It recognised three leadership positions within the institution of traditional leadership: kingship, senior traditional leadership and headmanship.<sup>11</sup> For present purposes only the provisions relating to kingship need closer attention.<sup>12</sup>

[7] The recognition and removal of kings and queens under the old Act would, in the normal course, proceed in terms of sections 9 and 10. Both these sections require the involvement of the royal family concerned.<sup>13</sup>

---

<sup>9</sup> Id sections 3 and 7.

<sup>10</sup> Id sections 4 and 5.

<sup>11</sup> Id section 8.

<sup>12</sup> Although section 8(a) of the old Act speaks of “Kingship” only, the further provisions envision the recognition of both kings and queens.

<sup>13</sup> Sections 9 and 10 of the old Act provide:

**“Recognition of kings and queens**

- 9 (1) Whenever the position of a king or a queen is to be filled, the following process must be followed:
- (a) The royal family must, within a reasonable time after the need arises for the position of a king or a queen 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 of a king or a queen, as the case may be, after taking into account whether any of the grounds referred to in section 10(1)(a), (b) and (d) apply to that person; and
    - (ii) through the relevant customary structure—
      - (aa) inform the President, the Premier of the province concerned and the Minister, of the particulars of the person so identified to fill the position of a king or a queen;
      - (bb) provide the President with reasons for the identification of that person as a king or a queen; and
      - (cc) give written confirmation to the President that the Premier of the province concerned and the Minister have been informed accordingly; and
  - (b) the President must, subject to subsection (3), recognise a person so identified in terms of paragraph (a)(i) as a king or a queen, taking into account—

- 
- (i) the need to establish uniformity in the Republic in respect of the status afforded to a king or queen;
  - (ii) whether a recognised kingship exists—
    - (aa) that comprises the areas of jurisdiction of a substantial number of senior traditional leaders that fall under the authority of such king or queen;
    - (bb) in terms of which the king or queen is regarded and recognised in terms of customary law and custom as a traditional leader of higher status than the senior traditional leaders referred to in subparagraph (aa), and
    - (cc) where the king or queen has a customary structure to represent the traditional councils and senior traditional leaders that fall under the authority of the king or queen; and
  - (iii) the functions that will be performed by the king or queen.
- (2) The recognition of a person as a king or a queen in terms of subsection (1)(b) must be done by way of—
- (a) a notice in the *Gazette* recognising the person identified as king or queen; and
  - (b) the issuing of a certificate of recognition to the identified person.
- (3) Where there is evidence or an allegation that the identification of a person referred to in subsection (1) was not done in accordance with customary law, customs or processes, the President—
- (a) may refer the matter to the National House of Traditional Leaders for its recommendation; or
  - (b) may refuse to issue a certificate of recognition; and
  - (c) must refer the matter back to the royal family for reconsideration and resolution where the certificate of recognition has been refused.
- (4) Where the matter which has been referred back to the royal family for reconsideration and resolution in terms of subsection (3) has been reconsidered and resolved, the President must recognise the person identified by the royal family if the President is satisfied that the reconsideration and resolution by the royal family has been done in accordance with customary law.
- (5) (a) The President may, by notice in the *Gazette*, make regulations concerning—
- (i) the traditional or ceremonial role of a king or queen;
  - (ii) the responsibilities of a king or queen in respect of nation building; and
  - (iii) other functions or roles of a king or queen.
- (b) Regulations made in terms of paragraph (a) must be tabled in Parliament after their publication in the *Gazette*.

**Removal of kings or queens**

- 10 (1) A king or queen may be removed from office on the grounds of—

[8] Disputes concerning leadership positions within the institution of traditional leadership<sup>14</sup> had to be resolved by the Commission on Traditional Leadership Disputes and Claims<sup>15</sup> (Commission), the second respondent. The Commission had the authority to investigate, either on request or of its own accord, cases of doubt as to whether a kingship, senior traditional leadership or headmanship was established in

- 
- (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 which, based on acceptable medical evidence, makes it impossible for the king or queen to function as such;
  - (c) wrongful appointment or recognition; or
  - (d) a transgression of a customary rule or principle that warrants removal.
- (2) Whenever any of the grounds referred to in subsection (1)(a), (b) and (d) come to the attention of the royal family and the royal family decides to remove a king or queen, the royal family must, within a reasonable time and through the relevant customary structure—
- (a) inform the President, the Premier of the province concerned and the Minister, of the particulars of the king or queen to be removed from office;
  - (b) furnish reasons for such removal; and
  - (c) give written confirmation to the President that the Premier of the province concerned and the Minister have been informed accordingly.
- (3) Where it has been decided to remove a king or queen in terms of subsection (2), the President must—
- (a) withdraw the certificate of recognition with effect from the date of removal;
  - (b) publish a notice with particulars of the removed king or queen in the *Gazette*; and
  - (c) inform the royal family concerned, and the removed king or queen of such removal.
- (4) Where a king or queen is removed from office, a successor in line with customs may assume the position, role and responsibilities, subject to section 9.”

<sup>14</sup> For those not resolved internally within a traditional community or customary institution: see section 21(1)(a) and (2) of the old Act.

<sup>15</sup> The Commission was established under section 22 of the old Act.

accordance with customary law and customs,<sup>16</sup> and where the title or the right of the incumbent to a traditional leadership position was contested.<sup>17</sup>

[9] Section 25(3)(a) and (b) of the old Act provided that:

- “(a) When considering a dispute or claim, the Commission must 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.
- (b) The Commission must—
  - (i) in respect of a kingship, be guided by the criteria set out in section 9(1)(b) and such other customary norms and criteria relevant to the establishment of kingship; and
  - (ii) in respect of a senior traditional leadership or headmanship, be guided by the customary norms and criteria relevant to the establishment of a senior traditional leadership or headmanship, as the case may be.”

[10] Section 26 regulated the decisions of the Commission, and provided that:

- “(1) A decision of the Commission is taken with the support of at least two thirds of the members of the Commission.
- (2) A decision of the Commission must, within two weeks of the decision being taken, be conveyed to—
  - (a) the President for immediate implementation in accordance with section 9 or 10 where the position of a king or queen is affected by such a decision; and
  - (b) the relevant provincial government and any other relevant functionary which must immediately implement the decision of the Commission in accordance with applicable provincial legislation in so far as the implementation of the decision does not relate to the recognition or removal of a king or queen in terms of section 9 or 10.

---

<sup>16</sup> Section 25(2)(a)(i) of the old Act.

<sup>17</sup> Id section 25(2)(a)(ii).



(3) Any decision taken by the Commission must be conveyed to the President.”

[11] As will be seen later, the provisions of the new Act are only relevant to a limited extent and need not be dealt with here in any detail. To return, then, to the facts.

### *Facts*

[12] The Commission was entrusted by the President with the task of establishing whether the existing traditional leadership structures and positions were in accordance with customary laws and customs. The Commission embarked on an extensive investigation, in two phases: the first dealing with the structures, the second with individual or incumbent disputes. Of relevance to this matter is that it decided, in relation to the latter issue, that the fourth respondent was the rightful king of the amaMpondo aseQaukeni, not the incumbent, the applicant.

[13] The Commission took this decision on 21 January 2010. Its term of office came to an end on 31 January 2010. It was only some time later, that the President made the decision public in a government notice.<sup>18</sup>

[14] Even before the notice was issued the applicant sought to set aside the Commission’s decision in the North Gauteng High Court, Pretoria (High Court). The application was ultimately unsuccessful. Attempts for leave to appeal to the Supreme

---

<sup>18</sup> *Government Gazette*, 33732 5 November 2010.

Court of Appeal also failed. The applicant now seeks leave to appeal against the High Court judgment in this Court.

*Leave to appeal*

[15] From the discussion of the constitutional and legal framework it is apparent that the institution of traditional leadership and the determination of who should hold positions of traditional leadership have important constitutional dimensions. Resolution of this festering dispute troubling the amaMpondo needs to be constitutionally clarified. It is in the interests of justice to do so. Leave to appeal must be granted.

*Issues on appeal*

[16] The applicant attacked the High Court's finding on procedural and substantive grounds. Procedurally, he contends that the Commission and President erred in not following the prescripts of sections 9 and 10 of the old Act in the applicant's removal and that the President issued the notice of the removal of the applicant and the recognition of the fourth respondent in terms of the new Act, which he was not entitled to do. He also contends that the High Court erred in not finding that the Commission's finding was substantively wrong in its acceptance that in the customary law and customs of amaMpondo the right-hand house never succeeds and that amaMpondo practised a system in terms of which an issue born of *iqadi*<sup>19</sup> at the level of kingship takes precedence over the right-hand house.

---

<sup>19</sup> Meaning the left-hand house in isiXhosa.

[17] Only the first, second, third and fifth respondents (respondents) actively took part in the proceedings in this Court. They accepted that the old Act applied, but contended that the President's notice, although issued in terms of the new Act, was substantively compatible with the old Act and should be treated accordingly. They disputed that the President had to follow the sections 9 and 10 route, but contended that the Commission in any event substantively complied with the sections' consultation and participation requirements in its determination of the dispute.

[18] The Centre for Law and Society (Centre) was admitted as a friend of the court (*amicus curiae*). Its submissions were restricted to the approach that the Commission and the President should have adopted in the process of appointing a king under customary law. It contended that this entailed a recognition of this Court's jurisprudence emphasising the 'living' aspect of customary law; that historical 'rules' or 'principles' of customary law were often after-the-fact rationalisations of what was, in its 'living' aspect, pragmatic decisions based on what best served the community; and that this approach was not apparent in the President's and the Commission's approach.

[19] The issues to be resolved are the following:

- (a) Which Act applies: the old or the new?
- (b) If the old Act applies—

- (i) What effect does this have on the notice issued under the new Act?
  - (ii) Did the Commission and President need to follow the provisions of sections 9 and 10 of the old Act?
  - (iii) If so, was this substantially done?
- (c) Did the Commission substantively err in its approach and finding?

*Old or new Act?*

[20] The respondents conceded that the provisions of the old Act applied to the Commission's decision. This concession was properly and correctly made. The ordinary rule of our law is that statutes operate only prospectively.<sup>20</sup> A distinction was often made between substance and procedure which then allowed rules that affected only procedural matters to operate retrospectively. In *Unitrans*<sup>21</sup> the Supreme Court of Appeal refined this to a distinction between cases where the amending procedures come into effect before the old procedures had been initiated and situations where the amendments only come into effect after the old procedures had been initiated.<sup>22</sup> In the latter case, unless a contrary intention is clear from the amendment, the old procedure remains intact.<sup>23</sup>

---

<sup>20</sup> See *Veldman v Director of Public Prosecutions, (Witwatersrand Local Division)* [2005] ZACC 22; 2007 (3) SA 210 (CC); 2007 (9) BCLR 929 (CC) at paras 48-53 and 68.

<sup>21</sup> *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission and Others; Transnet Ltd (Autonet Division) v Chairman, National Transport Commission, and Others* [1999] ZASCA 40; 1999 (4) SA 1 (SCA) (*Unitrans*).

<sup>22</sup> *Id* at para 17.

<sup>23</sup> *Id* at para 19.

[21] In the present case the Commission investigated and made its decision on 21 January 2010, before the new Act came into operation.<sup>24</sup> The Commission's procedures were thus initiated and substantially completed under the old Act. The procedures under the old Act thus remained in place to be followed in respect of the final stage of the procedure, that is, the President's notice.

*President's notice under the new Act*

[22] It is clear from the notice above<sup>25</sup> that the President purported to give effect to the Commission's decision under the provisions of the new Act.

[23] The provisions of the new Act in relation to the proceedings of the Commission are different from the provisions of the old Act. It is not necessary to set out and analyse the differences in detail. Suffice it to point out that under the old Act the Commission was authorised to make "decisions" in respect of disputes referred to it,<sup>26</sup> but under the new Act it could only make recommendations.<sup>27</sup> The procedure for dealing with the Commission's recommendations under the new Act<sup>28</sup> also differs

---

<sup>24</sup> It came into operation on 25 January 2010.

<sup>25</sup> See above n 18.

<sup>26</sup> See [10] above.

<sup>27</sup> Section 25(2)(a) of the new Act provides that "[t]he Commission has authority to investigate 'and make recommendations on . . . ' various matters."

<sup>28</sup> Section 26 of the new Act provides:

**"Recommendations of the Commission**

- (1) A recommendation of the Commission is taken with the support of at least two thirds of the members of the Commission.
- (2) A recommendation of the Commission must, within two weeks of the recommendation having been made, be conveyed to—

materially from the process of implementation of the Commission's decisions under the old Act.<sup>29</sup>

[24] The implementation of the Commission's decisions under the old Act could thus not be done under the provisions of the new Act. In argument it was suggested that reference to the provisions of the new Act in the notice was a mistake. The problem with this, however, is that nowhere in the papers does the President say that it was a mistake.

[25] On the contrary, a perusal of the notice indicates that the President elected to invoke the new Act. The notice is titled: "Recognition of Kingships and Kings in the Republic of South Africa". The first part of it reads:

"In terms of section 28(8) read with section 2A of the Traditional Leadership and Governance Framework Act, 2003 (Act No 41 of 2003) (the Act), I Jacob

- 
- (a) the President and the Minister where the position of a king or queen is affected by such a recommendation; and
  - (b) the relevant provincial government and any other relevant functionary to which the recommendation of the Commission applies in accordance with applicable provincial legislation in so far as the consideration of the recommendation does not relate to the recognition or removal of a king or queen in terms of section 9, 9A or 10.
  - (3) The President or the other relevant functionary to whom the recommendations have been conveyed in terms of subsection (2) must, within a period of 60 days make a decision on the recommendation.
  - (4) If the President or the relevant functionary takes a decision that differs with the recommendation conveyed in terms of subsection (2), the President or the relevant functionary as the case may be must provide written reasons for such decision.
  - (5)
    - (a) The Premiers must, on an annual basis and when requested by the Minister, provide the President and the Minister with a report on the implementation of their decisions on the recommendations of the Commission.
    - (b) A copy of the report referred to in paragraph (a) must be submitted to the relevant provincial house for noting."

<sup>29</sup> See [10] above.

Gedleyihlekisa Zuma, President of the Republic of South Africa, hereby recognize the following Kingships and Kings”.

[26] After listing the recognised Kingships and the incumbent Kings, the notice further states: “In terms of section 2A of the Act, I hereby recognise the following kingship” and then refers to the VhaVenda Kingship. The notice then continues to state:

“In terms of section 28(9) of the Act, I further hereby recogni[s]e the following deemed kingships and kings, which recognition will lapse on the death of the incumbent king or as provided in terms of section 28(9)(c) of the Act”.

This demonstrates that the President did not choose to use the old Act because it did not have a section 28(8) or (9). Neither did it have a section 2A.

[27] Because of the material differences between the old Act and the new Act, some of which have been highlighted, it cannot be said that a notice issued under the new Act can be taken to have been issued under the old Act. In any event such an argument would be inconsistent with the decision of this Court in *Harris*.<sup>30</sup>

[28] The notice must be set aside. The President purported to exercise powers not conferred on him by the provisions of the old Act.

[29] This finding makes it unnecessary to deal with any of the other issues.

---

<sup>30</sup> *Minister of Education v Harris* [2001] ZACC 25; 2001 (4) SA 1297 (CC); 2001 (11) BCLR 1157 (CC) at paras 17-8.

*New evidence*

[30] At a late stage, after the oral hearing, the respondent applied to present new evidence relating to the date when the Commission informed the President of its decision and references to passages in the record which allegedly showed the extent of consultation the Commission had before making its decision. The application to lead further evidence is dismissed because it was late and the evidence is in any event immaterial to the outcome of the matter.

*Order*

[31] The following order is made:

1. Leave to appeal is granted.
2. The application to lead further evidence is refused.
3. The appeal is upheld.
4. The order of the North Gauteng High Court, Pretoria, is set aside.
5. The notices of the President (Presidential Minute 407 and *Government Gazette* No. 33732) dated 3 November 2010 and 5 November 2010, respectively, are set aside insofar as they relate to the applicant, Justice Mpondombini Sigcau and the fourth respondent, Zanozuko Tyelovuyo Sigcau.
6. The President of the Republic of South Africa is ordered to pay the applicant's costs in the North Gauteng High Court, Pretoria and the Supreme Court of Appeal, and in this Court, including the costs of two counsel, where applicable.



For the Applicant:

Advocate PM Mtshaulana SC and  
Advocate PG Seleka instructed by  
Webber Wentzel.

For the First to Third and Fifth  
Respondents:

Advocate N Arendse SC, Advocate D  
Borgström and Advocate T Lupuwana  
instructed by Bhadrish Daya Attorneys.

For the Amicus Curiae:

Advocate T Ngcukaitobi instructed by  
Legal Resources Centre.