IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION: MTHATHA]

CASE NO. 3501/2019

In the matter between:

KING PAHLO ROYAL FAMILY	**1st Applicant**
LUZUKO MATIWANE	**2nd Applicant**
and	
SIMPHIWE SYDWELL MOLOSI	**1st Respondent**
NTOMBENKONZO MASETI	**2nd Respondent**
DOSINI ROYAL FAMILY	**3rd Respondent**
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**4th Respondent**
THE MINISTER OF CO-OPERATIVE GOVERANCE AND TRADITIONAL AFFAIRS	**5th Respondent**
THE PREMIER OF THE EASTERN CAPE	**6th Respondent**

JUDGMENT

JOLWANA J:

Introduction

[1] Before me are three interrelated applications all relating to the same matter in which this Court delivered judgment on the 14 January 2020 in respect of the main application. I have considered it convenient and less confusing to refer to the parties as they were in the main application, save where otherwise indicated. The fourth, fifth and sixth respondents did not participate in these proceedings. For this reason, I shall refer to the first, second and third respondents as "the respondents" for the sake of brevity, save where otherwise indicated.

[2] First is an application for leave to appeal made by the respondents against the whole judgment and orders in the main application. In essence in those orders this Court declared invalid the third respondent's resolution in which it identified the second respondent as a queen of AmaMpondomise. The third respondent was also declared not to be a royal family for purposes of identifying a king or queen in terms of section 9(1)(*a*) of the Traditional Leadership and Governance Framework Act 41 of 2003 (the Framework Act) to assume kingship or queenship of AmaMpondomise which was left vacant by the late king Mhlontlo. The respondents were also interdicted from identifying a person to assume a kingship or queenship of AmaMpondomise, which is a position which was left vacant by king Mhlontlo. The fifth and fourth respondents were directed to consider the first applicant's resolution in terms of which it identified the second applicant as the king of AmaMpondomise in terms of section 9(1)(*b*) of the Framework

Act. The respondents were also ordered to pay the costs of the main application, including costs occasioned by the employment of two counsel.

[3] The applicants oppose the application for leave to appeal. They have also filed an application in terms of section 18 of the Superior Courts Act 10 of 2013 (the section 18 application) for the execution of the judgment and orders referred to above pending the finalisation of any appeal and further appeals. The section 18 application is opposed by the respondents.

[4] Upon being served with papers in respect of the section 18 application, the respondents launched an application in terms of rule 30*A* of the Uniform Rules of Court (the rule 30*A* application) to set aside the applicants' section 18 application in its entirety. It goes without saying that the rule 30*A* application is opposed by the applicants.

[5] This judgment is in respect of all the three applications. I deal with them *ad seriatim*. In doing so I will start with the application for leave to appeal, followed by the rule 30*A* application and lastly the section 18 application.

The application for leave to appeal.

[6] It appears from the numerous grounds of appeal that the appeal in essence is against the reasons for the judgment delivered on the 14 January 2020, including its *obiter dicta*. But very little is being said about the orders in the grounds of appeal; the orders not even being mentioned in the application for leave to appeal save for the following vague reference:

> "55. The Honourable Court further erred in granting a prohibitory interdict against the applicants. In essence, the Honourable Court not only created a situation where the constitutional right to exercise tradition and custom by the applicants, but also in limiting the applicant's right to the remedies provided for a constitutional legislation.
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> 56. The Honourable Court ultimately made an incorrect judgment and order and it is submitted that the prospects of success on appeal are reasonable and it is probable that another court would find differently on both the judgment and even the question of costs."

[7] Even this indirect reference to the prohibitory interdict does not seem to be based on its requirements for not having been established or the discretion having not been exercised by the court properly. I can only assume from what is being said about the prohibitory interdict that the ground of appeal in relation thereto is that because what was interdicted was the exercise of a constitutional right, therefore the interdict should not have been granted. The basis on which the exercise of the constitutional rights may not be interdicted or was wrongly interdicted is however not addressed at all. There is not even an indirect reference to a discretion having been exercised improperly in granting the interdict.

[8] The grounds of appeal based on the reasons for the judgment and not on the orders themselves is problematic in many ways. One of the difficulties with an over emphasis on the reasons for the judgment and an almost complete disregard of the orders granted is that it suggests that because the reasoning could have been different, the orders are incorrect. Put differently, because one disagrees with the reasoning therefore, the orders so granted are necessarily incorrect. I have difficulties with this approach.

[9] In explaining the role and significance of the reasons for the order, Goldstone J expressed the following sentiments in *Mphahlele*[1] which I consider to be extremely apposite:

> "There is no express constitutional provision which requires Judges to furnish reasons for their decisions. Nonetheless, in terms of section 1 of the Constitution, the rule of law is one of the founding values of our democratic state and the Judiciary is bound by it. The rule of law undoubtedly requires Judges not to act arbitrarily and to be accountable. The manner in which they ordinarily account for their decisions is by furnishing reasons. This serves a number of purposes. It explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions. Then, too, it is essential for the appeal process, enabling the losing party to take an informed decision as to whether or not to appeal or, where necessary, seek leave to appeal. It assists the appeal Court to decide whether or not the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar matters. It may well be, too, that where a decision is subject to appeal it would be a violation of the constitutional right of access to courts if reasons for such a decision were to be withheld by a judicial officer.
>
> …
>
> Courts of first instance invariably furnish reasons for their decisions, whether in criminal or civil cases. As I have already suggested, if they fail to do that, they might be in violation of a constitutional duty. In the present case Southwood J furnished reasons for his decision. It was on the basis thereof that the Chief Justice was petitioned for leave to appeal. The two Judges of the Supreme Court of Appeal had those reasons before them when they considered the application. As stated in the letter from the Legal Administrative Officer in the Chambers of the Chief Justice, the refusal of leave to appeal means that the Judges were of the opinion that there was no reasonable prospect of an appeal succeeding. That has always been the position. <u>It does not necessarily carry with it the implication that the Judges in the Appeal Court agree with the reasons of the court below.</u>[2] It might mean no more than that, whether for the reasons in the judgment, or for other legal considerations, there is no reasonable prospect of a different order being granted on appeal. In the result, the applicant has been given reasons for the adverse decision in the court of first instance and has been informed by the highest Court having jurisdiction in the matter that there are no reasonable prospects of a different order being granted on appeal. In any opinion, this procedure is not in any way inconsistent with an open and democratic society."

[10] I do not intend to analyse and deal with each and every ground of appeal which, as I have said before, are in the main, against the reasons for the decision and very little is

[1] *Mphahlele v First National Bank of SA Ltd* 1999 (2) SA 667 (CC) at paras 12 and 18.
[2] My emphasis.

being said about the decision itself. However, invariably, it will at times be necessary to repeat what was said in the judgment against which this appeal lies. From the rather prolix and repetitive grounds of appeal, it is clear that the greatest gripe about the judgment in the main application is that the applicants should not have instituted those proceedings without first referring the matter to the Commission on Traditional Leadership Disputes and Claims (the Commission). It is common cause that this matter served before the Commission on no less than two occasions. That those Commissions dealt with the matter in the manner that they did is a different matter altogether. But it does not detract from the fact that the matter served before the Commission before, for the same reason, namely, the restoration of the kingship and the incumbency thereto.

[11] The first occasion was when the matter was before the Nhlapo Commission. In *Matiwane1*[3] the following appears from the judgment of Griffiths J:

> "After the commission had held three public hearings and completed its own investigations, it made its determination on 21 January 2010, which determination was apparently unanimous. This determination, which was the conclusion of some 34 pages of reasons, reads as follows:
>
> "8.1.1. In terms of the Framework Act, AmaMpondomise do not have a kingship.
>
> 8.1.2. Thus, there is no kingship to be restored.
>
> 8.1.3. Therefore claims by Loyiso Matiwane, Vicks Velile Thonjeni and Masibulele Maseti are unsuccessful."
>
> According to the answering affidavit of Moleleki, the Commission was composed of persons who are practising lawyers, academics and linguists who are knowledgeable experts in matters relating to the institution of traditional leadership, South African history, customary law and traditional affairs in general. Its members, who heard the claim of the AmaMpondomise, were: Moleleki himself, a professor of African languages and employed as such in the Department of African Languages at the University of the Free State; Mr AS S Hlebela, a practising attorney; Ms S R Mdluli a

[3] *Matiwane v President of the Republic of South Africa and others* [2014] 2 All SA 419 [ECM] at paras 17-18.

> member of the department of African languages at UNISA; Adv S D Ndengezi; Dr R M Ndou a retired educationist; Pro. P P Ntuli a sociologist; Adv S Poswa-Lerotholi; Adv Z B Pungula and Ms P P Robinson, a Magistrate."

[12] The applicant in *Matiwane1* was the second applicant in the main application. Masibulele Maseti who was the fifth respondent in *Matiwane1* championed the claim by the house of Dosini now championed by the second respondent following Masibulele's unfortunate demise.

[13] In that matter Griffiths J issued the following order:

> "…The decision of the Commission on Traditional Leadership Disputes and Claims (the sixth respondent), the substance of which was that AmaMpondomise never had a kingship and thus the refusal to in-state or reinstate such kingship, is hereby reviewed and set aside.
>
> …"[4]

[14] In *Matiwane 2*[5] Brooks J said:

> "The judgment of Griffiths J did not set aside the proceedings of the Nhlapo commission. No such relief was contained in the notice of motion upon which the proceedings were premised. In the circumstances, those proceedings, in their completed form, remain extant[6]. Only the decision taken by the Commission on those proceedings was set aside."

[15] Therefore to the extent that the contention of the applicants is that this matter needed to be first investigated and deliberated upon by a commission because of its research capacity and expertise, that did happen and both the house of Mhlontlo represented by the second applicant's late brother Loyiso Matiwane submitted all the evidence they had to the Nhlapo Commission. Similarly, the house of Dosini herein represented by the second respondent made submissions to the Nhlapo Commission

[4] Ibid at para 43.
[5] *Matiwane v President of the Republic of South Africa and Others* [2019] 3 All SA 209 [ECM] at para 27.
[6] My emphasis.

and submitted all the evidence they had, therein represented by the late Masibulele Maseti.

[16] Brooks J further said in *Matiwane 2*:

> "It is apposite to record that in its deliberations, flawed as they were, the Tolo Commission stated:
>
> "1. In 1855 Mhlontlo became the leader of AmaMpondomise and was the first leader of AmaMpondomise to encounter colonialists.
>
> 2. In 1861, some six years after Mhlontlo had come to power, the colonialists annexed East Griqualand which formed part of the land of AmaMpondomise;
>
> 3. [T]here is no evidence to support the contention that Mhlontlo was regarded as 'paramount chief' by the colonists."
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> On the first two findings set out in the preceding paragraph, the Tolo Commission appears to have been correct. However, on the third finding the Commission was wrong. The contention that the colonists regarded Mhlontlo as a "permanent chief" is to be found in the letter dated 22 December 1903 written by the resident magistrate in Mount Frere, W. Leary ("Leary"). On page three thereof the magistrate records:
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> > "Umhlontlo was a stirct disciplinarian, none of his tribe disobeyed or dared to disobey him, his word was law to them. He was and still is, the paramount chief of all the Pondomise, he had quarrelled with Mditshwa and they fought, peace only being restored when the country was taken over and Mr Orpen appointed British resident of St John's Territory, the name under which the five districts of Maclear, Mount Fletcher, Mount Frere, Qumbu and Tsolo were known" (*sic*).
>
> A copy of this letter was attached by the applicant to his replying affidavit. This appears to have been done to meet the allegations in the answering affidavit of the fourth respondent which highlights an absence of such proof. Inasumnch as the material in reply was furnished in response to the answering affidavit, does not constitute new material in the sense that it supports the tenor of the whole founding affidavit and there has been no objection thereto or application to strike out, the Court is at liberty to have regard thereto.
>
> Further evidence of this level of regard for Mhlontlo is to be found in the magistrate Joseph Orpen's memorandum to the Select Committee on [Native] Affairs, 1873, which was referred to in the applicant's founding affidavit.
>
> Properly read the import of the relevant section of the Tolo Commission report suggests that if there was contemporaneous evidence that the colonialists had regarded Mhlontlo as a "paramount chief" this would enable support for the finding that AmaMpondomise kingship did exist at the time.
>
> Also unchallenged in the applicant's replying affidavit and highly relevant to the issues with which this application is concerned, is the following statement:

> "In the present government, all paramount chiefs were accepted as the kings, and it would be unjust to treat AmaMpondomise kingship differently."
>
> On a conspectus of all the evidence and the material which supports it, in my view it has been established on a balance of probabilities that AmaMpondomise had a kingship, alongside the three other major kingdoms whose rootedness in the Eastern Cape is indisputable. Factors beyond AmaMpondomise control such as *Mfecane* wars, colonial occupation and colonial administrative acts placed AmaMpondomise under enormous pressure, leading to partial disestablishment and disarray. However, every indication is that since the mid nineteenth century, repeated attempts have been made by AmaMpondomise leaders to restore or reinstate recognition of AmaMpondomise kingship. Those attempts have not failed because of the emergence of strong views from within AmaMpondomise which indicate a groundswell of support for a community without a kingship. Rather, again, those attempts have been thwarted by apparent political expedience, government inefficiency and, most recently, administrative action which is inconsistent with the Constitution."[7]

[17] Brooks J thereupon granted an order declaring that AmaMpondomise did have a kingship and reinstated it. In addition to the other reasons on the basis of which I granted the orders for which leave to appeal is now sought, at least three things are very relevant and fundamental in my view. First, both the issue of the kingship of AmaMpondomise served before the Commission on a least two occasions, the Nhlapho Commission and the Tolo Commission. Second, both the house of Dosini now represented by the respondents and the house of Mhlontlo now represented by the first and second applicants presented evidence of their entitlement to the throne. Third, as Brooks J pointed out in *Matiwane 2,* the proceedings of the Nhlapho Commission were never set aside and remain extant. Fourth, it is clear from *Matiwane 2* that the kingship that was being reinstated by the court is that of king Mhlontlo. Fifth, the second applicant is a direct descendant of king Mhlontlo and his assertion of entitlement to succeed his great grandfather is not being contested within the house of Mhlontlo.

[7] *Matiwane* (note 5 above) at paras 59-65.

[18] In the circumstances the orders granted in the main application were justified in my view and there can be no reasonable prospect of another court coming to a different conclusion.

[19] The suggestion that this Court had no jurisdiction in the main application is clearly misplaced. There are many reasons why the jurisdiction of the courts is not ousted by the Framework Act. I refer to at least two constitutional provisions hereunder. Section 34 of the Constitution[8] reads:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[20] Section 211(3) of the Constitution reads:

> "The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."[9]

[21] The second applicant had a customary law dispute that could be resolved by the application of the law relating to his claim to be entitled to succeed his great grandfather, king Mhlontlo. This Court is empowered by section 211(3) of the Constitution to apply customary law which is applicable and this Court just did that. I do not understand the Framework Act to be ousting the power of the courts to deal with customary law disputes. In fact, the Framework Act is designed to assist courts to have resources such as the Commission has in having such matters investigated through the Commission's expertise and research capacity. That did happen in this case as I said before. It cannot be correct to construe the Framework Act as ousting the jurisdiction of the courts to adjudicate customary law disputes as suggested by the respondents.

[8] Constitution of the Republic of South Africa, 1996.
[9] Ibid section 211(3).

[22] On jurisdiction of the courts Mothle AJA had this to say in *Mphephu*[10]:

> "This matter indeed concerns customary law and customs, a body of laws recognised by the Constitution. The Commission, with its special knowledge of customary law, was designed mainly to deal with the distortions in traditional leadership, lineages and disputes as a result of interference by the apartheid regime. But, as pointed out by the appellant, the respondents' argument confuses judicial deference, which a court may appropriately exercise in judicial review proceedings, and the justiciability of the appellant's application. The jurisdiction of the Courts is not dependent on whether or not a person has lodged a claim or declared a leadership dispute with the Commission. The exercise of judicial deference is unwarranted in this instance. The Courts are vested with authority to adjudicate customary law issues in appropriate cases and to that end s 211 of the Constitution obliges them to apply and give effect to customary law where it is implicated.
>
> …"

[23] As I understand *Matiwane* 2 there are principally two reasons why the court did not deal with the second applicant's claim to be entitled to succeed his great grandfather. The first one is that that issue was no longer before court by agreement between the applicants and the respondents. Secondly, section 9(1)(*a*) of the Framework Act has given the power to identify a person to fill the position of a king or queen to a royal family and there are processes that must be followed which ultimately lead to the recognition of the person so identified.

[24] In my view, it would have been incorrect for the court in the main application to abdicate its responsibility only on the contention of the respondents that the matter ought to go to the Commission again. This, in circumstances where there is no dispute that since about 1300 to 1900 successive kings have only come from the house of Cirha the first king of AmaMpondomise in the line of king Mhlontlo after Dosini was disinherited. The second applicant is clearly indisputably entitled to succeed his great grandfather which is all he sought to do.

[10] *Mphephu v Mphephu-Ramabulana and Others* [2019] 3 All SA 51(SCA) at para 14.

[25] The respondents in the main application never asked the court to set aside the disinheritance of Dosini. They, even now, as far as I am aware, have not taken any action to do so. Therefore, the disinheritance remains extant.

[26] In the main judgment I did reason that in my view, even if king Mhlontlo was alive today, I cannot see why the respondents would not be entitled to challenge his entitlement to the throne as a reigning monarch. To this end the respondents would be well within their right to have the matter looked at by the Commission especially the main reason for their claim, ie the disinheritance of Dosini, if so advised. The applicants have no issue with the validity of the disinheritance and accordingly they have no interest in it being investigated neither do they want it set aside. The basis on which, in those circumstances, the second applicant whose only desire is to simply step into the shoes of his great grandfather, king Mhlontlo, should be concerned about the propriety or lack thereof of how his ancestors assumed the AmaMpondomise kingship escapes me. I also can conceive of no reason why he should be forced to worry himself about that unless of cause it is in the process initiated by the respondents who would want to unsit him through any of the legal processes that are available to them.

[27] If the respondents were to succeed, and I have great reservations that they would succeed, in having the disinheritance of Dosini annulled, and the successive kingships from king Cirha to the second applicant himself set aside, the second applicant would be obliged to vacate the throne. In this regard the applicants have made it clear both in the main application and in these proceedings that they would do so. When the Nhlapo Commission came to the conclusion that AmaMpondomise did not have a kingship, the respondents did nothing about that. It is the house of Mhlontlo, the second applicant in

particular, who instituted the proceedings in *Matiwane*1 in which Griffiths J reviewed and set aside the findings of the Nhlapo Commission.

[28] The second commission after the Nhlapho Commission was the Tolo Commission. It made the following findings about the house of Dosini:

> "9.1 The claim of the Dosini claimants is farfetched as it is not based on any convincing evidence.
>
> 9.2 The members of the Dosini are at present not holding any traditional leadership position and have no area of jurisdiction nor a community that recognises them as their traditional leaders.
>
> 9.3 The disregard of Dosini as an heir apparent was a decision of the royal family centuries ago and the claim of the claimants being direct descendants of the Dosini, the son of Ngcwina has no empirical evidence."

[29] It then made the following recommendation:

> "It is recommended that the claims by Velile Vicks Tonjeni and Masibulele Maseti for the restoration of the Mpondomise kingship from Qumbu and Tsolo be dismissed."

[30] The fourth respondent acted on this recommendation and dismissed the claim. The respondents remained supine and it was again the second applicant who instituted the proceedings in *Matiwane* 2 in terms of which the AmaMpondomise kingship was reinstated by the court. One would have expected the house of Dosini to challenge any finding that their claim for entitlement to the kingship of AmaMpondomise is farfetched. They did not. This makes it almost unavoidable to have the uncanny feeling that their main preoccupation is that the second applicant should never succeed his great grandfather, king Mhlontlo for no legally justifiable reasons.

[31] Section 17(1) of the Superior Courts Act 10 of 2013 provides for applications for leave to appeal as follows:

"17 (1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

(a) (i) the appeal would have a reasonable prospect of success; or
(ii) there is some other compelling reason why the appeal should be heard, in including conflicting judgments on the matter under consideration;
…"

[32] The legal position as it relates to the granting of an application for leave to appeal has received consideration and has been pronounced upon by our courts a number of times. In *Mkhitha*[11] it was explained as follows:

> "Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(*a*) of the Supreme Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal *would* have a reasonable prospect of success; or there is some other compelling reason why it should be heard.
>
> An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal."

The respondents have not, in my view, succeeded in showing that there is a realistic chance of success on appeal.

[33] In addition to the other reasons referred to above I do want to emphasize a few aspects of this case even if in so doing, I sound repetitive. There can be no dispute, in my view, that the second applicant is entitled to succeed his great grandfather king Mhlontlo whose kingship was reinstated in *Matiwane* 2. I am satisfied with the process followed by the first applicant in identifying the second applicant as the person to be recognised by the fourth respondent, the President of the Republic of South Africa. However, in the main judgment, I have left it to the fifth and fourth respondents to satisfy themselves and perform their duties as prescribed in the applicable legislation. There

[11] *MEC for Health, Eastern Cape v Mkhitha and another* [2016] JOL 36940 (SCA) at paras 16 -17.

are many houses of AmaMpondomise and the house of Mhlontlo herein represented by the first applicant is the only one in my view, entitled to identify a person to fill the position of kingship left vacant by king Mhlontlo. The respondents are entitled to pursue the question of whether or not the disinheritance of Dosini in the 1300 hundreds was done correctly and the proceedings before me in the main application were not about that. Therefore, the application for leave to appeal must fail as the appeal has no reasonable prospect of success.

The rule 30A application

[34] Consequent upon the filing of an application for leave to appeal the applicants filed an application in terms of section 18 of the Superior Courts Act 10 of 2013.

[35] The section 18 application seeks to execute the orders granted in the main application pending any appeal processes. The respondents did not file an answering affidavit in the section 18 application. Instead they launched an application in terms of rule 30*A* (2) in anticipation of the hearing of the application for leave to appeal and the section 18 application both of which were set down for hearing on the 09 March 2020.

[36] In the notice of motion in respect of the rule 30*A* application the respondents seek mainly the following orders:

> "1. That the applicants' said notice of motion and founding affidavit [in the section 18(3) application] as well as the notice of set down for 9 March 2020, be and are hereby declared to be an improper step on account of same not being complied with the provisions of Rule 6(5) and 49(1)(d), read in context.
>
> 2. That the Applicants' said notice of motion, founding affidavit and notice of set down be set aside and/or struck out.
>
> 3. That the applicants' impugned application in terms of Section 18 be forthwith struck off the roll with costs."

[37] Other ancillary relief is also sought in the rule 30*A* application. It appears from the rule 30A notice which preceded the rule 30*A* application that the main basis for the rule 30*A* application is twofold. Firstly, it is that the respondents were not given time within which to file their notice of intention to oppose the section 18 application. Secondly, the respondents were not given a period of 15 days within which to file their answering affidavit.

[38] For various reasons that I need no go into, these applications could not be heard on the 09 March 2020 and the 30 March 2020. Eventually the matter was set down for hearing on the 29 June 2020 on which date the matter proceeded. The respondents had still not filed any answering affidavit in the section 18 application arguing that the latter application could not be heard as its fate depended on the ruling in the rule 30*A* application. It was submitted in court that not only did the respondents intend to oppose the section 18 application, they also intended to file an answering affidavit to it but had not done so on the basis that they could not do so until there was a decision on their rule 30*A* application.

[39] On the other hand, the applicants wanted to proceed with all the applications before court. However, I directed that only the application for leave to appeal would be argued on the 29 June 2020. I would decide the rule 30*A* and the section 18 applications on the papers filed and the heads of argument, including supplementary heads of argument. To that end consent orders for the filing of the answering affidavit and the replying affidavit in the section 18 applications as well as the filing of the supplementary heads of argument were issued.

[40] I do not intend to get into a long analysis of the rule 30*A* application and the submissions made in the papers. However, I must point out that I find it absurd that no answering affidavit was filed in preparation for the hearing of the 09 March 2020, this, apparently on the basis that the section 18 application was deemed by the respondents to be irregular. Again I refrain from dealing with both rule 30 and rule 30*A* and the interaction between them and the submissions made in that regard. I also find it absolutely baffling that on the 29 June 2020, more than three months after the 09 March 2020, the respondents had still not filed their answering affidavit.

[41] They, instead, with a measure of brinkmanship, sought to force a postponement of the section 18 application even after I had issued a directive that all three applications would be heard together. On 27 May 2020 I had issued a directive that all three applications would proceed simultaneously on the 29 June 2020. Disturbingly, the respondents ignored that directive and did not file their answering affidavit and they have not explained their failure to do so. I therefore consider it appropriate that the court's mark of displeasure in that regard is warranted in respect of the rule 30*A* application through an appropriate order for costs. This is so because I could find no acceptable basis as none was proffered why the answering affidavit was not filed. This is especially so because the main genesis for the rule 30*A* application was the alleged insufficiency of the time afforded to the respondents for the filing of the answering affidavit. There was simply no merit in that contention.

[42] A submission was made quite strenuously that at the heart of the rule 30*A* application, was the applicants' non-compliance with rules 6(5) and 49(1)(*d*) of the Uniform Rules of Court. This submission is misplaced in the circumstances and on the

facts of this matter and were that submission to hold true it would be to place emphasis on form above substance. This is more so where the non-compliance with these rules has not caused any prejudice to the respondents.

[43] In *Liebenberg*[12] the Constitutional Court dealt with non-compliance with statutory provisions as follows:

> "In *Unlawful Occupiers, School Site v City of Johannesburg*, the Supreme Court of Appeal stated:
>
> > '(I)t is clear from the authorities that even where the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the object of the statutory provision had been achieved.'
>
> This was amplified by the Supreme Court of Appeal in *Nokeng Tsa Taemane Local Municipality v Dinokeng Property Owners Association & Others* where it was stated:
>
> > "It is important to mention that the mere failure to comply with one or other administrative provision does not mean that the whole procedure is necessarily void. It depends in the first instance on whether the Act contemplated that the relevant failure should be visited with nullity and in the second instance on its materiality…. To nullify the revenue stream of a local authority merely because of an administrative hiccup appears to me to be so drastic a result that it is unlikely that the Legislature could have intended it.'
>
> In *African Christian Democratic Party v Electoral Commission and Others*, this Court, in the context of assessing a local authority's compliance with municipal electoral legislation, held that '([a) narrowly textual and legalistic approach is to be avoided'. Rather, the question is whether the steps taken by the local authority are effective when measured against the object of the Legislature, which is ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular.
>
> Therefore, a failure by a municipality to comply with relevant statutory provisions does not necessarily lead to the actions under scrutiny being rendered invalid. The question is whether there has been substantial compliance, taking into account the relevant statutory provisions in particular and the legislative scheme as a whole."

The rule 30*A* application was doomed to fail from the start as it was clearly devoid of merit. It was at best, a disingenuous attempt to force a postponement of the section 18 application. The rule 30*A* application must accordingly be dismissed.

[12] *Liebenberg NO & Others v Bergrivier Municipality* 2013 (5) SA 246 (CC) at paras 23-6.

The section 18 application

[44] In the section 18 application the applicants seek orders the effect of which is the execution of the judgment in the main application pending the finalisation of all appeal processes. That the respondents intend to pursue the appeal in all relevant *fora* is beyond doubt thus justifying the consideration of the section 18 application even though the application for leave to appeal is being dismissed.

[45] Section 18 reads:

> "18 (1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.
>
> (2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.
>
> (3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.
>
> (4) If a court orders otherwise, as contemplated in subsection (1) –
>
> (i) the court must immediately record its reasons for doing so;
>
> (ii) the aggrieved party has an automatic right of appeal to the next highest court;
>
> (iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and
>
> (iv) such order will be automatically suspended, pending the outcome of such appeal.
>
> (5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules."

[46] In the founding affidavit deposed to on behalf of the applicants many reasons are cited to show that the applicants will be prejudiced by further delays in the matter. The

first one relates to the deposition of king Mhlontlo by the colonial administration in or about 1904. That kingship was reinstated in 1930 to king Mhlontlo's son Sigidi in a reduced status of a chief. AmaMpondomise continued to demand their kingship throughout the colonial and Bantustan administrations and the democratic government. After chronicling in quite some detail the attempts made by AmaMpondomise to have their kingship reinstated in *Matiwane 2*, Brooks J made the following conclusions:

> "On a conspectus of all the evidence and the material which supports it, in my view it has been established on a balance of probabilities that AmaMpondomise had a kingship, alongside the three other major kingdoms whose rootedness in the Eastern Cape is indisputable. Factors beyond AmaMpondomise control such as *Mfencane* wars, colonial occupation and colonial administrative acts placed AmaMpondomise under enormous pressure, leading to partial disestablishment and disarray. However, every indication is that since the mid nineteenth century, repeated attempts have been made by AmaMpondomise leaders to restore or reinstate recognition of AmaMpondomise kingship. Those attempts have not failed because of the emergence of strong views from within AmaMpondomise which indicate a groundswell of support for a community without a kingship. Rather, again, those attempts have been thwarted by apparent political expedience, government inefficiency and, most recently, administrative action which is inconsistent with the Constitution.
>
> There is a constitutional imperative to address the wrongs of the past in this country and to restore and respect the dignity of all her citizens. The long struggle of AmaMpondomise for the reinstatement of kingship demonstrates the collective response of a community to the pain and loss of a sense of full identity which flows inevitably from dislocation, suppression and deprivation of land and leadership. The longstanding plea from AmaMpondomise which lies at the heart of this matter has been expressed historically in every appropriate forum, without success but not without merit. It has finally found its way into this Court. In all the circumstances it is appropriate that an order which is just, fair and reasonable should now be given."[13]

[47] The second basis among many others referred to in the founding affidavit is couched by the applicants as follows:

> "20. In the process of all these delays, the heir to king Mhlontlo, the brother of the second applicant, Loyiso Matiwane, passed away. Axiomatically, there are many other heirs who could have ascended the throne but died before they did.
>
> 21. The second applicant is now the only surviving son in the direct lineage to this kingship. He is already 43 years old at the moment. The nation of

[13] *Matiwane* (note 5 above) at paras 65-6.

> AmaMpondomise are now preparing to identify a wife for him who must bear an heir to the throne in terms of custom and traditions. The leave to appeal and the appeal processes will halt all these preparations and resulting in immeasurably (sic) immense prejudice. The second applicant is not getting any younger in the process."

[48] The respondents have dealt with the applicants' averments in essentially two ways. First, they have dedicated the bulk of their answering affidavit to readdressing the same issues that were relevant in the main application and which we dealt with thereat. Second, they have also extensively dealt with the merits and demerits of the application for leave to appeal to make their point that there are reasonable prospects of success on appeal. Third, they have made averments that are essentially bare denials clothed with submissions that are not relevant to the issues that the applicants have raised. In the process of doing so, they have failed to address the issues that the applicants have raised.

[49] As regards the submissions that were made in the main application which are repeated by the respondents in their answering affidavit, I would have to regurgitate the main judgment were I to deal with them. I see no value in that approach.

[50] The fudging of an application for leave to appeal with the section 18 application in the respondents' submissions is incorrect in my view. For instance, a good amount of effort is spent arguing that because in their view, they have reasonable prospects of success on appeal, therefore the section 18 application must fail. This, reasoning is, in my view, flawed.

[51] There are many reasons why this is so. I will mention just a few of them below. Chief amongst those reasons is that section 18 prescribes certain requirements for the

execution application. The requirements which such an application must meet were summarised and crystalized in *Incubeta*[14] as follows:

> "It seems to me that there is indeed a new dimension introduced to the test by the provisions of s18. The test is twofold. The requirements are:
>
> - First, whether or not 'exceptional circumstances' exist; and
> - Second, proof on a balance probability by the applicant of –
>
> - the presence of irreparable harm to the applicant/ victor, who wants to put into operation and executive the order; and
> - the absence of irreparable harm to the respondent/loser, who seeks leave to appeal."

[52] As can be seen from *Incubeta* and section 18 itself, the prospects of success on appeal are not mentioned. They are therefore, in my view, not always a relevant consideration, although a frivolous and vexatious appeal would effectively militate in favour of granting an execution application. While each case depends on and must be determined on its facts, the inability of the court hearing the section 18 application to assess the prospects of success on appeal is not a bar to the determination of whether or not the requirements prescribed in section 18 have been met.

[53] I am emboldened in this view by the sentiments expressed by Navsa JA in *Ntlemeza*[15] in which he said:

> "In *UFS* this court, after considering that *Incubeta* had held that the prospects of success in the pending appeal played no part in deciding whether to grant the application, preferred the contrary approach of the court in *Minister of Social Development Western Cape & Others v Justice Alliance of South Africa & Another* WCC 20806/13 (unreported; 1 April 2016). However, in *UFS*, in deciding the matter before it, this court recorded that the review record was not before it and thus had no regard to the prospects of success. We are in the same position in the present appeal. As in *UFS,* but more so, because of the application for leave to appeal the principal order, pending in this case, before us the question of prospects of success recedes into the background. As stated at the commencement of this judgment, s18 has now had as

[14] *Incubeta Holdings & Another Ellis& Another* 2014 (3) SA 189 (GJ) at para 16.
[15] *Ntlemeza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA) at para 44.

a consequence the curious and ostensibly undesirable position that there are two appeal processes in one appeal court in relation to the same case."

[54] In addition to the considerations dealt with in the preceding paragraphs, in my view, that an application for leave to appeal fails does not mean that the execution application must suffer the same fate. In fact, it might call for the granting of the execution application for the very reason that the jurisdictional facts for the section 18 application have been established. By the same token, that the application for leave to appeal succeeds does not mean that the execution application must fail. Consideration of the success of an application for leave to appeal does not predestine or seal the fate of the section 18 application, at least, not necessarily. Each case must depend on its own factual matrix, the test of cause always being whether the criterion set out in section 18 has been satisfied.

[55] I turn now to what I consider to be the respondents' failure to deal effectively with the averments of the applicants. By way of an example the applicants make the following averments in their founding affidavit after a brief narration of the common cause history of the claim of AmaMpondomise for their kingship:

"18. All these years AmaMpondomise were without a king and thus suffering immense prejudice, because they were treated differently from other nations in the Eastern Cape. This too, is recognised by Justice Brooks in his judgment when reinstating the kingship.

19. The issue has been subject of investigation by the commissions such as Nhlapo Commission and Tolo Commission. Eventually justice was served to AmaMpondomise when this Honuorable Court finally made a ruling to the effect that AmaMpondomise do have a kingdom and reinstated same only in 2019.

20. In the process of all these delays, the heir to king Mhlontlo, the brother of the second applicant, Loyiso Matiwane, passed away. Axiomatically, there are many other heirs who could have ascended the throne but died before they did.

21. The second applicant is now the only surviving son in the direct lineage to this kingship. He is already 43 years old at the moment. The nation of AmaMpondomise are now preparing to identify a wife for him who must bear an heir to the throne in terms of

> custom and traditions. The leave to appeal and the appeal processes will halt all these preparations and resulting in immeasurable[y] (sic) immense prejudice. The second applicant is not getting any younger in the process."

[56] These averments are dealt with by the respondents by lumping them together at paragraph 40 of their answering affidavit where they deal with paragraphs 13 to 28 of the founding affidavit. Paragraph 40 of the answering affidavit has 10 subparagraphs in which a lot is said while nothing of relevance is said ultimately. I say so because the above averments are basically ignored in the lot that is said in paragraph 40 most of which is irrelevant, in my view, at least for the purposes of addressing the applicants' averments on what the applicants call irreparable prejudice in the relevant subheading. I consider these to be some of the exceptional circumstances to which the respondents adopted a dismissive approach.

[57] In *Wightman*[16] the legal position was stated in clear terms for circumstances in which a party elects to rely on denials without meaningfully engaging with the facts averred by the other party. Heher JA had this to say:

> "A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be

[16] *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at para 13.

> permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."

[58] To a great extent the respondents have submitted that the applicants have not alleged any exceptional circumstances. The respondents must be under the mistaken impression that the requirement for exceptional circumstances refers to the words or heading "exceptional circumstances" being also a requirement. In my view, that approach is incorrect. Section 18 requires the applicant to show exceptional circumstances why the execution order should be granted. Whether or not such a heading or the words "exceptional circumstances" have been used is not a requirement.

[59] Section 18 requires the court to grant an execution order while appeal processes are underway only under exceptional circumstances and if on a balance of probabilities the applicant has proved that he/she will suffer irreparable harm if the execution order is not granted and the respondent will not suffer any irreparable harm as a result of the execution order being granted. The question before court is, firstly, whether exceptional circumstances have been established and secondly whether on a balance of probabilities the applicant will suffer irreparable harm if the execution order is not granted while the respondent will not suffer any irreparable harm if it is granted.

[60] In my view, the history of this matter is on its own exceptional in many ways. Let me mention a few aspects of this history that make it exceptional. History tells us that AmaMpondomise have had a kingship since time immemorial. For many centuries since about 1300 up until about 1904, the AmaMpondomise kingship was under the

rulership of the descendants of king Cirha the last of which was king Mhlontlo who was deposed from his kingship by the colonial government.

[61] Since the deposition of king Mhlontlo in or about 1904 to the reinstatement of that kingship only in 2019 it has taken a period of over a century. In essence, since an existing kingship was abruptly and vindictively brought to an end, AmaMpondomise had to live without a kingship and without a king. The indignity of being the only nation without a king in the Eastern Cape, if not the whole Republic is on its own an exceptional circumstance. To allow the injustices of the successive colonial administrations to carry on would, in my view, be insensitive to AmaMpondomise as a nation and that goes against the restorative justice underpinning our constitutional order.

[62] As I understand it the biggest contention of the respondents is that the matter should have gone to a Commission under the Framework Act. It is a fact that this matter did serve before a Commission at least twice. The fact that the process did not achieve the desired results and in fact this Court had to intervene to correct the wrongs which occurred in those Commissions is also an exceptional circumstance as that stood in the way of the AmaMpondomise kingship being restored and the incumbent identified. As the applicants have pointed out, in the intervening period Loyiso Matiwane, the older brother to the second applicant who had taken the matter before the Nhlapo Commission passed away. The second applicant had to be substituted and continue with the legal processes that were underway when his brother passed away. It is averred in the founding affidavit that the second applicant is now 43 years old and the process of identifying a wife for him who would bear a successor to the throne of

AmaMpondomise as required by their custom was impeded after an application for leave to appeal was filed by the respondents.

[63] These facts not only show the exceptionality of the circumstances justifying the granting of the execution order, but also show the irreparable harm that has been caused to AmaMpondomise as a nation that might still be suffered because of any further delays. The second applicant also does not know whether or not he will succeed his great grandfather, king Mhlontlo in his life time. He clearly, therefore, is unable to say that he is in fact a king or not and accordingly plan his life with AmaMpondomise on that basis. This uncertainty obviously also affects AmaMpondomise as a nation who have been yearning for the restoration of their kingship and the enthronement of their king for a very long time. This, in circumstances in which the case of the respondents has throughout, been about the whole kingship from king Cirha to king Mhlontlo being in their view, not legitimate kingships despite its well documented existence since about 1300. They are not contesting the entitlement of the second applicant to succeed his great grandfather king Mhlontlo, at least not cogently nor are they arguing that it is the second respondent (Ms Maseti) who should succeed king Mhlontlo.

[64] I simply cannot see any prejudice or irreparable harm that will be suffered by the respondents if the second applicant succeeds his great grandfather. In fact, as pointed out in the main judgment, their right to mount a challenge against the applicants and therefore against the rulership or kingship of AmaMpondomise by the house of Cirha all the way to king Mhlontlo and therefore to the second applicant remains extant. The respondents themselves have not established the irreparable harm that they will suffer and their averments on irreparable harm are woefully inadequate.

[65] On the other hand, it is also in the general public interest that the institution of traditional leadership be protected as recognised by our Constitution. To allow a situation in which for innumerable centuries a kingship existed and was brought to an end by colonial governments who clearly had no interest in traditional leadership and the people who live under that system of governance is an unjustifiable perpetuation of the disrespect to the people who live under traditional leadership in general and AmaMpondomise in particular for no cogent reasons. If customary law and the traditional leadership are to occupy their rightful place under the Constitution alongside common law, all obstacles to its growth and survival must be removed without delay. Failure to do so is to undermine the indigenous people who choose to live under that system, some of whom know and recognise no other system of law and who constitute a substantial majority of the people in this country.

[66] In *Ntlemeza*[17] the court had this to say on the public interest:

> "In so far as the requirements of s18(3) are concerned the High Court cannot be faulted for its approach in respect of the question of irreparable harm to General Ntlemeza. On the other side of the coin there is the public interest and the crucial place that the DPCI enjoys in our young democracy as set out above. In my view the High Court cannot be criticised for concluding that HSF and FUL had proved, on a balance of probabilities, that the public will suffer irreparable harm if the court does not grant the order, and that General Ntlemeza will not suffer irreparable harm in light thereof."

[67] It was never contended by the respondents that AmaMpondomise will not suffer irreparable harm nor can it be contended that the public interest in the institution of traditional leadership will not suffer irreparable harm. The house of Dosini which the respondents represent has not ruled anywhere for many centuries. The house of Cirha represented by the applicants have ruled continuously since about 1300. That was

[17] *Ntlemeza* (note 15 above) at para 47.

ended vindictively by the colonial government. Clearly our restorative justice even as it pertains to the institution of traditional leadership generally and AmaMpondomise and the descendants of king Mhlontlo in particular enjoins this Court to bring that injustice to an end and restore dignity and respect to the traditional leadership as an institution.

[68] Historical records attest to the immense suffering and humiliation to which king Mhlontlo was subjected consequent upon his deposition from the throne. It is not clear to me why his descendants should continue being subjected to that indignity under the democratic dispensation founded on constitutionally entrenched rule of law. For this same reason of the rule of law, the submission by the respondents that if the second applicant is enthroned, he might refuse to vacate the throne if they eventually succeed in contesting for kingship is unsustainable. I, therefore, find that there are exceptional circumstances for the granting of the execution order. I also find, on a balance of probabilities that the applicants will suffer irreparable harm if the execution order is not granted while the respondents will not suffer any irreparable harm whatsoever if it is granted.

[69] In the result the following order shall issue:

1. The application for leave to appeal is dismissed.

2. The application in terms of rule 30*A* is dismissed.

3. The applicants in the section 18 application are granted leave to execute and put into operation the judgment and orders of this Court dated 14 January 2020 pending the finalisation of any appeal processes and further appeals to that judgment and orders.

4. The first, second and the third respondents are ordered to pay the costs of the application for leave to appeal and the section 18(3) application on a party and party scale.

5. The first, second and the third respondents are ordered to pay the costs of the application in terms of rule 30*A* on an attorney and client scale.

6. The costs referred to in 4 and 5 above shall include costs consequent upon the employment of two counsel where applicable.

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M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicants: M. GWALA SC and S.X. MAPOMA

Instructed by: MVUZO NOTYESI INC.

Mthatha

Counsel for the 1st, 2nd & 3rd Respondents: G. SHAKOANE SC and M. MATHAPHUNA

Instructed by: MKATA ATTORNEYS

Mthatha

Heard on: 29 June 2020

Delivered on: 28 July 2020