**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)**

**CONST COURT CASE NUMBER: CCT48/16**
**NGHC (LIMPOPO) NO: 456/2014**

In the matter between:-

**TSHIVULANA ROYAL FAMILY** Applicant

and

**NDITSHENI NORMAN NETSHIVHULANA** Respondent

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## APPLICANT'S WRITTEN ARGUMENT

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1.

References herein to the papers filed of record in the court *a quo* are distinguished from references to the papers filed in the application for leave to appeal in this court as such as follows. References to the former papers are typed as:

FA = Founding affidavit

AA = Answering affidavit

RA = Replying affidavit

References to the founding affidavit and answering affidavit in the application for leave to appeal are expressed as such.

All such references are followed by the paragraph number (where applicable) and page number. Accordingly RA23 p 136 refers to paragraph 23 of the replying affidavit filed in the court *a quo* at that page; whilst a reference to Founding Affidavit 25 p 13 refers to page 25 of the founding affidavit in the application for leave to appeal.

2.

As explained at Founding Affidavit 6, pp 5-6 the Premier of the Limpopo Province (cited as second respondent), the Member of the Executive Council (cited as third respondent), the Tshimbupfe

Traditional Council (cited as fourth respondent) and the Tshimbupfe Royal Council, being the custodian of the Chieftaincy of Tshimbupfe (cited as fifth respondent) abided the outcome, and did not participate in the proceedings.

**CONDONATION:**

3.

It is noted that the respondent does not oppose condonation of the late filing of the application for leave to appeal. The reasons therefor have been fully explained at Founding Affidavit 31-37, page 16-17. It is submitted that the explanation justifies condonation.[1]

[1] The principles according to which the courts have exercised their discretion in deciding whether good cause has been shown for condonation are fully expounded in Erasmus *Superior Courts Practice*, 2nd Edition (Van Loggerenberg), pp D1-322 to D1-323. See also the discussion at D1-670 to D1-671.

**THE BACKGROUND FACTS AND CRUX OF THE DISPUTE:**

4.

The main issue is whether the Premier acted lawfully in appointing the respondent as Headman of the Tshivulana Settlement, instead of Dhavana Elias Muluadzi, which was identified and appointed by the applicant royal family. The relief sought in the notice of motion was for the reviewing and setting aside of that decision and substituting therefor the recognition of Dhavana as Headman, and a consequential order for the concomitant issue of a certificate of recognition.[2]

5.

The factual background and issues between the parties have, with respect, been summarised succinctly and accurately at paragraphs

[2] Notice of motion, Record, Vol 1, pp 1-2.

1 to 10 of the judgment of the court *a quo*,[3] and is not repeated herein.

**THE JUDGMENT OF THE COURT *A QUO*:**

6.

Only the two points *in limine* raised by the respondent were dealt with.

7.

The first was that Dhavana should have been joined.

7.1 This was dismissed on the basis that the issue for adjudication was not about his demanding to be recognised; and according to the customary practice

[3] Record, Vol 2, p 199-203. The judgment is also appended to the application for leave to appeal as annexure "FA2" at p 21 of those papers.

outlined in the judgment the application was about the total disregard of the applicable customary practice in which the VHO-MaKhatsi (the deponent to the founding affidavit) had the final say in which he had no role to play.[4]

7.2 It is not clear whether the respondent wishes to resurrect that issue in the application for leave to appeal.[5] If so, it is submitted that this is not receivable. There is no cross-appeal by the respondent on this point. In any event, and apart from the basis upon which the point was dismissed by the court *a quo*, Dhavana has filed an affidavit abiding the outcome of the proceedings.[6]

[4] Judgment, para 11, Record, pp 204-205.

[5] Compare the last sentence of paragraph 9 of the answering affidavit.

[6] Record, Vol 2, annexure “RA1”, p 143.

8.

The second point *in limine* was decided against the applicant and forms the sole subject-matter of this application for leave to appeal, *viz* the finding that the applicant had at its disposal an internal remedy which it failed to exhaust, and which could not be condoned on the basis of exceptional circumstances.

**GROUNDS UPON WHICH LEAVE TO APPEAL IS SOUGHT:**

9.

The grounds are stated in the Founding Affidavit.[7] Summarised, these are the following:

9.1 It is clear that the honourable learned judge unfortunately based her reasoning on an obsolete rendition of the dispute resolution provisions contained

[7] Application for leave to appeal, paras 14-25, pp 18-13.

in Chapter 6 of the Traditional Leadership and Governance Framework Act No 41 of 2003 ("the Framework Act"). That much appears from the quotation from section 25(2)(a) of the Act quoted at the top of page 9 of the judgment which reads:

"*The Commission has authority to investigate, <u>either on request or of its own record …</u>*" instead of the current reading in which the underlined part now reads:

"*… and make recommendations on.*"

The current wording of Chapter 6 is annexed to the Founding Affidavit as annexure "FA4" at page 33. The previous wording is annexed as annexure "FA3" at pages 31-32.

9.2 Flowing from the reliance on the previous text is the fact that the Commission previously had the authority <u>to</u>

decide on any traditional leadership. Such power to decide would, if applicable, constitute an internal remedy pertaining to the disputes dealt with in section 21(1) of the Framework Act, that is, disputes amongst traditional communities.

9.3 The first problem with the basis upon which the court *a quo* found in favour of the respondent on the point *in limine* is that the review application concerns a dispute between the applicant and the Premier (and the applicable Provincial Department), and not a dispute within traditional communities or other customary institutions which is the only subject dealt with by Chapter 6.

9.4 The second problem is that the Commission's powers *to decide* such disputes and claims has since the coming into operation of the amended version of Chapter 6 per section 20 read with section 29 of the Traditional

Leadership and Governance Framework Amendment Act No 23 of 2009 ("the Amendment Act"), been reduced only to a power to *recommend*. This relates specifically also to the Commission's power to decide any traditional leadership dispute per the previous reading of section 25(1) and (2)(a)(i).[8] The repeal of the power of the Commission to *decide* has removed its capacity "*… to provide immediate and costs-effective relief …*" and accordingly the *remedy* which it could previously provide.[9] The current reading of section 25(1) expressly restricts the Commission's powers only to make recommendations on any traditional leadership dispute and claim[10] *to the Provincial Government*[11] *which must, within a period of 60 days, make a decision on the recommendation*.[12]

[8] The text has been attached to the Founding Affidavit in the application for leave to appeal as annexure "FA3" at p 31-32 of those papers.

[9] See *Koyabe v Minister for Home Affairs* 2010 (4) SA 327 at para 35.

[10] The current text is annexed to the Founding Affidavit in the application for leave to appeal as annexure "FA4" at p 33.

[11] Section 26(2)(b).

[12] Section 26(3).

9.5 But it goes further. The reference to the Commission in Chapter 6 has become redundant as it could only investigate and make recommendations on those disputes that were before it on the date of coming into operation of Chapter 6 (subsection 25(4)) or six months thereafter (subsection 25(5)). Chapter 6 was substituted through section 20 of the Amendment Act and in terms of section 29 of the latter Act it came into operation on 1 February 2010 which means that the Commission could only have dealt with matters which came before it six months later, i.e. the end of July 2010. Accordingly, the making of recommendations by the Commission to the Provincial Government per section 26 for the latter's decision on the Commission's recommendation does also not apply *in casu*.

10.

It is submitted that this represents a fundamental misdirection on

the part of the learned judge in the court *a quo* which warrants reconsideration thereof on appeal.

11.

It is difficult to make out how the procedure would now function if Chapter 6 of the Framework Act were to apply. As the various subsections of section 26 now read, it would appear that a recommendation by the now defunct Commission to either the President or the relevant Provincial Government (the former relating to disputes where the position of a king or queen is affected) per subsections (1) and (2) stand as a jurisdictional fact for the exercise of the power by the President or the Provincial Government per subsections (3) and (4) to decide the issue. A possible approach is to read Chapter 6 as though all references to the Commission have fallen away, which, however, would still leave the applicant's contention valid, i.e. that whatever procedure may be found to apply (notwithstanding the fact that this is a dispute between the applicant and the Premier and the

Department themselves), will ineluctably end up with the Provincial Department and Premier being the functionaries who themselves issued the impugned decision,[13] and are moreover *functus officio*.

**SECTIONS 11 AND 12 OF THE LIMPOPO AND FRAMEWORK ACT RESPECTIVELY:**

12.

For convenience the two sections are annexed hereto as annexures **"X"** and **"Y"** respectively.

13.

For their part neither section 12 of the Limpopo Houses of Traditional Leaders Act No 5 of 2005 ("the Limpopo Act") nor section 11 of the Framework Act refers to the Commission. They

[13] *Administrative Law and Justice and South Africa* by Devenish, Govender and Hulme at p 440; *Lenz Township Co. Ltd v Lorentz* 1961(2) SA 450 (A) at 458G – H.

provide that if the Premier is cognisant of "*evidence or an allegation*" that the identification of a person was not done in accordance with customary law, customs or processes, the Premier **may** refer the matter to the Provincial House of Traditional Leaders and relevant Local House of Traditional Leaders for their recommendations, **or** may refuse to issue a certificate of recognition; **and must** refer the matter to the Royal Family for reconsideration.

14.

Subsection 12(3) of the Limpopo Act and section 11(4) of the Framework Act then provide that where the Royal Family had reconsidered **and resolved** the matter, the Premier **must** recognise the person identified by the Royal Family **if the Premier is satisfied** that the consideration and resolution by the Royal Family has been done in accordance with customary law.

15.

Neither section 12 of the Limpopo Act nor section 11 of the Framework Act therefore provides for a clear cut, final decision by the Premier where, notwithstanding a referral back to the Royal Family, the matter has not been resolved; and even if it was resolved, the Premier should only finalise the recognition if satisfied that it was done in accordance with customary law. It is not stated what should happen if the Premier is not so satisfied.

16.

The problem is, however, this: the Premier and Provincial Department have already acted. The respondent was appointed, and a certificate issued. Either the Department (and Premier) had not been informed at all that the dispute was brewing, or it was ignored by them.

17.

It is submitted that it is not necessary, nor is this court called upon to decide which of those possibilities apply and/or the exact grounds in terms of the Promotion of Administrative Justice Act the review and setting aside of the decision is to be assessed. The fact of the matter is that none of those two questions could have been pursued by the applicant through some internal remedy which was available *against the decision made*.

18.

It is submitted that not only does this warrant sufficient grounds for leave to be granted; it warrants, with respect, the appeal to succeed.

**THE CONSTITUTIONAL ISSUE INVOLVED:**

19.

This has been dealt with at paragraph 27 of the Founding Affidavit.[14] To those considerations may be added that as section 7(2)(a) of PAJA gives effect to section 33 of the Constitution, "*… matters relating to the interpretation and application of PAJA will of course be constitutional matters*".[15] The applicability of section 7(2)(a) in the circumstances of this case lies at the core of the applicant's challenge to the decision of the court *a quo* in the light of the administrative-justice protections enshrined in section 33 of the Constitution.[16] As such it also touches upon the denial of access to the courts protected under section 34 of the Constitution.[17] As stated by Froneman J in ***Mankayi v Anglo***

[14] At pp 15-16 of the application for leave to appeal papers.

[15] *Batho Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) at para 25.

[16] *Koyabe v Minister for Home Affairs* 2010 (4) SA 327 (CC) at 339C-D.

[17] *Koyabe v Minister for Home Affairs* 2010 (4) SA 327 (CC) at 339D.

***Gold Ashanti Ltd***[18] the mere fact that the case concerns the interpretation of a statute is sufficient to bring it within the Constitutional Court's jurisdiction. A decision by this court on the matter would also be in the interests of justice as it will bring to light clarity regarding the procedure to be followed in the event of disputes which may arise between the many traditional communities in the country in regard to matters of traditional leadership, which are deeply rooted in cultural custom and are by their nature highly sensitive.

**CONCLUSION:**

20.

It is submitted that leave to appeal should be granted, and the appeal should be allowed with costs.

[18] 2011 (5) BCLR 453 (CC).

21.

It is submitted that as the merits of the application as such was not considered by the court *a quo*, the matter should be remitted to that court for its consideration.

R J RAATH SC
Counsel for the Applicant
Chambers
Pretoria
5 August 2016

Tshivulana-Netshivhulana.X **ANNEXURE "X"**

## SECTION 11 OF THE TRADITIONAL LEADERSHIP AND GOVERNANCE FRAMEWORK ACT NO 41 OF 2003

"***11. Recognition of senior traditional leaders, headmen or headwomen.*** *– (1) Whenever the position of senior traditional leader, headman or headwoman is to be filled-*

*(a) the royal family concerned must, within a reasonable time after the need arises for any of those positions to be filled, and with due regard to applicable customary law-*

*(i) identify a person who qualifies in terms of customary law to assume the position in question, after taking into account whether any of the grounds referred to in section 12(1)(a), (b) and (d) apply to that person; and*

*(ii) through the relevant customary structure, inform the Premier of the province concerned of the particulars of*

*the person so identified to fill the position and of the reasons for the identification of that person; and*

*(b) the Premier concerned must, subject to subsection (3), recognise the person so identified by the royal family in accordance with provincial legislation as senior traditional leader, headman or headwoman, as the case may be.*

*(2)(a) The provincial legislation referred to in subsection (1)(b) must at least provide for-*

*(i) a notice in the Provincial Gazette recognising the person identified as senior traditional leader, headman or headwoman in terms of subsection (1);*

*(ii) a certificate of recognition to be issued to the identified peson; and*

*(iii) the relevant provincial house of traditional leaders to be*

*informed of the recognition of a senior traditional leader, headman or headwoman.*

*(b) Provincial legislation may also provide for-*

*(i) the election or appointment of a headman or headwoman in terms of customary law and customs; and*

*(ii) consultation by the Premier with the traditional council concerned where the position of a senior traditional leader, headman or headwoman is to be filled.*

*(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 Premier-*

*(a) may refer the matter to the relevant provincial 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 Premier must recognise the person identified by the royal family if the Premier is satisfied that the reconsideration and resolution by the royal family has been done in accordance with customary law.*"

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Tshivulana-Netshivhulana.Y **ANNEXURE "Y"**

## SECTION 12 OF THE LIMPOPO HOUSES OF TRADITIONAL LEADERS ACT 5 OF 2005

"***12 Recognition of senior traditional leader, headman or headwoman***

*(1) Whenever a position of a senior traditional leader, headman or head woman is to be filled-*

*(a) the royal family concerned must, within a reasonable time after the need arises for any of those positions to be filled, and with due regard to the customary law of the traditional community concerned-*

*(i) identify a person who qualifies in terms of customary law of the traditional community concerned to assume the position in question; and*

*(ii) through the relevant customary structure of the traditional community concerned and after notifying the traditional council, inform the Premier of the particulars of the person so identified to fill the position and of the*

*reasons for the identification of the specific person.*

*(b) the Premier must, subject to subsection (2)-*

*(i) by notice in the Gazette recognise the person so identified by the royal family in accordance with paragraph (a) as senior traditional leader, headman or headwoman, as the case may be;*

*(ii) issue a certificate of recognition to the person so recognised; and*

*(iii) inform the provincial house of traditional leaders and the relevant local house of traditional leaders of the recognition of a senior traditional leader, headman or headwoman.*

*(2) 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 Premier-*

*(a) may refer the matter to the provincial house of traditional leaders and the relevant local house of traditional leaders for their 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;*

*(3) Where the matter which has been referred back to the royal family for reconsideration and resolution in terms of subsection (2) has been reconsidered and resolved, the Premier must recognise the person identified by the royal family if the Premier is satisfied that the reconsideration and resolution by the royal family has been done in accordance with customary law.*"

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# IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

**Case No.CCT48/2016**

In the matter between:

**TSHIVHULANA ROYAL FAMILY** **APPLICANT**

**AND**

**NDITSHENI NORMAN NETSHIVHULANA** **RESPONDENT**

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## RESPONDENT'S HEADS OF ARGUMENT

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## 1. INTRODUCTION

1.1. The Applicant brought an application for the review and setting aside of a decision of the Second Respondent in terms of which the Second Respondent, having withdrawn the recognition of Davhana Elias Mulaudzi as Headman of Tshivhulana village, recognised the Respondent in this matter as Headman.

1.2. The orders sought in the application were, save for a costs order, threefold, namely

1.2.1. Reviewing and setting aside administrative action of the Second Respondent of recognising the First Respondent as Headman of Tshivhulana;

1.2.2. Substituting the Second Respondent's administrative action of recognising the First Respondent as Headman of Tshivhulana with the with the recognition of Davhana Elias Mulaudzi as Headman of Tshivhulana in terms of section 12(1)(b) of the Limpopo Traditional Leadership and Institutions Act, 6 of 2005, with effect from 05 May 2014;

1.2.3. Ordering that a certificate recognizing Davhana Elias Mulaudzi be issued within (30) days of the Court Order.[1]

1.3. Only the Respondent (First Respondent in the High Court application) opposed the application and the orders sought; the other Respondents (Second, Third, Fourth and Fifth Respondents in the High Court application) opted not to either oppose the application, file any papers or abide by the decision of the Court.

1.4. The application was dismissed by the High Court and application for leave to appeal was refused by both the High Court and the Supreme Court of Appeal. The ConstitutionalCourt has now granted the Applicant leave to appeal. These then are the Respondent's Heads of Argument before the Constitutional Court.

## 2. STRUCTURE OF HEADS OF ARGUMENT

2.1. We have structured these heads of argument as follows:

2.1.1. we identify the applicant and the respondents and sketch their relationships in order to place the matter and the issues involved in context;

2.1.2. we address the preliminary points raised by the First Respondent and the context within which they were raised;

2.1.3. we deal with our argument and submissions and the High Court's conclusions, rulings and decisions on, more specifically, the exhaustion of local or internal remedies;

2.1.4. we give the background, facts and circumstances of the matter;

[1] Notice of Motion, Constitutional Court Record, pp1 (lines 14-15) - 2 (lines 1-14).

2.1.5. we then deal with the question of whether the Applicant is, purely on the facts and the application of the law and irrespective of the preliminary points raised by the Respondent, entitled to the relief it seeks;

2.2. we then make our final submissions.

## 3. THE PARTIES AND THEIR RELATIONSHIPS

3.1. We mention at the outset that the Applicant is cited in the papers as Tshivhulana Royal Family. There is no indication or specificity in the Founding Affidavit as to who the Applicant in this instance is. Except for stating that she is a member of the Tshivhulana Royal Family, the deponent to the Founding Affidavit, **TSHIMANGADZO CHRISTINA MULAUDZI**[2]does not specify or explain who the Applicant is.

3.2. The deponent to the Founding Affidavit bases her authority to depose to the Founding Affidavit on a resolution to that effect, filed of record, annexed and marked "FA1".[3] We draw the Court's attention to the fact that annexure "FA1" is signed by only two persons , namely T.C Mulaudzi and D.E Mulaudzi. As can be gleaned from the Applicant's papers, the inescapable conclusion is that T.C Mulaudzi is the deponent to the Founding Affidavit and D.E Mulaudzi is DAVHANA ELIAS MULAUDZI, the person who is the actual contender to the Tshivhulana Headmanship and has a direct and substantial interest in the matter. In any event, there is no proper power of attorney authorizing the deponent to the Founding Affidavit to act either on behalf of the "Applicant" or Davhana Elias Mulaudzi.[4]

3.3. The Respondent is, as stated in the applicant's Founding Affidavit, the person whom the Premier of Limpopo Province recognized as Headman of Tshivhulana with effect from 05 May 2014.[5] We expand on the relationships between the Respondent, the deponent to the Founding Affidavit and DAVHANA ELIAS MULAUDZI when we give the background, facts and circumstances of the matter.

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[2] We shall hereinafter refer to her as the "deponent to the Founding Affidavit."

[3] Constitutional Court Record, p7, lines 1 – 5 (para. 1.1).

[4] We shall argue later in our Heads of Argument that Davhana Elias Mulaudzi is actually the main or major party in this matter.

[5] Constitutional Court Record, p7, lines 11 -14.

3.4. The Second Respondent in the application in the High Court was the Premier of the Limpopo Province ("the Premier"), the authorised executive authority who took the administrative action which the Applicant seeks to have reviewed and set aside.

3.5. The Third Respondent was the Member of the Executive Council of the Limpopo Province responsible for Co-Operative Governance, Human Settlements and Traditional Affairs ("the MEC: COGHSTA), the head of the provincial department which administers issues related to traditional affairs.

3.6. Both the Premier and the MEC:COGHSTA were, as opposed to the Fourth and Fifth Respondent were cited in their official capacity and have no other relationship whatsoever with the other parties. As will become more clearer later in our argument, the relationship between the Applicant and the Respondent on the one hand and the Fourth and Fifth Respondent on the other, is rooted in customary and traditional practices of the Tshimbupfe and Tshivhulana traditional communities; it goes beyond and cannot even be remotely associated with purely administrative functions.

3.7. The Fourth Respondent was the Tshimbupfe Traditional Council. It is common cause, and this appears from the Applicant's papers, that the Tshimbupfe Traditional Council is a traditional council responsible, among others, for forwarding the names and details of the person identified as Headman to the Premier for the purpose of recognition.[6]

3.8. The Fifth Respondent was the Tshimbupfe Royal Council. It is the senior royal family and advisory council which oversees traditional or customary matters of the whole of the Tshimbupfe area. Tshivhulana is a village which is headed by a Headman under the senior traditional leadership of the Tshimbupfe traditional royalty. under the senior traditional leadership and tutelage of Senior Traditional Leader Netshimbupfe.

3.9. We submit at the outset that there is no dispute on the papers that the Respondent isthe first born son of **RASILINGWANI PIET NETSHIVHULANA**, the late Headman of Tshivhulana settlement.

[6] Constitutional Court Record, 9 lines 1 – 5.

3.10. At the outset wealso draw the Honourable Court's attention to the fact that the application is ostensibly brought by the Tshivhulana Royal Family and that the deponent to the Applicant's Founding Affidavit,**TSHIMANGADZO CHRISTINA MULAUDZI**, is herself for some inexplicable reason not a party to the proceedings.

3.11. As stated in the Respondent's Answering Papers, **TSHIMAMANGADZO MULAUDZI** is the Respondent's aunt from the Second House. She was made a "Khadzi" or female adviser of the Respondent's father at the time of his installation as Headman of Tshivhulana.[7]

3.1. **DAVHANA ELIAS MULAUDZI** is the younger brother of the Respondent's father and deceased immediate Headman of Tshivhulana. As appears from the papers, he is the main and only contender to the Headmanship of Tshivhulana but not a direct party to the proceedings. We shall deal with this aspect later.

3.12. We shall lateralso provide the historical background, customs and traditions of the Tshivhulana Royal Family when we deal with the merits of the Applicant's case. We first deal with the points *in limine* raised by the First Applicant, namely:

3.12.1. the *non-joinder* of **DAVHANA ELIAS MULAUDZI** as an interested party and applicant; and

3.12.2. the Applicants' failure to exhaust *local or remedies*[8] before approaching the Honourable Court.

## 4. THE FIRST POINT IN LIMINE: NON-JOINDER

4.1. It was submitted on behalf of the Respondent that the first point *in limine*, namely the non-joinder of **DAVHANA ELIAS MULAUDZI** ought to be decided first before the hearing of the substantive application.

4.2. It was submitted that the determination of the first point *in limine* was crucial for a proper hearing and adjudication of the matter.

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[7] Constitutional Court Record, p 62, lines 19 – 25.

[8] The phrase 'local remedies' appears to be more suitable when dealing with disputes of traditional leadership under customary lawas influenced by the Constitution, national legislation and provincial legislation, rather than the phrase "internal remedies"which , we submit, is more suited to the review of purely administrative acts.

4.3. **DAVHANA ELIAS MULAUDZI** filed a confirmatory affidavit which for one reason or the other is not part of the record before this court. It was submitted on behalf of the Respondent that the mere fact that **DAVHANA ELIAS MULAUDZI** hadfiled a confirmatory affidavit was on its own not sufficient. He is a contender to the recognition and appointment of the Respondent as Headman of Tshivhulana. His own version was as such crucial to a proper and fair determination and adjudication of the dispute.

4.4. Should the first point *in limine*have been decided in favour of the Respondent, it would have become necessary to supplement the First Respondent's opposing affidavit and/or confirmatory affidavits. This was so because should **DAVHANA ELIAS MULAUDZI**have been joined as a party he would have been enjoined to file an affidavit giving hisversion of the chain of events and attendant legal issues, which version and legal issues the Repondent has not had the opportunity and benefit of dealing with and/or addressing in both the opposing affidavit and submissions or argument on the merits of the case.

4.5. The Applicant application is cited as **TSHIVHULANA ROYAL FAMILY**. We submit in the first place that, strictly speaking, this is an anomaly because the Respondent is also a member of the Tshivhulana Royal Family and oppose the application. As matters stand the only applicant in the matter is the Tshivhulana Royal Family. Neither**TSHIMANGADZO CHRISTINA MULAUDZI**, who deposed to the Applicant's Founding Affidavit, nor **DAVHANA ELIAS MULAUDZI**, who is the person claiming to be the rightful Headman of Tshivhulana, are cited as parties in the application.

4.6. It is fairly clear from the application that **DAVHANA ELIAS MULAUDZI** has a direct and substantial interest in the matter. As is clear from the Applicant's Founding Affidavit, the purpose of the application is the review and setting aside of the recognition of the First Respondent as Headman of Tshivhulana and to obtain an order directing that Davhana Elias Mulaudzi be recognised as Headman of Tshivhulana. We submit in this respect that **DAVHANA ELIAS MULAUDZI**ought tohave been joined as an applicant in the matter[9].

4.7. The trial court dismissed the point *in limine* of non-joinder. We submit that the trial court erred in this respect.

[99] Constitutional Court Record, p10 (lines 11-14) – p11 (lines 1–5).

4.8. Joinder and non-joinder are matters of substance rather than form (***Bowring NO v Vredesdorp Properties CC*** 2007 (5) SA 391 (SCA), para. 21). The common law rules relating to the obligatory joinder of parties remain unaltered.

4.9. The principal rule applicable to joinder is well established. A defendant has the right to demand the joinder of another party if such party has a direct and substantial interest in the issues involved and the order which the court might make.

4.10. The concept of 'direct and substantial interest' relates to an interest in the right which is the subject matter of the litigation and not merely a financial interest, which is only an indirect interest. It is generally accepted that what is required is a legal interest in the subject matter of the action which could be prejudicially affected by the judgment of the Court. (***Aquatur (Pty) Ltd v Sacks & Others***1989 (1) SA 56 (A) at 62 A – F)

4.11. A party has a direct and substantial direct interest and is a necessary party to the proceedings if the court will not be able to deal with the dispute or issues in the dispute if joinder is not effected (see ***Khumalo v Wilkins*** 1972 (4) SA 470 (N). The power of the Court to order the joinder of a party in proceedings which are already pending is well-established and undoubted. The reason for this is that the court is able to ensure that a person who has a direct and substantial interest in the subject-matter of the dispute and whose rights may be affected by the judgment of the court will be before court. Joinder also brings about a reduction in the number of litigation and consequently reduces costs.

4.12. We submit that **DAVHANA ELIAS MULAUDZI** was a necessary and indispensable party to the litigation to enable the Honourable Court to adjudicate effectively and completely on the issues in the application.

4.13. We submit that Davhana Elias Mulaudzi ought to havebeen joined as an applicant in the application. Such joinder would have been in the interests of all parties and in the interests of justice.

## 5. SECOND POINT IN LIMINE: INTERNAL REMEDIES

5.1. It was submitted on behalf of the First Respondent that there wasa failure on the part of the part of the Applicant to exhaust internal remedies before approaching the Honourable Court.

5.2. To the extent that the Second Respondent's decision to recognize and appoint the First Respondent as Headman of Tshivhulana is an administrative action for purposes of the Promotion of Administrative Justice Act, 3 0f 2000 (PAJA), it was necessary to examine whether the Applicant had available to it an internal or local remedy which it ought to have utilised. We submit that such remedy was available but the Applicant either chose not to use it or simply failed to use it.

5.3. The exhaustion of internal remedies for purposes of PAJA is peremptory. Section 7(2) of PAJA provides as follows:

"(a) Subject to paragraph (c), no court or tribunal shall review and administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

(b) Subject to paragraph (c), a court or tribunal must, if it is not satsisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

(c) A court or tribunal may, *in exceptional circumstances* and *on application* by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice."

5.4. National Legislation which deals with traditional leadership and governance, namely the Traditional Leadership and Governance Framework Act, 41 of 2003 makes provision for internal remedies where there is a dispute regarding the identification and recognition of a traditional leader.

5.5. Section 21 of the Traditional Leadership and Governance Framework Act provides as follows:

"**21. Dispute resolution**

(1)(a) Whenever a dispute concerning customary law or customs arises within a traditional community or between traditional communities or other customary institutions on a matter arising from the implementation of this Act, members of such a community and traditional leaders within the

traditional community or customary institution concerned must seek to resolve the dispute internally and in accordance with customs.

(b) ……

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

(b) If a provincial house of traditional leaders is unable to resolve a dispute as provided for in paragraph (a), the dispute must be referred to the Premier of the province concerned, who must resolve the dispute after having consulted -

(i) the parties to the dispute; and

(ii) the provincial house of traditional leaders concerned."

5.6. The identification and recognition of a traditional leader is a matter which is dealt with in the Traditional Leadership and Governance Framework Act as envisaged in section 21(1).

5.7. The Applicant was not entitled to approach the Honourable Court before and until the dispute has been addressed, by, or attempts made to resolve the dispute in terms of section 21 of the Traditional Leadership and Governance Framework Act.

5.8. There were no exceptional circumstances which justified the Applicant's failure to exhaust the internal remedies provided for in section 21 of the Traditional Leadership and Governance Framework Act.

5.9. There was no application for exemption from the duty to exhaust the internal remedy provided for in section 21 of the Traditional Leadership and Governance Framework, and it could not be shown that it would be in the interest of justice to exempt the Applicant from the obligation to exhaust the internal remedies provided for in section 21.

5.10. It was submit that the Applicant had no leg to stand on and to approach the Honourable Court at that stage.

5.11. It was submitted that purely on the basis of this point *in limine* the application ought to be dismissed.

5.12. The submission was based purely and solely on the fact that the dispute which is the subject of the application was about who, between the First Respondent and **DAVHANA ELIAS MULAUDZI**, is the legitimate Headman of Tshivhulana village in accordance with the customary law or customs of the Tshimbupfe and Tshivhulana traditional communities.

5.13. The dispute is a dispute which falls squarely within the provisions of section 21(1)(a) of the Traditional Leadership and Governance Framework Act, 41 of 2003 and falls, first and foremost, to be dealt with in terms of that section.

5.14. In terms of section 21(2)(a),if a dispute concerning customary law or customs, more specifically one which relates to leadership in accordance with customary law or customs within a traditional community, cannot be resolved in terms of section 21(1)(a) it must be referred to the provincial house of traditional leaders, which house must seek to resolve the dispute in accordance with its rules and procedures.

5.15. In terms of section 21(2)(b) if the provincial house of traditional leaders fails to resolve the dispute, it must be referred to the Premier, who must resolve the dispute *after* having consulted the parties to the dispute and the provincial house of traditional leaders. In this instance the Premier does not act alone because the section enjoins him or her to consult with the parties concerned and the house of traditional leaders.

5.16. Section 21 makes provision for three successive internal remedies, all of which must be exhausted before other remedies can be initiated. We submit in this respect that the Applicant's failure to exhaust all these internal remedies is fatal to its case and that for this reason the application must fail.

5.17. It is necessary to examine the meaning and purport of the duty to exhaust "internal (or local remedies within the context of section 21 of the Traditional Leadership and Governance Framework Act.

5.17.1. The duty to exhaust internal or local remedies has its roots in English law.[10] It became part of South African law as a result of English law influence.

5.17.2. The rationale for the duty to exhaust internal or local remedies is threefold. Firstly, it is an immediate and cost-effective tool which advances the doctrine of the separation of powers between the executive and the judiciary. Second, it is a tool which is used to determine the ripeness of a dispute for judicial adjudication. And, thirdly it is a tool which encourages parties to consider available internal or local remedies first before approaching the courts, because in some instances statutory or administrative internal remedies are better placed to resolve disputes without having to resort to the courts.

5.17.3. Section 33 of the Constitution now provides an even more compelling rationale for the duty to exhaust internal or local remedies. Section 33(1) provides that "everyone has the right to administrative action that is lawful, reasonable and procedurally fair". Section 33(2) provides that "everyone whose rights have been adversely affected by administrative action has the right to be given written reasons". Section 33(3) provides that "national legislation must legislation must be enacted to give effect to these rights". The Promotion of Administrative Justice Act, 3 of 2000 (PAJA) was specifically enacted for that purpose.

5.17.4. The present application was brought in terms of in terms of PAJA and was dismissed on account of a failure to exhaust internal remedies as required by PAJA.

5.17.5. The essence of the judgment of the trial court is that a review under PAJA is premature if the Applicant has failed to exhaust internal remedies. If this Court finds that the Applicant has failed to exhaust internal remedies, then the application for leave to appeal must fail.

5.17.6. PAJA does not permit a court to review an administrative action in terms of the Act unless an internal remedy provided for in the law has first been exhausted.

5.17.7. Where a court is not satisfied that an internal remedy has been exhausted, PAJA makes it peremptory for the court to direct the applicant to first exhaust an internal remedy before instituting proceedings in a court.

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[10] See in general CF Forsyth *Administrative Law* 8th ed, (2000)

5.17.8. It is only in exceptional circumstances and on application that an applicant may be exempted from exhausting internal remedies (section 7(2)(c), PAJA).

5.17.9. The trial court correctly found that there were no exceptional circumstances that warranted an exemption from exhausting internal remedies. An additional consideration in this respect is that the Applicant did not, in any event, bring an application for exemption as required by section 7(2)(c) of PAJA.

5.17.10. The administrative law requirement that an applicant in an application for the review of an administrative act or decision is well-known and well-established in our law. Section 7(2)(a) of PAJA reinforces and codifies the common law principle of exhausting internal remedies before an applicant in a review application can approach the courts for relief.

5.17.11. Internal remedies exist in addition to judicial control of administrative acts or decisions and not in themselves judicial acts or decisions. The internal process or remedy contains within it full powers of not only examining and re-examining the matter but also the power to enquire into, consider and to decide on the merits of the case and may even examine the efficacy of the act.

5.17.12. An internal remedy is a means of control over an administrative act or decision which gives the aggrieved party a simple, informal and, as a rule, easy means of settling administrative disputes.

5.17.13. Where a statute makes provision for internal remedies, the statute, or more appropriately, the intention of the legislature, is decisive. If it is obvious that the statute in question requires, either expressly or by necessary implication, that external remedies first be exhausted, the application for judicial review simply cannot be entertained until the internal remedies have been exhausted; what this means is that until the internal remedies have been exhausted, the court has no jurisdiction to hear the dispute.

5.17.14. Unless exceptional circumstances are found to exist and on application by the person concerned, PAJA specifically requires that available internal remedies be exhausted prior to the person concerned approaching the court for judicial review.

5.17.15. The function and purpose of internal remedies were explained by Mokgoro J, in *Koyabe and Others v Minister for Home Affairs and Others*[11] as follows:

"Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid".[12] (at para. 35)

5.17.16. Approaching a court before an available or existing internal or local remedy is exhausted undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function. The scope of administrative action extends over a wide range of circumstances, and the crafting of specialist administrative procedures suited to the particular administrative action in question enhances procedural fairness in our Constitution. Courts have often emphasized that what constitutes a 'fair' procedure will depend on the need to allow executive agencies to utilise their own fair procedure is crucial in administrative action.

5.17.17. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*,[13] Oregan J held that –

'a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker.'

[11] 2010 (4) SA 327 (CC).

[12] At para. 35.

[13] 2004 (4) 490 (CC) at 48.

5.17.18. Once an administrative task is completed, it is then for the court to perform its review responsibility, to ensure that the administrative action or decision has been performed or take in compliance with the relevant constitutional and other legal standards.

5.17.19. Internal administrative remedies may require specialised knowledge, which may be of a technical and/or practical nature. The same holds true for fact-intensive cases where administrators have easier access to the relevant facts and information. Judicial review can only benefit from a full record of an internal adjudication, particularly in the light of the fact that reviewing courts do not ordinarily engage in fact-finding and hence require a fully developed factual record (at para. 370."

5.17.20. The trial decided the application on the PAJA requirement of exhausting internal remedies and it is only on the basis of the ruling and decision of the trail court that the Application for Leave to Appeal must be considered.

5.18. The trial courtcorrectly held that a procedure for an internal remedy is provided for in section 21 of the Traditional Leadership and Governance Framework Act of 2003 (the Act).[14]

5.19. The Act deals with and makes provision for matters relating to traditional leadership and governance. Section 21 of the Act deals specifically the resolution of disputes. The Court*a quo* correctly ruled that the dispute of Headmanship in the instant case could be resolved by any of the internal remedies provided for in section 21 of the Act.

5.20. The Applicant has not shown that exceptional circumstances exist for the Court on application to exempt it from exhausting internal remedies. The Supreme Court of Appeal has held that "it is now compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies unless exempted from doing so by way of a successful application under section 7(2)(c). Moreover the person seeking exemption must satisfy the court of two matters: first that there are exceptional circumstances and second, that it is in the interest of justice that the exemption be given." (*Nichol and*

[14] Constitutional Court Record, p205, lines11-12.

*Another v The Registrar of Pension Funds and Others* 2008 (1) SA 383 (SCA) at para. 15).

5.21. The question of whether the section 21 dispute resolution mechanism fell within the meaning of "internal remedy" was raised by Mogoeng JP (as he then was) in the *Mamogale v Premier North West and Others*.[15] The Chief Justice (as he now is) posed the following closely related question:

"In other words, what are the parameters of 'internal' within an African traditional setting which provides a framework within which a solution could be found. Is a remedy perhaps not be understood as 'internal' if it is located within the confines of the Royal Family or the particular traditional community, between traditional communities or other customary institutions?"[16]

5.22. The Chief Justice expressed a doubt whether a dispute in that case could properly be regarded as an internal remedy and posited an explanation of why section 21(1)(a) of the Act refers to "measures taken by a traditional community, or traditional communities or customary institutions to resolve their disputes as an attempt 'to resolve the dispute internally. But does not characterise similar attempts to resolve the same disputes in the House, the Premier or the Commission as internal measures".[17]

5.23. We submit that the question posed and the explanation posited by the Chief Justice are relevant and pertinent not only to a determination of the dispute in this case but to all other disputes which arise from the constitutional, common law, legislative and customary nature and structure of our South African law insofar as it pertains to "a traditional community, or traditional communities or customary institutions." It is precisely on this basis that the First Respondent opposed and opposes the present application.

5.24. In *Mamogale* the Chief Justice came to the conclusion that the decision of the Premier had "elevated what once was a an internal dispute, potentially capable of internal resolution, to a dispute between a faction of the Royal Family as well as a section of the tribe on the one hand, and the Provincial Government on the other, which has caused the resolution no longer to be internal. A truly internal dispute is, *in the context of this case* (emphasis),

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[15] (227/2006) [2006] ZANWHC 63 (13 October 2006) (*Mamogale*).

[16] At para. 18.

[17] Para. 18.

capable of being resolved by the Royal Family through customary laws, customs and processes".[18]

5.25. We submit that the context to which the Chief Justice referred to in *Mamogale* is distinct from the present context.

5.26. It is on the basis of that distinction that this case must be decided. In *Mamogale*, as the Chief Justice correctly stated, the provincial legislation in *Mamogale*, the facts of the case and the non-existence or non-appointment of a commission placed the context in *Mamogale* in a different perspective.[19] We submit that the context in this case differs completely from the context in *Mamogale*.

5.27. First, the issues in *Mamogale* were, in addition to section 21 of the Act, also regulated by the Bophuthatswana Traditional Authorities Act, No. 23 of 1978 ("the Bop Provincial Act"). The provincial legislation in *Mamogale* was promulgated in 1978, came into operation before the coming into operation of section 21 of the Act and had not been repealed. The Bop Provincial Act was, in the context of Mamogale, the recognised applicable provincial legislation that governs issues affecting traditional leadership and institutions in the North West Province.

5.28. The provincial legislation in this case is the Limpopo Traditional Leadership and Institutions Act, 6 of 2005, as amended by Act 4 0f 2011 ("the Limpopo Provincial Act"). It came into operation of 01 April 2006, after the coming into operation of the main Act, on 24 September 2004. By the same token, the Limpopo Provincial Act governs issues affecting traditional leadership and institutions in the Limpopo Province.[20]

5.29. Second, as the facts show, the context in *Mamogale*, was about an alleged or perceived misconduct of the Applicant, rather than about who should *rightfully* (emphasis) be recognised as the rightful Headman.

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[18] Para. 19.

[19] Para. 25 – para.26.

[20] We mention in this respect that, apart from the effort to bring provincial legislation in line with the Constitution and national legislation (the Act), matters, questions, disputes and claims of traditional leadership have ben handled and resolved differently by different traditional communities since time immerial.

5.30. Third and last, it is submitted that the appointment of a Commission as envisaged in section 21(1)(b) pf the Act does not arise in this case. The appointment of a Commission relates to a case which must be investigated by the Commission in respect of matters or issues referred to in section 25(2) of the Act. The withdrawal of the recognition of Davhana Elias Mulaudzi and the recognition of the Respondent in this matter is not a matter or an issue which falls under section 25(2). This case is not about the establishment of a headmaship but about the recognition of a specific person as headmanship. It is common cause that the Tshivhulana headmanship was established a long time ago and still exists.

5.31. We now deal with the factual background to the application.

## 6. FACTUAL BACKGROUND

6.1. Tshivhulana village is a small traditional community which falls under Tshimbupfe Traditional Council and tribal office.

6.2. According to current history, the person to be recognized as Headman of Tshivhulana was **Netshivhulana**.[21] He was succeeded by his firs born son **Mukovhi**.

6.3. Mukovhi was succeeded by his first born son **Mangathu**. Mangathu was succeeded by his first born son **Tumbani**. Tumbani was succeeded by his first born son **Mudzulafhedzi**. Mudzulafhedzi was succeeded by his first born son **Lukhevhedzhane**. Lukhevhedzhane was succeeded by his first born son **Mugoidwa**.

6.4. When Mugoidwa died his first born son, **Piet Rasilingwane**, was still a minor and was according to custom not ready to succeed him. **Muligidi**, the younger brother of Mugoidwa, was appointed to act on behalf of Piet Rasilingwane.

6.5. Muligidi died in 1936 but at that time Piet Rasilingwane was still attending school and could not succeed his father. **Daniel Davhana**, the younger brother of

[21] Under customary law, Netshivhulana would have been installed as headman of Tshivhulana by the then Tshimbupfe Senior Traditional Leader in order to administer that village on his behalf and would either have been a trusted brother, close relative or confidante of Tshimbupfe.

Muligidi, acted until he died in 1937. In 1938, **Nyamphwe**, the sister of Daniel Davhana, acted for Piet Rasilingwane until she died in 1958.

6.6. After the death of Nyamphwe, **Piet Rasilingwana**, the rightful heir and successor ascended the throne and became the Headman of Tshivhulana. After the death of Piet Rasilingwane his first born son **Wilson Mutheiwana** ruled as Traditional Leader of Tshivhulana from 1978 until he died in 1992.

6.7. As can be seen from the above, the Tshivhulana headmanship has always been in accordance with the custom of male primogeniture in terms of which the first born son of the late headman succeeded his father as headman. This aspect of the Tshivhulana custom and practice is not placed in dispute by the applicant.

6.8. The Respondent, **Nditsheni Norman Netshivhulana**, is the first born son of Wilson Mutheiwana from his first wife.

6.9. Davhana Elias Mulaudzi is the younger brother of Wilson Mutheiwana and the uncle of the Respondent.

6.10. It is common cause that Davhana Elias Mulaudzi was appointed as regent or acting Headman after the death of his brother, Wilson Mutheiwana. Davahana Elias Mulaudzi was appointed as regent because at the time of the death of Wilson Mutheiwana the Respondent, his first born son, was still a minorand could not, because of his minority, ascend to the throne. This, in essence, is the only valid reason which led to the appointment of Davhana Elias Mulaudzi as Headman or, more precisely, regent or acting Headman.

## 7. THE RIGHTFUL AND LEGITIMATE HEADMAN OF TSHIVHULANA

7.1. We submit that the Respondent is the rightful and legitimate Headman of Tshivhulana in whose place Davhana Elias Mulaudzi was acting after the death of Wilson Mutheiwana, the Respondent's father.

7.2. The Respondent is Wilson Mutheiwana's first born son from the first wife;

7.3. As appears from the sketched background, the principle of male primogeniture is central to the Tshivhulana customary law of succession to headmanship; the eldest surviving male from the first wife or subsequent wives if the first wife has

no male child, succeeds into the position held by his father. The Respondent therefore succeeds into the position which was held by the late Headman Wilson Mutheiwana.

7.4. Although the customary law principle of male primogeniture was declared unconstitutional in relation to the exclusion of women with respect[22] to the inheritance of property, it remains valid and intact in relation to the rules which govern the status of traditional leaders. In ***Bhe and Others v Magistrate, Khayelitsha and others; Shibi v Sithole and others; South African Human Rights Commission and Another v Presidenet of the RSA and another***[23]Langa DCJ sounded a very strong warning that the ***Bhe*** judgment must not in any way be read as having determined "the constitutionality of the rule of male primogeniture in other contexts within customary law, such as *the rules which govern status and traditional leaders*".

7.5. The Respondent had already been identified by the Tshivhulana Royal Family as the rightful and legitimate Headman of Tshivhulana after the death of his father.

7.6. The identification of the Respondent as the rightful and legitimate Headman of Tshivhulana was confirmed by the late Chief Netshimbupfe. The confirmation was in accordance with customary law, because the Tshimbupfe traditional leadership is the Senior Traditional Leadership under which the Tshivhulana Traditional Leadership falls and resorts.[24]

7.7. The main and only reason the Respondent could not at that time assume the Headmanship was that he was not yet married and was in terms of customary law regarded as a minor. It was for that reason that Davhana Elias Mulaudzi was appointed to act in his place.

7.8. The Applicant contends that the previous and deceased Headman, Wilson Mutheiwana, died without an heir. This contention is baseless and has no merit. We submit that the Respondent is the rightful and legitimate heir to the throne; the Applicant has not placed before the Honourable Court anything to the contrary.

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[22] T W Bennet ***Customary Law in South Africa*** (2004) at 337.

[23] 2005 (1) SA 580 (CC).

[24] Constitutional Court Record, p56.

7.9. The Applicant contends that Wilson Mutheiwana died without an heir because he did not have a "Dzekiso" wife. We submit that this contention is disingenuous and misleading and purely intended to legitimise Davhana Elias Mulaudzi's claim to be the Headman of Tshivhulana. No historical material or evidence was placed before the court to substantiate the claim that Wilson Mutheiwana died without an heir because he did not have a 'Dzekiso' wife and no rational explanation was given why that would have been so. In terms of the well-know and accepted principle of male primogeniture, the Respondent is the first born son of Wilson Mutheiwana and his legitimate heir. It is not the Applicant's contention that the Respondent is an illegitimate child of Wilson Mutheiwana and therefore cannot on account of being an illegitimate child cannot succeed his father as Headman of Tshivhulana.

7.10. Davhana Elias Mulaudzi was at no stage appointed as Headman of Tshivhulana. He was appointed as regent or acting Headman in the place of the Respondent.

7.11. Davhana Elias Mulaudzi has been acting as Headman for an inordinately long period and should have vacated the acting Headmanship a long time ago. He has however been refusing and still refuses to vacate the regency.

7.12. As a result of the fact that Davhana Elias Mulaudzi has been acting as Headman for an inordinately long time, the Tshivhulana Royal Family resolved that his acting appointment should be withdrawn and that the Respondent, as the legitimate and rightful heir and successor,should be installed as Headman.[25]

7.13. The Senior Traditional Royal House, namely the Netshimbupfe Royal Family was approached to facilitate the reinstatement of my Headmanship and the installation of the Respondent as Headman of Tshivhulana.

## 8. THE RESTORATION OF THE TSHIVHULANA HEADMANSHIP

8.1. On 23 September 2012 the Tshivhulana Royal Family attended a meeting at the Netshimbupfe Royal Family. The purpose of the meeting was to discuss the restoration of the Tshivhulana Headmanship and the installation of the Respondent as the legitimate and rightful Headman of Tshivhulana.

[25] Constitutional Court Record, p53.

8.2. Subsequent to the meeting of 23 September 2012 the late Chief MA Netshimbupfe wrote a letter, dated 31 Ocober 2012, to the Applicant, informing it that he had received a delegation from the Netshivhulana family enquiring about the Tshivhulana headmaship.

8.3. In paragraph 9.15 of its Founding Affidavit the Applicant avers that a resolution was taken at a meeting that a meeting should be convened to identify a successor and that eighteen months would be required to resolve the problem of who is the rightful and legitimate successor.[26]If any such decisions were taken, they are curious and ridiculous becausethe Respondent had already been identified as the rightful and legitimate successor immediately after the death of his father. We submit that such decisions could only have been taken to unduly delay the recognition, appointment and installation as of the Respondent as Headman of Tshivhulana. In any event, a subsequent request for an extension of time was rejected the Netshimbupfe Royal Family, it being the Senior Traditional Leadership Family.

8.4. It is both revealing and appalling that the deponent to the Applicant's Founding Affidavit deliberately ignored the directive from the Netshimbupfe Royal Family, it being the Senior Traditional Leadership Family, and instead chose to identify the maternal younger brother of the 1st Respondent as the successor. We submit that this was a deliberate attempt to prevent 1st Respondent from succeeding his late father as Headman of Tshivhulana.

8.5. In paragraph 20 of its Replying Affidavit the Applicant seeks to downplay and dismiss the views of the Tshimbupfe Royal Family as contained in the letter of 27 June 2013 by stating that it "makes no sense for the Tshimbupfe Royal Family to state that the First Respondent should have succeeded his late father as Headman of Tshivhulana when he turned twenty (21) years of age whereas the first respondent was already twenty four (24) years of age when the deceased died.[27]

8.6. In the above respect the Applicant misconstrues the views of the Tshimbupfe Royal Family and ignores the facts. The view taken and expressed by the Tshimbupfe Royal Family is simply that by law a successor can legally succeed only once he has reached the age of majority, which is 21 years. In this instance the Respondent's father died after he had attained majority and ought to have

[26] Constitutional Court Record, p17, lines 16 – 20.

[27] Constitutional Court Record, p132, 9 – 13.

succeeded his father as Headman. The facts, however, are that at the time of the death of his father the 1st Respondent had not yet married and was in accordance with customary law regarded as a minor. It was for that reason that Davhana Elias Mulaudzi was appointed to act on his behalf. Davhana Elias Mulaudzi ought to have stepped down, and the Respondent installed, as Headman once he got married.

8.9. It is our submission that the restoration of the Tshivhulana Headmanship and the installation and recognition of the Respondent as the legitimate and rightful Headman of Tshivhulana been marred with and riddled by shenanigans orchestrated by Davhana Elias Mulaudzi and the deponent to the Applicant's Affidavits.

8.10.It is also appalling for the deponent to the Applicant's Founding Affidavit to say that "the Neshivhulana Royal Family was prepared to turn a blind eye and identify the successor within the children of the deceased".The earmarked successor was Oriel Netshivhulana, the younger brother of the Respondent. We submit that the deponent's statement in this regard betrays her dishonesty and cunning and points out to an orchestrated attempt to prevent the Respondent from assuming his place as the legitimate and rightful Headman of Tshivhulana and to perpetuate and solidify the position of Davhana Elias Mulaudzi as a traditional leader of Tshivhulana.

8.11.We submit that the identification Oriel Netshivhulana as a scuccessor in the place of the Respondent was an orchestrated attempt to sow division between the Respondent and his younger brother, to undermine the Respondent, to alienate the Respondent and to ensure that Davhana Elias Mulaudzi would continue as regent or acting Headman and eventually become entrenched as a permanent Headman of Tshivhulana.

8.12.Oriel Netshivhulana was in fact approached by the deponent and some loyalists of Davhana Elias Mulaudzi with the proposal that he should succeedas Headman of Tshivhulana,instead of the Respondent.Oriel Netshivhulana rejected the proposal to become Headman. We submit that he rejected the proposal because he knew that the Respondent is his elder brother and that by customary law it is the Respondent who must succeed their father as Headman of Tshivhulana.

8.13. Subsequent to the rejection by Oriel Netshivhulana to the proposal to become Headman of Tshivhulana, the deponent to the Applicant's papers and some people loyal to Davhana Elias Mulaudzi then proceeded to identify Davhana Elias Mulaudzi as Headman of Tshivhulana. We submit that the identification of

Davhana Elias Mulaudzi, who had been acting as Headman in the Respondent's place, is not in accordance with customary law and applicable legislation and is unlawful.

## 9. THE RECOGNITION OF RESPONDENT AS HEADMAN OF TSHIVHULANA

9.1. We now deal with the factual background and legality of the recognition of the Respondent as Headman of Tshivhulana by the Premier of the Limpopo Province.

9.2. We shall also later deal with judicial review and the requirements therefor in terms of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA"), in view therof and to the extent that the Applicant bases its application on PAJA..

9.3. It is common cause that the Premier of Limpopo Province is in terms of applicable legislation empowered and obliged to appoint Chiefs and Headman whose traditional area of jurisdiction fall within the province.

9.4. It is also common cause that in terms of applicable legislation that the Premier of Limpopo Province is empowered and obliged to recognise as Chief or Headman only a person who has been identified and recommended by the relevant Traditional Council.

9.5. It is common cause that in this instance the Tshimbupfe Traditional Council is the only relevant and competent Traditional Council for the purpose of making a recommendation as to who must be recognised as Headman. The Tshimbupfe Royal Council is the custodian of the Tshimbupfe senior traditional leadership. The Applicant readily admits that this is the case. (Constitutional Court Record, p9, lines 1 – 5).

9.6. The deponent to the Applicant's Founding Affidavit purportedly identified Davhana Elias Mulaudzi as Headman. The purported identification of Davhana Elias Mulaudzi as Headman was submitted to the Tshimbupfe Traditional Council for forwarding to the the Premier of Limpopo Province. It is only logical to conclude that the Tshimbupfe would have forwarded the identification of Davhana Elias Mulaudzi to the Premier if it supported it. As it turned out, the Tshimbupfe Traditional Council did not support and rejected the identification of

Davhana Elias Mulaudzi as Headman and therefore logically did not forward it to the Premier.

9.7. Subsequent to the rejection of the identification of Davhana Elias Mulaudzi as Headman of Tshivhulana, the Tshimbupfe Traditional Council, on 26 January 2014, held a meeting at which it was resolved that the Respondent is the rightful and legitimate Headman of Tshivhulana and must duly and formally be recognized and installed as such. In this respect the Tshimbupfe Traditional Council was acting in accordance with the appointment of the Respondent as Headman of Tshivhulana by the late Chief M A Netshimbupfe, after consulatation with the family of the Headmanship of Tshivhulana.

9.8. The decision of the Tshimbupfe Traditional Council that the Respondent is the rightful and legitimate Headman of Tshivhulana and must be recognized as such was communicated to the Vhembe District Head of the Co-Operative Governance, Human Settlements and Traditional Affairs (COGHSTA) of Limpopo Province for processing and forwarding to the Premier. The relevant documents are part of the record.[28]

9.9. Among the supporting documents is a formal appointment Respondent by the late Chief M A Netshivhulana and an an earlier appointment of Davhana Elias Mulaudzi as regent or Acting Headman of Tshivhulana, acting on behalf of the Respondent.

9.10.In due course, an application for the withdrawal of the appointment of Davhana Elias Mulaudzi, and the recognition and appointment of the 1st Respondent, as Headman of Tshivhulana were forwarded to the Head of Department of COGHSTA by the Vhembe Support Centre.

9.11. On 17 March 2014 the abovementioned application was forwarded to the Premier for consideration, having been signed and recommended by the Senior Manager, Traditional Affairs on 18 March 2014 and the General Manager, Traditional Affairs and the Senior General Manager, Co-Operative Governance on 20 March 2014.

9.12. On 28 March 2014 the Acting Head of Department supported the application and recommendation. The responsible Member of the Executive Council recommended the approval of the application on 31 March 2014.

[28] Constitutional Court Record, pp 35 – 58).

9.13. On 05 May 2014 the 3rd Respondent approved the application and recommendation. For the sake of convenience we set out the approval in full, which is as follows:

"1. The recognition of acting Headman Davhana Elias Tshivhulana be withdrawn in terms of section 15(4) of Limpopo Traditional Leadership and Institutions Act, No. 6 of 2005.

5. Netshivhulana Norman be recognized as Headman of Tshivhulana Village in terms of section 12 (1)(b) of Limpopo Traditional Leadership and Institutions Act, No. 6 of 2005…"

11.4. We shall deal more fully with the procedure followed in the identification and recognition of the Respondent as Headman of Tshivhulana.

## 10. LEGISLATIVE FRAMEWORK

10.1. We now deal with the legislative framework in respect of the recognition of traditional leaders. We submit in this respect that all that any person who wishes to challenge a decision of the Premier of Limpopo to recognise someone as a traditional leader must first show that the Premier did not act in accordance with the legislative framework or acted contrary to it. We shall deal more fully with the requirements for judicial review at a later stage.

10.2. In this case the applicantcorrectly premises its application on the Limpopo Traditional Leadership and Leadership Act, 6 of 2005. The Limpopo Traditional Leadership and Institutions Act is provincial legislation. We submit, however, that the starting point is the Traditional Leadership and Governance Framework Act, 41 of 2003, which is national legislation. The Traditional Leadership and Governance Framework Act must be read with the Limpopo Traditional Leadership and Institutions Act.

10.3. The Traditional Leadership and Governance Framework Act, 41 of 2003 came into operation on 24 September 2004 and was subsequently amended by the Traditional Leadership and Governance Framework Amendment Act 23 of 2009, which came into operation on 25 January 2010. The Act seeks to set out a national framework and norms and standards which define the place and role of traditional leadership within the new system of democratic governance, to transform the

institution in line with constitutional imperatives and to restore the integrity and legitimacy of the institution of traditional leadership in line with customary law and practices.

10.4. The process for the recognition of traditional leadership is contained in section 11(1) of the Traditional Leadership and Governance Framework Act, 41 of 2003, which must in this case be read with section 12 of the Limpopo Traditional Leadership and Institutions Act, 6 of 2005. Section 12(1) of the Limpopo Traditional Leadership and Institutions Act, 6 of 2005 is an exact replica of section 11(1) of the Traditional Leadership Act, 41 of 2003.

10.5. Section 11(1) of the Traditional Leadership and Governance Framework Act, 41 of 2003 provides as follows:

"**11. Recognition of senior traditional leaders, headmen or headwomen**

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

(a) the royal family concerned must, within a reasonable time after the need arises for any of those positions to be filled, and with due regard to applicable customary law -

(i) identify a person who qualifies in terms of customary law to assume the position in question, after taking into account whether any of the grounds referred to in section I2(l)(a), (b) and (d) apply to that person; and

(ii) through the relevant customary structure, inform the Premier of the province concerned of the particulars of the person so identified to fill the position and of the reasons for the identification of that person; and

(b) the Premier concerned must, subject to subsection (3), recognise the person so identified by the royal family in accordance with provincial legislation as senior traditional leader, headman or headwoman, as the case may be.

10.6. Both section 11(1)(a)(i) of the Traditional Leadership and Governance Framework Act, 41 of 2003 and section 12(1)(a)(i) of the Limpopo Traditional Leadership Act, 6 of 2005 provide that the royal family concerned must, with due regard to the applicable customary law, identify a person who qualifies in terms of customary law to assume the position of traditional leader. The provisions of section 11(1)(a)(i) and section 12(1)(a)(i) are peremptory and must be followed to the letter.

10.7. In terms of section 11((1)(a)(ii) of the Traditional Leadership and Governance Framework Act, 41 of 2003 and section 12(1)(a)(ii) of the Limpopo Traditional Leadership Act, 6 of 2005 once the person who qualifies to be appointed the traditional leader is identified the royal family must, through the relevant customary structure of the traditional community concerned and after notifying the traditional council, inform the premier of the person so identified to fill the position.

10.8. In terms of section 11(1)(b) of the Traditional Leadership and Governance Framework Act, 41 of 2003 the Premier must recognise the person identified by the royal family in terms of section 11(1)(a). Section 11(2)(a)(i) of the Traditional Leadership and Governance Framework Act, 41 of 2003 and section 12(1)(b)(ii) the Limpopo Traditional Leadership and Institutions Act, 6 of 2005 make provision for the issuing of certificate of recognition by the Premier.

10.9. Section 11(3) of the Traditional Leadership and Governance Framework Act, 41 of 2003 and section 12(2) of the Limpopo Traditional Leadership and Institutions Act, 6 0f 2005[29] make provision for instances where there is an allegation that the identification of a traditional leader was not done in accordance with customary law, customs or processes. Section 11(3) of the Traditional Leadership and Governance Framework Act, 41 of 2003 provides as follows:

"(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 Premier –

[29] Section 12(2) of the Provincial Legislation is a mirror-image of the section 11(3) of the National Legislation.

(a) may refer the matter to the relevant provincial 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."

10.11. We submit in the first instance that the Applicant has failed to show that the Premier has not acted in accordance with or has acted contrary to the legislative framework for the recognition and appointment of traditional leadership.

10.12. We submit in the second instance that, if it is the Applicant's contention that the Premier's recognition and appointment of the Respondent as Headman of Tshivhulana, it ought to have raised the matter with the Premier.

10.13. As we have already submitted, where there is evidence or an allegation that the identification of a person as a traditional leader was not done in accordance with customary law, custom or processes, the Premier may refer the matter to the relevant provincial house of traditional leaders for its recommendations, or may refuse to issue a certificate of recognition, and must refer the matter back to the royal family for consideration and resolution where he refuses to issue a certificate of recognition.

10.14. In this matter the Applicant has not brought any evidence or complaint of impropriety to the attention of the Premier. They have also not advanced any explanation or reasons why they have not raised their dissatisfaction with the Premier for him to deal with it in terms of section 11(3) of the National Legislation or section 12(2) of the Provincial Legislation.

10.15. We submit in the above respect that the Applicant's application was premature and, purely on that basis, correctly dismissed.

## 11. PROCEDURE FOLLOWED IN THE INSTANT CASE

11.1. The first and original recognition of the Respondent at the local and traditional sphere of governance as Headman of Tshivhulana was made by the late Senior Traditional Leader Chief M A Netshimbupfe of the Tshimbupfe Royal

Family, who acted in consultation with the Tshivhulana Royal Family and the late Makhadzi Radzilane. This happened in 1992, after the death of the Respondent's father. Due to the fact that at that stage he was still regarded as a minor under customary law, Davhana Elias Mulaudzi was appointed as regent to act on his behalf, until he attained majority under customary law.

11.2. The appointment of Davhana Elias Mulaudzi as regent or acting Headman was recognized and formalized by the late Chief M A Netshimbupfe. Davhana Elias Mulaudzi did not at that stage or at any stage thereafter contest or dispute the authority of the late Chief M A Netshimbupfe to recognise and appoint him as acting Headman on behalf of the 1st Respondent. It will be surprising if Davhana Elias Mulaudzi now suddenly contest or dispute the authority of Chief M A Netshimbupfe after he himself had acted for such a long time under that authority, or at the very least, the recognition of him as acting Headman.

12.3. It is common cause that a traditional leader acts and decides in consultation with and on the advise of the royal family and the royal council.

12.4. The Applicant readily admists that the royal council of the Tshimbupfe and the villages which fall under Tshimbupfe is the Tshimbupfe Royal Council, which is the custodian of the Chieftaincy of Tshimbupfe and responsible primarily with the identification of a person to fill the vacant position of a Senior Traditional.[30]

12.5. The Applicant fails to state, however, that the Tshimbupfe Royal Family and the Tshimbupfe Traditional Council are the senior traditional leadership institutions and the relevant customary structures envisaged in section 11(1)(a)(ii) of the Traditional Leadership and Governance Framework Act, 41 of 2003 and section 12(1)(a)(ii) of the Limpopo Traditional Leadership and Institutions Act, 6 of 2005. That this is so is borne out by the fact that the Applicant could only process the application for the recognition of the Tshivhulana Headmanship through the Tshimbupfe Royal Council, which is what it attempted to do when it improperly and unlawfully identified Davhana Elias Mulaudzi for recognition as Headman.

12.6. It is significant to note that Davhana Elais Mulaudzi acted as Headmen from 1992 until 2012, when other members of the Tshivhulana royal family raised

[30] Constitutional Court Record, p 9, lines 10 – 13).

concerns about the fact he had been acting as Headman for a considerable long time.

12.7. On 23 September 2012 the Tshimbupfe Royal Family, being the senior traditional leadership structure of the community, received members of the Tshivhulana Royal Family who were enquiring about the traditional leadership position of the Tshivhulana Royal Family.

12.8. Subsequent to the visit and enquiry by the Tshivhulana Royal Family, the Tshimbupfe Royal Family directed the Tshivhulana Royal Family to convene a meeting of the Tshivhulana Royal Family to indicate who the rightful and legitimate successor is and thereafter to inform the Tshimbupfe Royal Family accordingly. For all intents and purposes, the late Chief M A Netshimbupfe had already in 1992 recognised the Respondent as the successor and it was the expectation that Davhana Elias Mulaudzi, who had been appointed as acting Headman in the place of the Respondent, would step down and pass on the Headmanship to the Respondent.

12.9. The visit of the Tshivhulana Family to the Tshimbupfe Royal Family and the directive to the Tshivhulana Royal Family to convene a meeting to indicate who the successor is is set out in a letter written by the Tshimbupfe Royal Family to the Tshivhulana Royal Family and received by them on 31 October 2012.[31]

12.10. The Tshivhulana Royal Family convened a meeting as stated in Paragraph 9.15 of the Applicant's Founding Affidavit.[32] At the meeting the Applicant however avoided discussing and taking a decision on who the rightful and legitimate successor is but instead claimed that they will require 18 (eighteen) months within which to resolve the problem. We submit that this was purely a ploy and part of delaying tactics on the part of Davhana Elias Mulaudzi and the deponent to Applicant's Founding Affidavit to "buy for time" and to perpetuate and sustain the position Davhana Elias Mulaudzi as acting Headman.

12.11. In a letter dated 27 June 2013 the Tshimbupfe Royal Family, as the Senior Traditional Leadership House, rejected the request for an 18 (eighteen) months extension as alluded to in Paragraph 9.16 of the Applicant's Founding Affidavit, based on the reason that Davhana Elias Mulaudzi had been acting for an inordinately long time. It was pointed out in the letter that the Respondnt should have ascended, as the rightful successor, to the throne when he reached the age of 21 (twenty-one) years. The Tshivhulana Royal Family, being the Junior Traditional

[31] Constitutional Court Record, pp15 (line 9) – p16 (line8).

[32] Constitutional Court Record, p 17, lines 11 – 20.

Family, was directed by the Tshimbupfe Royal Family to convene a meeting on 30 June 2013 to finalize the matter.

12.12. On 10 February 2014 and after the Applicant and Davhana Elias Mulaudzi had resisted and delayed the finalization of the succession of the Respondent to the Tshivhulana Headmanship, the Tshimbupfe Royal Family wrote a letter to the District Head of the Department of Co-operative Governance, Human Settlements and Traditional Affairs (CoGHSTA), recommending that the Respondent be recognized as The Headman of Tshimbupfe-Tshivhulana Village.

12.13. On 06 March 2014 the District Head of the Vhembe Support Centre duly forwarded an application to the premier, for the withdrawal of Davhana Elias Mulaudzi as Acting Headman and the recognition of the Respondent as Headman of Tshivhulana Village under Tshimbupfe Traditional Community.

12.14. On 17 March 2014 the application for the withdrawal of Davhana Elias Mulaudzi as Acting Headman and the recognition of the Respondent as Headman of Tshivhulana Village was recommended by the Limpopo Member of the Executive Council and approved by the Premier.

12.15. On 02 June 2014 the Tshimbupfe Royal Council wrote a letter to the Tshivhulana Royal Family, informing them that the appointment of Davhana Elias Mulaudzi as acting Headman has been withdrawn and that the Respondent is the recognized Headman of Tshivhulana Village with effect from 05 May 2014.

12.16. We submit therefore that the Respondent was properly, duly and lawfully recognised by the Premier of Limpopo as Headman of Tshivhulana Village.

## 12. GROUNDS OF REVIEW

12.1. The application which was dismissed was brought as an application for review under PAJA.[33]

12.2. Save for the bare assertion that "the administrative action of the Second Respondent of recognizing (me) is contrary to the … identification of Davhana Elias Mulaudzi is a reviewable administrative act in terms of section 6(2)(b)(d)(iii) and (f)(i) of PAJA", the Applicant has failed to advance any specific grounds for review.

[33] Constitutional Court Record, p22, lines 14 – 16).

12.3. We submit that the application for review was framed too broadly and lacking in specificity. It was broadly based on sections 6(2)(b), 6(2)(d) and 6(2)(f) of PAJA.[34]

12.4. Section 6(2)(b) of PAJA makes provision for review where there has been a failure to comply with a mandatory or material procedure prescribed by an empowering legislation or provision. It is not clear from the Applicant's Founding Affidavit if there has been such a failure and, if so, in what respect. We have shown earlier the that Premier acted in terms of and in compliance with the national and provincial legislative framework provided in section 11 of the Traditional Leadership and Governance Framework Act, 41 of 2003 and section 12(1) of the Limpopo Traditional Leadership Act, 41 of 2003. It cannot be shown, and the Applicant has failed to show, that the Premier failed to comply with a mandatory or material prescribed by the framework we have already alluded to.

12.5. Section 6(2)(d) of PAJA makes provision for review where the administrative action was materially influenced by an error of law. It is not clear from the Applicant's Founding Affidavit whether the decision to recognise me as Headman of Tshivhulana was materially influenced by an error of law, and if so, in what respect. We submit that, having regard to the process followed in identifying the 1st Respondent and recognising him as Headman of Tshivhula as evidenced by documents filed of record, it cannot be shown that the decision by the 2nd Respondent to recognise him as Headman of Tshivhulana in term of section 11 of the Traditional Leadership and Governance Framework Act, 41 of 2003 and section 12(1) of the Limpopo Traditional Leadership and Institutions Act, 6 of 2003 was materially influenced by an error of law.

12.6. Section 6(2)(f) makes provision for the review of administrative action which contravenes a law or is not authorised by the empowering provision concerned or is not rationally connected to the purpose for which it was taken, the purpose of the empowering provision or the information before the administrator or the *reasons given* for it by the administrator. We submit that there is nothing in the Applicant's Founding Affidavit or in the documents filed of record which places the application within the scope of section 6(2)(f).

12.7. What section 6(2)(f) requires is that the administrative decision which is sought to be reviewed must be rationally connected to the information before the decision-maker or the reasons given for it; it means that the information on which

[34] Constitutional Court Record, p27, lines 19 -20).

the decision is based and the reasons given for it must support and justify the decision taken.

12.8. In ***Democratic Alliance v President of South Africa*** [2012] ZACC 24; 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 (CC) the Constitutional Court held that the rationality requirement relates to both the means and the end, that is the process by which the decision is reached and the decision itself. In that case it was said:

"The conclusion that the process must also be rational in that it must be rationally connected to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve this purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitute means towards attainment of the purpose for which the power was conferred".

12.9. It is not a requirement, however, that an administrative decision be perfect, or, in the court's estimation, the best decision on the facts (see ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others***[2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (***Bato Star***) at paras 45-9; ***Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and Another; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd*** [2003] ZASCA 46; 2003 (6) SA 407 (SCA) at paras 51-2).

12.10. In the above respect, the Administrative Law writer, Hoexter, notes that –

> "[a] crucial feature [of rationality review under PAJA] is that it demands merely a rational connection – not perfect or ideal rationality. In a different context Davis J has described a rational connection test of this sort as 'relatively deferential' because it calls for 'rationality and justification rather than the substitution of the Court's opinion for that of the tribunal (or decision-maker) on the basis that it finds the decision . . . substantively incorrect'." (Hoexter Administrative Law in South Africa 2nd edition (Juta & Co. Ltd, Cape Town 2012, at 342.

12.11. The Applicant has also not, in its papers, addressed the steps which ought to be taken or ought to have been taken in terms of section 3 of PAJA to give effect to its claim to the right of fair administrative action.

12.12. The Applicant has failed to consider and to address section 5 of PAJA, which states that any person whose rights have been materially affected by administrative action and who has not been given reasons for the action may within 90 (ninety) days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons.

12.13. The Applicant has not asked for reasons of the decision to recognize the 1st Respondent as Headman of Tshivhulana and cannot say that the decision was taken without good reason. It is only where a decision-maker fails to furnish reasons that it can be presumed, and in the absence of evidence to the contrary, that the administrative action was without good reason.

12.14. Sections 3, 5, 6, 7 and 8 of PAJA clearly set out the steps which must be followed and the relevant grounds which must exist when dealing with the question whether administrative action is fair or not. It is only after all the steps have been taken and the grounds have been established that the court can embark upon the process of review and determine whether administrative action is fair or unfair.

12.15. The Applicant has not followed the steps set out in PAJA and has failed to state and substantiate the grounds upon which the Honourable Court must review the administrative action of recognising the 1st Respondent as Headman of Tshivhulana. On the contrary the effect of the application is to demand drastic and far-reaching relief when it has failed to properly exhaust all internal remedies and avenues before approaching the court for relief.

12.16. In any event section 8(1)(c)(ii) of PAJA clearly states that the court should only in *exceptional cases* substitute or vary administrative action.

## 13. FINAL SUBMISSIONS

13.1. In the premises we submit that the Applicant has not made out a case for the review and setting aside of the decision by the Premier to recognize the Applicant as Headman of Tshivhulana.

13.2. We submit that if even the application would not have been dismissed on the basis of a failure to exhaust local remedies, it would still fall to be dismissed on the merits and the application of the law.

13.3. We submit therefore that the application ought to be dismissed with costs.

**M.J MPSHE, SC**
**COUNSEL FOR THE RESPONDENT**

ORIGINAL 16



**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**CONST COURT CASE NUMBER: CCT48/16**
**NGHC (LIMPOPO) NO: 456/2014**

In the matter between:-

**TSHIVULANA ROYAL FAMILY** Applicant

and

**NDITSHENI NORMAN NETSHIVHULANA** Respondent

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**INDEX: APPLICANT'S SUPPLEMENTARY WRITTEN ARGUMENT**

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**APPLICANT'S SUPPLEMENTARY WRITTEN ARGUMENT**

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**INTRODUCTION:**

1.

The need for the submission of this supplementary written argument arose as follows:

1.1 The court of first instance dealt in its judgment only with the two points *in limine* raised by the respondent and not the main merits of the matter. The first point *in limine* (lack of *locus standi*) was dismissed, but the second (failure to exhaust an available internal remedy) succeeded;

1.2 There is no cross-appeal before the court against the dismissal of the first point *in limine* (lack of *locus standi*) notwithstanding the

fact that that finding was appealable.[1]

1.3 Following the failure of applications for leave to appeal to both that court and the Supreme Court of Appeal, the applicant applied to this court.

1.4 As the judgment appealed against did not deal with the main merits of the matter (i.e. apart from the merits of the successful point *in limine* as such), the application for leave to appeal to this court and the grounds raised in support thereof were by definition restricted to the merits of the judgment of the court of first instance as regards the point *in limine* as such.

1.5 On 30 March 2016 the Chief Justice issued directions, paragraph 3 of which read:

"*The applicant must ... file a paginated record ... containing only those portions of the record that are strictly necessary for the determination of the issues.*

*Written argument, including argument on the merits of the appeal, must be lodged by (a) the applicant on 12 August 2016; and (b) the respondents, on or before 19 August 2016.*"

(Our underlining)

[1] *American Natural Soda Corporation v Competition Commission* 2003 (5) SA 655 (SCA) at paras 12-14; *Smit v Kwanonqubela Town Council* 1999 (4) SA 947 (SCA) para 1.

2.

Accordingly, the applicant's first written argument dealt only with the merits of the issue which formed the subject-matter of the application for leave to appeal (i.e. the internal remedy issue) and concluded with the submission that should the appeal against the court *a quo's* decision on the internal remedy issue succeed, the review application as such should be remitted to the court *a quo* for its consideration of the main merits.

3.

It is respectfully submitted, for the reasons shown below, that in the event of a successful appeal on the internal remedy issue remittal would indeed be indicated in the circumstances.

4.

The respondent's written argument deals with the application as launched in the court *a quo* in its entirety, also resurrecting the *locus standi* issue notwithstanding the absence of a cross-appeal. The applicant's instructing attorney then wrote to the registrar of this court requesting confirmation as to whether the applicant is called upon to deal with the matter accordingly. It was pointed out that the main merits of the application was not heard by the court of first instance. (Para 4 of applicant's attorneys' letter of 24 August 2016 to the Chief Justice). We have not been involved in this matter prior to the application to the Supreme Court of Appeal for leave to appeal. Our instructions of the applicant's attorney of record, who argued the matter, are that the court *a quo* entertained argument on the points *in limine* only. This is indeed demonstrated by the statement of the learned judge that:

> *"The affidavits filed reveal disputes of fact regarding the processes engaged involving the applicant and the first, fourth and fifth respondents but this is not for adjudication presently."*[2]
>
> (Own emphasis)

5.

The supplementary written argument is now presented in compliance with the directive received from the registrar in response to the applicant's abovementioned request. The misunderstanding of the first directive is unfortunate and we apologise therefore. The applicant will seek condonation therefor at the hearing of this matter.

**THE INTERFACE BETWEEN THIS SUPPLEMENTARY WRITTEN ARGUMENT, AND APPLICANT'S FIRST WRITTEN ARGUMENT:**

6.

Whilst the applicant has nothing to add to its submissions on the internal remedy issue dealt with in its first written argument (except that, for the sake of completeness and convenience, the reference to ***Sicgau v President of South Africa***[3] cited at paragraph 26.6 of the founding affidavit in the application for leave to appeal should have been repeated), the main merits are, for the reasons shown below, largely governed by the empowering provisions in terms of which the Department of Co-operative Governance Human Settlement and Traditional Affairs ("the Department") acted, being sections 11 and 12 of the Limpopo and Framework Acts dealt with at

[2] Judgment, para 8 (concluding sentence), Volume 2, p 273.

[3] 2013 (9) BCLR 1091 (CC).

paragraphs 12 to 18 of the applicant's first written argument, and more particularly the prescripts governing the actions of the Premier *where there is evidence or an allegation that the identification of the person involved was not done in accordance with customary law, customs or processes.*[4]

7.

The identification of a successor to the headmanship is a matter which is squarely and fully to be done *in accordance with customary law, customs or processes.* Any conflicting contentions as to who should be identified as such will point towards conflicting contentions on the applicable customary law, customs or processes. Accordingly, once the Department (and/or the Premier) becomes aware that there are conflicting contentions as to who should be appointed (referred to below as a "customary law appointment issue"), the prescripts referred to in the applicant's first written argument as to how the Premier is to deal with it, and which define his or her powers to make the appointment, are triggered. This is the first aspect dealt with below.

8.

The further issue emanating from sections 11 and 12 of the Framework and Limpopo Acts respectively pertains to the reference to "*the Royal Family concerned*" in subsection (1)(a) of both enactments – the question being whether this would *in casu* refer to the applicant Royal Family as opposed to the Tshimbupfe Royal Family (referred to below as "the governing Royal Family issue").

[4] Section 11(3) of the Framework Act; section 11(2) of the Limpopo Act.

9.

Whereas both those issues emanate from the wording of the Acts themselves, there are further issues of customary law involved in this matter, dealt with below.

**CLEAR INDICATIONS CONVEYED TO THE DEPARTMENT THAT A CUSTOMARY APPOINTMENT LAW ISSUE WAS INVOLVED:**

**Issues relating to the identification of the person to be appointed:**

10.

Towards the end of 2013 Netshivhulana Gilbert and four others wrote to the Department requesting its intervention as the Acting Headman was in that position for 21 years.[5] The letter specifically states that:

> "*Two meetings were held with the officials from the Department ... there seems no solution is reached.*"[6]

The letter continues:

> "*Therefore as a family we request that our uncle be removed and our brother (first respondent) to take the position as it*

[5] As this must have been since 1992 when the previous headman passed, and it is common cause that Dhavana has acted since, the 21 years referred to would take one to the end of 2013.

[6] Record, Volume 1, p 53; the space left in the passaged quoted represents a word which is not legible.

*belongs to him*."[7]

(Own underlining)

11.

It is submitted that the mere fact that there was a headman acting for 21 years notwithstanding the claim that the position *belongs to* the first respondent should already have been indicative to the officials of the Department that there was some contentious issue at play. It must certainly have surfaced at the two meetings with the Department's officials, especially as "*no solution*" was reached.

12.

The next communication of the Tshimbupfe Royal Council to the Department leaves no doubt as to the existence of a customary law issue: it reads:

"*RE: TSHIVULANA HEADMANSHIP*

1. *The above matter refers.*

2. *Tshimbupfe Royal Council received correspondences from Tshivulana Royal Family indicating that the acting headman Mr Mulaudzi ED should be permanently recognised as a headman of Tshivulana Village.*

3. *At the meeting held on 26 January 2014 the Council took a resolution that (first respondent) be recognised as a*

[7] Ibid.

*headman of the afore-mentioned village as approved by the late Khosi Vho-Netshivhulana N.A. in 1992 (see attached annexure 'C').*"[8]

(Own underlining)

13.

The letter proclaims the conflicting contentions in its own terms. This notwithstanding, the Premier was made to understand by the officials involved that the applicant Royal Family had decided upon the First Respondent.[9]

14.

On 10 February 2014 the Tshimbupfe Traditional Council got involved, writing to the Department that the Tshimbupfe Royal Council had recommended the first respondent as headman "*of Tshimbupfe-Tshivulana community*".[10] From a perusal of the subsequent documentation emanating from the Department's records, it is clear that the subsequent events followed with no sign that the officials of the Department paid any attention to the fact that it was a contentious issue.

15.

Had the Premier been properly informed and/or properly considered this, he would, and indeed should have, acted accordingly to the prescripts dealt with

[8] Annexure "FA8" to the supplementary founding affidavit, Volume 3, p 225, referred to at supplementary founding affidavit, para 5, Volume 3, p 218.

[9] Supplementary founding affidavit, para 4.4, Volume 3, p 217, read with annexure "FA7" s v "DISCUSSION" at p 222.

[10] Departmental Record, Volume 1, p 55.

in the applicant's first written argument. By failing to do so, the appointment of the first respondent falls squarely within the ambit of section 6(2)(b) of the Promotion of Administrative Justice Act as a failure to comply with a mandatory and material procedure and/or condition applicable to the power exercised.

16.

Equally, the failure on the part of the Premier and his Department to refer the matter back to *the Royal Family* (which also goes to the governing Royal Family issue dealt with below) for reconsideration at the behest of the imperative requirement of section 11(3)(c) of the Framework Act and section 12(2)(c) of the Limpopo Act, compounded by the summary appointment of the first respondent, represents an act performed in contravention of the applicable law as well as one not authorised by the empowering provision as intended in section 6(2)(f)(i) of PAJA.

**Issues relating to the governing Royal Family issue:**

17.

It is clear that the Department was aware of the conflicting attitudes of the two royal families involved. Again, the Premier should have acted in accordance with the applicable prescripts referred to above.

18.

As for the governing Royal Family issue, both sections 11 of the Framework Act and 12 of the Limpopo Act deal with appointments of:

18.1 firstly, senior traditional leaders; and

18.2 secondly, headmen or headwomen.

19.

It is common cause that the Tshimbupfe Royal Council is the custodian of the Chieftaincy of Tshimbupfe, and in that capacity primarily responsible for the identification of a person to fill a vacant position of Senior Traditional Leader.[11] Accordingly, where the latter position is concerned, the phrase "*the Royal Family concerned*" would refer to the Tshimbupfe Royal Family.

20.

The phrase "*the Royal Family concerned*" can in the case of a headman or headwoman, only refer to the Royal Family of which he or she is to serve as such.

21.

It is quite clear from the record of the Department that it was aware of the fact that this concerned an appointment for specifically the applicant Royal Family. However, it availed itself only of the input from the Tshimbupfe Royal Family as though the latter family was the repository of the final power of appointment. It did so notwithstanding the clear indications that the matter was contentious specifically as the applicant Royal Family held different views on the matter.

[11] Founding affidavit, para 6.1, Volume 1, p 9; Answering affidavit, para 6.2, Volume 1, p 69 and answering affidavit, para 39, Volume 1, p 81.

22.

As such, the Department and the Premier took irrelevant considerations into account (i.e. the source of the purported appointment) and failed to consider relevant considerations (i.e. the input and views of the applicant Royal Family) as intended in section 6(2)(e)(iii) of PAJA.[12]

23.

It is submitted that should this court decide to adjudicate directly upon the main application, the applicant should succeed on any or both of the abovementioned grounds.

**FURTHER CUSTOMARY LAW ISSUES INVOLVED:**

24.

The following issues appear from the papers in the court *a quo*.

*Qualifications for a Dzekiso wife:*

25.

According to the applicant these are: she must be married a virgin; she must be married by bride wealth which should come from the father of the headman; and she must be royalty herself. The respondent denies this, promising to deal with it "*later*" in the papers[13] without, however, doing so.

[12] Identified by way of a typing error as d(iii) at founding affidavit, para 11.5, Volume 1, p 27.

[13] Answering affidavit, para 10, Volume 1, p 71.

*Whether the respondent had to be born from a Dzekiso wife in order to be entitled to succession:*

26.

The applicant states that this is a requirement: the primary function of the *Dzekiso* (or great) wife is to render an heir to the headmanship.[14] This is indeed admitted by the respondent.[15] Being the governing criterion, the firstborn son of a *Dzekiso* wife is entitled to succession, even though her marriage to the headman was not his first.[16] This also indicates that the phrase "*the Royal family concerned*" in the legislation refers to the Royal family of which the person to be appointed will be the Headman.

*The position where the deceased headman had not married a Dzekiso wife: the final repository of the power to identify a successor:*

27.

According to the deponent to the founding affidavit she has the power in her capacity as VHO-Khatsi to identify the successor, acting in liaison with the Ndumi where, due to the absence of a son born from a *Dzekiso* wife, no automatic succession takes place in terms of customary law. This is disputed by the respondent.[17] But the respondent only offers a bald denial in this regard, arguing that as his mother was the First Wife of his father and her

[14] Founding affidavit, para 9.6, Volume 1, p 13.

[15] Answering affidavit, para 11, Volume 1, p 71.

[16] Replying affidavit, para 12, Volume 2, pp 118-119.

[17] Founding affidavit, para 9.3, Volume 1, p 12; Answering affidavit, para 8, Volume 1, p 71; para 13.3, Volume 1, p 120. Also founding affidavit, para 9.21, Volume 1, p 20; Answering affidavit, para 24, Volume 1, p 76.

house as the Great and/or First House, he is indicated by customary law as the heir to headmanship.[18] The respondent denies the deponent's capacity as VHO-Khatsi, but without any motivation.[19] The applicant points out that the deponent's capacity as such was admitted by the respondent in the previous proceedings for an interim interdict.[20]

28.

The respondent is rather ambivalent in this regard. He clearly relies on the fact that (as is common cause) his mother was the deceased headman's first wife, without ever pertinently alleging that she was in fact a *Dzekiso* wife. Nowhere does he identify the royalty to which his mother belongs.[21]

*The powers and/or role of the applicant Royal Family vis-à-vis the Tshimbupfe Royal Family in matters of succession to headmanship:*

29.

As already mentioned, it is common cause that the Tshimbupfe Royal Family, which is the custodian of the Chieftaincy of Tshimbupfe is primarily responsible for the identification of a person to fill the vacant position of Senior Traditional Leader.[22] According to the respondent this also entails that the Tshimbupfe Royal Family, being the Senior Traditional Leadership Family is entitled to identify the successor notwithstanding the fact that the applicant

[18] Answering affidavit, para 10.1, Volume 1, p 71.

[19] Answering affidavit, para 6.1, Volume 1, p 69.

[20] Replying affidavit, para 11.2, Volume 2, p 118.

[21] As pointed out at replying affidavit, para 14.4, Volume 1, pp 121-122.

[22] Founding affidavit, para 6.1, Volume 1, p 9; Answering affidavit, para 6.2, Volume 1, p 69 and para 39, Volume 1, p 81.

royal family may have identified someone else.[23] This is hotly disputed by the applicant royal family which claims the autonomous right to act in this regard.[24] This is raised by the applicant Royal Family both as a matter of customary law, and as the situation at the behest of the Act.[25] Hence, so says the applicant, that the Tshimbupfe Royal Family initially directed the applicant royal family to effect the appointment.[26]

30.

It is submitted that these issues cannot be resolved on affidavit. They should be dealt with by way of evidence as to the customary law which applies. The best we have been able to achieve by way of research on the applicable customary law since receipt of the latest directive of the Chief Justice is a reference to the Ph.D dissertation by Pfarelo Eva Matshidze "The Role of Makhadzi in Traditional Leadership Among the Venda" submitted to the Faculty of Anthropology and Development Studies at the University of Zululand (December 2013) under the supervision of Professor G V C Buijs (Dr N R Ngcobo as co-supervisor). The purpose of these references is firstly to demonstrate the broad support of the applicant's case herein that the Vho-Khadzi (referred to in the dissertation as the Makhadzi) has the final and conclusive say in matters of identification of a successor (albeit only following thorough consultation of other role players referred to) and, secondly, the preference enjoyed by the first-born son of a Dzekiso wife, who must be born from royalty herself; and finally, that it is a matter for evidence which should be remitted to the court *a quo*:

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[23] Compare answering affidavit, para 14.3, Volume 1, p 73 and para 21.3, Volume 1, p 75.

[24] Replying affidavit, para 17.3, Volume 2, p 130.

[25] Replying affidavit, para 25.2.2, Volume 2, p 139.

[26] Founding affidavit, para 9.12, Volume 1, pp 15-16; Answering affidavit, para 15.2, Volume 1, p 74; Answering affidavit, para 18.2, Volume 1, p 131.

30.1 At page 5 (second paragraph from the top):

*"The royal family Makhadzi plays an important part in succession matters as well that she does not do that alone. She works with the Khotsimunene (traditional leader's paternal uncle). The Makhadzi, the Khotsimunene and the traditional leader are important in Venda traditional leadership. She commands a privileged position in the kinship system of the Venda and particularly so in the royal houses. The Venda descent system is patrilineal and therefore male-dominated. Makhadzi is thus strategically, a female father. She along with a senior paternal uncle, Khotsimunene, and the Chief constitute the supreme organ of traditional leadership in Venda. It is in this respect that Venda traditional leadership can be aptly characterised as a triumvirate."*

30.2 At the bottom of page of page 12 over to page 13 the following appears:

30.2.1 The Makhadzi together with the Khotsimunene are the only people who have the right of appointment. The final say on succession, however, rested with the Makhadzi.

30.2.2 A traditional leader is allowed to marry as many wives as he can, as long as amongst them there is one who is supposed to give birth to a successor. The woman to bear a successor should be of royal blood from another related traditional leadership.

30.2.3 Reference is made to the fact that the legislation has converted what was a private, secret process into a public

affair while before the current Traditional Leadership Act, one would not even know that there is a dispute, and everything would have been resolved privately. While the government is responsible for the legislation of a new traditional leader at a provincial level (we may add, but only on the basis of due cognisance having been taken of any controversy as the customary law issues involved, and their application to the specific situation).

30.3 Paragraph 5.3.2 commencing from page 154 is entitled **Case Study 2: The Role of *Makhadzi* in dispute resolution relating to succession**. Various forms of disqualification of persons who might otherwise have qualified are discussed. One such potential disqualification is where a possible successor has had a sexual encounter with the Chief's wife. Traditionally that may even have led to the potential successor being killed or banished by members of the Royal House: "*If members of the Royal household organised the death of such a person, it must be sanctioned by the Makhadzi. The Makhadzi is the one who drives the whole process, even if she is not directly involved in the killing or in the banishment; she gives the directives. In such a case she will also organise who becomes the successor. One Makhadzi informant said that there are always exceptions to that rule. There are for instance situations when, even if there has been such conduct between a successor and his father's wife, the successor could still be enthroned.*" (Bottom of page 155 over to page 156).

30.4 At page 157:

*"The practice used in this family was that the child that was supposed to inherit was born to a chief wife who comes from a royal family. These days, with the Constitution being supreme law of the country, such a principle could be challenged on the basis of equality".*

The author then quotes what she has been told during an interview with a respondent Makhadzi that:

*"In the last analysis I am the one with the final say when the successor is chosen."*

And at page 158 (top paragraph):

*"When a Chief wants to marry a Dzekiso wife, the Makhadzi is fully involved because she has to choose who is going to marry the Chief in order to produce an heir to the throne. The Chief is not entrusted with the decision to choose a Dzekiso wife for himself; this is always done by the Makhadzi in consultation with other members of the Royal Council."*

Lower down the same page reference is made to the fact that the Dzekiso wife is not the Chief's wife alone, but the wife of the community since she is the one who will give birth to the successor. Beauty is not the main consideration. The respondent Makhadzi interviewed by the author referred to an instance where a Dzekizo wife was indicated for marriage which the Chief accepted, but he stayed with somebody else.

*"He only came when he needed to sleep with the new wife in*

*order to procreate an heir, but he was not staying with her. The Dzekizo wife was not jealous at all, because she was taught proper behaviour when she was growing up. The elders will impress upon a girl who is from a Royal household, if she is chosen to be a Dzekiso wife, she has to understand what it means to live with other women in a polygamous household."*

30.5 Lastly, it is stated at the top paragraph of page 159 that succession is not automatic, not even for the firstborn son of a Dzekiso wife. There may be conflicts which may take years to be resolved. This is followed by another detailed reference to an instance where a Dzekiso wife's firstborn son committed adultery with the Chief's young wife, but after serious controversy which almost divided the Royal family, he was accepted as the successor that notwithstanding, beacuse the Makhadzi and Khotsimunene were in agreement that in the circumstances it should be done (p 160).

31.

Again: this can only be applied to the Makhadzi of being *royal family concerned*. What has happened here is that the Tshimbupfe Royal Council has usurped the function of the Makhadzi (or VHO-Khadzi) of the applicant Royal Family.

**THE MYSTERIOUS APPOINTMENT OF 1992:**

32.

It is clear that the appointment was to a large extent driven by annexures

"NNN3" and "NNN4"[27] according to which Chief Netshimbupfe had appointed the respondent as headman, and Davhana Elias Mulaudzi as acting headman on his behalf.

33.

It is common cause that at that stage the respondent had already attained the age of 24. Constrained to explain the fact that the entire issue of his appointment or otherwise only arose in 2012, the respondent says that this was because in terms of customary law he was still considered to be a minor as he had been unmarried at that stage. However:

33.1 on his own account he married in 1998 already, without demur as regards any entitlement to headmanship (at least until about 2012);

33.2 in any event, according to the Tshimbupfe Royal Family itself, he should in fact have been directly appointed already in 1992 as he qualified for the position at 21.[28]

34.

The respondent's failure to have raised his claim, on his own account, immediately during 1998 renders the alleged 1992 appointment shrouded in mystery. It is another aspect which should be referred to evidence.

[27] Volume 1, pp 94-95.

[28] Annexure "FA4", Volume 1, p 180.

35.

The respondent's difficulty in this regard has forced him to refer to his appointment as a *reinstatement* (i.e. in a position already awarded to him in 1992).[29] But the letter of the Tshimbupfe Royal Family, annexure "FA4", whilst stating that the acting appointment was on behalf of the respondent who was at the time 24 years old expresses itself in the following terms:

> "*At present he is 45 years and should have been* ***installed*** *as Headman at the age of 21 years.*"
>
> (Own emphasis)

**CONSIDERATIONS AS TO WHY THE MATTER SHOULD BE REMITTED TO THE COURT OF FIRST INSTANCE:**

36.

As pointed out by this court, appeal proceedings should not be conflated with proceedings for direct access to this court.[30] Considerations on account of which this court has adopted the approach that leave for direct access should only be granted in exceptional circumstances include the following:

36.1 It is ordinarily not in the interest of justice for a court to sit as court

[29] Answering affidavit, para 14.3 and para 15.1, Volume 1, p 74.

[30] *Memo of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others* 1998 (4) SA 1157 (CC) at paras 26-27.

of first and last instance;[31] as decisions are more likely to be correct if more than one court has been required to consider the issues raised and the losing party at first instance has an opportunity of challenging the reasoning of the first judgment and of reconsidering and refining its arguments;

36.2 Also important in this regard is that the court would be called upon to deal with dispute of facts on which evidence was necessary if matters were able to be brought directly to it;[32] and such disputes would be more conveniently be considered by a single judge in a High Court rather than by 11 judges in the Constitutional Court.

**SUNDRY ASPECTS EMANATING FROM THE RESPONDENT'S HEADS OF ARGUMENT:**

**Attack upon the authorisation of the deponent to the founding affidavit in the court *a quo*:**[33]

37.

No such authorisation is required. The remedy of the respondent who wishes to challenge the authority of a person allegedly acting on behalf of a purported

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[31] *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) at paras 13-15; *Campus Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa* 2006 (6) SA 103 (CC) at para 26 and the cases cited at footnote 25; *Womens Legal Centre Trust v President of the Republic of South Africa* 2009 (6) SA 94 (CC) at para 27.

[32] *Van der Spuy v General Council of the Bar of South Africa* 2002 (5) SA 392 (CC) at paras 11-13, 16 and 19.

[33] Respondent's heads of argument, para 3.2, p 3.

applicant is not to challenge the authority in the answering affidavit but instead to make use of rule 7(1) of the Uniform Rules of Court. Not having done so it is not open to the respondent to challenge either the authority of the deponent in deposing to the affidavit or in regard to instituting the application.[34] In any event, nothing but the baldest denial of authorisation was raised in the answering affidavit.[35] That is not enough in order to place the resolution, annexure "FA1",[36] in dispute. It should be noted that the authorisation to launch the application for leave to appeal to this court is not mentioned at all in the respondent's answering affidavit.

**The compulsory joinder of Davhana Elias Mulaudzi in the proceedings:**

38.

The respondent's argument amounts to the following: He should have been compelled "*to give his version of the chain of events and attendant legal issues*" by joining him.[37] Also, he is a "*contender to the recognition and appointment of the respondent as headman*".[38] We are not aware of any authority to the effect that any party may be thus compelled to participate as a contender or otherwise, in litigation. Even a party who has a "*direct and substantial interest*" in the proceedings may decide to abide, and abstain from the proceedings. That is what Davhana Elias Mulaudzi has done.

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[34] *FirstRand Bank Ltd v Hazan and Another; FirstRand Bank Ltd v Hazan Wholesalers & Distributors CC* 2016 (2) All SA 112 (GJ) at paras 13 and 14 and authorities there cited.

[35] Answering affidavit, para 6.1; Record, Volume 1, p 69.

[36] Volume 1, p 32.

[37] Respondent's heads of argument, para 4.4, p 6.

[38] Respondent's heads of argument, para 4.3, p 6.

**Attempts to distinguish the decision in *Mamogale v Premier North West and Others:*[39]**

39.

Apart from the demise of the Commission dealt with in the applicant's first written argument, the reasoning at paragraphs 12 to 20 of that judgment to the effect that section 21 of the Framework Act does not provide an internal remedy *against a decision of the Premier* is squarely applicable here.

**The custom of male primogeniture in terms of which the firstborn son of the late headman succeeds was not placed in dispute by the applicant:[40]**

40.

This is not correct. See paragraph 12 of the replying affidavit[41]

**The judgment in *BHE and Shibi*:[42]**

41.

The judgment does not deal with the issue here, *viz* whether male primogeniture is applied to the firstborn son of the first house (first marriage) as opposed to the firstborn son of a Dzekiso wife. At paragraph 77 of the judgment it is stated that:

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[39] Respondent's heads of argument, paras 5.21-5.30, pp 15-17.

[40] Respondent's heads of argument, para 6.7, p 18.

[41] Volume 2, p 118.

[42] Respondent's heads of argument, para 7.4, p 19.

> *"In a monogamous family, the oldest son of the family head is his heir."*

Polygamous unions are dealt with at paragraph 122 and further, but only in the context of succession to property. Most importantly, this court stressed the notion of the 'living' customary law at paragraphs 109 and further. This again emphasises the necessity for evidence as regards the contemporary state of customary law in this specific community.

**No evidence before the court that the deceased headman died without a Dzekiso wife:**[43]

42.

This was repeatedly stated in the founding affidavit. There is no allegation by the respondent pointing to the existence of a Dzekiso wife. It is common cause.

**Discussion of the legislative framework at paragraph 10 of the respondent's heads of argument:**

43.

The argument here, that the applicant should have raised the matter with the Premier[44] cannot be reconciled with the argument elsewhere for an internal remedy. In any event the Premier was *functus officio*.

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[43] Respondent's heads of argument, para 7.9.

[44] Para 10.12.

**CONCLUSION:**

44.

It is respectfully submitted that as regards the main merits of the matter (should it be entertained by the court, and at which this supplementary written argument is directed):

44.1 The application for leave to appeal as well as the appeal as such should succeed with costs;

44.2 The order of the court of first instance to be set aside and substituted by an order:

44.2.1 as prayed for in the notice of motion with costs including the costs of the application for leave to appeal in the court of first instance and of the subsequent application for leave to the Supreme Court of Appeal;

44.2.2 *alternatively* remitting the matter to the Premier for reconsideration together with such order as to costs.

44.3 *Further alternatively*: The main merits should be remitted to the court of first instance (with the order suggested above regarding costs):

44.3.1 Not only has the court of first instance not pronounced on it; it has not been considered by it at all as it was not argued. The abovementioned pronouncements of this court that it should avoid acting as the court of first and last instance are

pertinently applicable;

44.3.2 Pertinent factual disputes are involved which can only be resolved by way of a reference to evidence (or should the court consider it preferable, to trial).

**R J RAATH SC**
**U B MAKUYA**

Counsel for Applicant

Chambers
Pretoria
4 October 2016