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Traditional leadership in South Africa: From blood and might usurpation to constitutional accountability

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Summary: *Despite regional variations, traditional leadership has always been practised in the same way all across oceans and nations. It has always been an incident of birth and gender, and the rank and status of the mother of the heir-apparent in his father's homestead has often been the overriding consideration. In the past there were methods through which dynasties and bloodlines could be altered, namely, (i) the 'blood and might' usurpation of power, which is the subject of this article; and (ii) oral wills ('dying declarations') that would have been made by the deceased ruler on his deathbed. However, the 'blood and might' method now is merely of historical genealogical significance; it only helps to provide context in the event of a dispute in this regard. To that end, relying on BaPedi Marota Mamone v Commission, as an example, the article explains the applicable legal history, including the significance of the 'blood and might' method in pre-colonial times, and how this helps to place the recent constitutional developments and judicial pronouncements in their proper perspective. The article also demonstrates that the 'indirect rule' of traditional communities – which was the hallmark of colonialism and apartheid – continues to apply albeit under the glare of the Constitution. Although it is crucial, gender*

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transformation should be introduced cautiously into this area of the law, and the change should be gradual and 'adaptive', as reflected in section 2 of the Traditional and Khoisan Leadership Act 3 of 2019. The resources of the affected communities also should not be used to curry favour with any political party or any grouping within it. Failing that, the social fabric and moral and ethical fibre of the affected communities would be ruptured.

Key words: *Constitution; court; customary law; traditional leadership*

1 Introduction

Since the advent of constitutional democracy in South Africa, there has been considerable litigation around traditional leadership.¹ The proliferation of court cases appears to have been precipitated by competing claims and disputes with regard to traditional leadership in some traditional communities.² The reasons for this development are many and varied. First, there is a genuine quest, on the part of the individuals and communities concerned, to assert their constitutional right to culture as set out in sections 30 and 31 of the South African Constitution.³ Second, there is a yearning to ensure justice for the affected communities, and to restore the dynasties and bloodlines, as far as possible, to what they were before the arrival of white people in South Africa.⁴ Third, the objective is to ensure that the concepts and principles that underpin traditional leadership are ventilated and distilled for posterity. Fourth, there have always been lucrative benefits (and influence) attached to the position of traditional leadership.⁵

This article seeks to provide a context to these developments That exercise requires the examination of the pre-colonial history, as may be gleaned from literature; the effect of colonialism and apartheid on

¹ In this regard, see eg *Mkhatshwa v Mkhatshwa & Another* 2002 (3) 441 (T); *Shilubana & Another v Nwamitwa* 2009 (2) SA 66 (CC); *Yende & Another v Yende & Another* [2020] ZASCA 179.

² Even though there have always been contestations among the BaPedi, BaTsonga and the BaVenda in Limpopo, it seems to have been the developments in the Zulu royal house that have catapulted this issue onto the foreground.

³ Constitution of the Republic of South Africa, 1996.

⁴ From case law, it would appear as though this problem is particularly endemic in the Eastern Cape, KwaZulu-Natal and Limpopo provinces.

⁵ This would seem to be the reason why the AmaHlubi traditional community are agitating for 'secession' from the Zulus, hoping to establish their own kingdom. See 'AmaHlubi nation adamant court will restore their kingship', <http://www.sundayworld.co.za/news/amahlubi-nation-adamant-court-will-soon-restore-their-kingship> (accessed 14 September 2023).

the institution of traditional leadership; the impact of constitutional democracy; and the resultant jurisprudence on that institution. The objective of this article, therefore, is to demonstrate that (i) first, the usurpation of traditional leadership by force of arms no longer is a determining factor for eligibility insofar as traditional leadership is concerned; (ii) second, under colonialism and apartheid, the institution of traditional leadership was an integral part of the politico-legal scheme of that period, which engendered segregation and exclusion; and (iii) third, even under the current constitutional dispensation, it remains part of one of the spheres of government, albeit subject to the provisions of the Constitution and the Bill of Rights enshrined in it.

The article is divided into four parts. The first part deals with the historical legal background. The second part deals with the current constitutional and statutory framework. The third part is a discussion and analysis of the relevant principles, concepts, applicable statutes and relevant case law. The fourth part presents the conclusion.

2 Historical background

Generally, all across the oceans and nations of the world,⁶ succession to the position of traditional leadership (especially kingship) has largely been founded on male primogeniture, in that only males could succeed other males within their agnatic group,⁷ to the exclusion of their female relatives.⁸ In a sense it was based on the quirk of birth, or a touch of luck and providence.⁹ Except for a few instances, ascending the throne had nothing to do with the physical stature or intellectual prowess of the individual involved. Royal pedigree was the overarching criterion.¹⁰ Everything largely depended on the rank and status of the mother of the heir-apparent in his father's homestead.¹¹

6 As to the position in Britain, see GW Pugh 'Historical approach to the doctrine of sovereign immunity' (1953) 13 *Louisiana Law Review* 476-480.

7 See JC Bekker *Seymour's customary law in Southern Africa* (1989) 273-274; TW Bennett *Customary law in South Africa* (2004) 334-335; C Himonga & T Nhlapo (eds) *African customary law in South Africa: Post-apartheid and living law perspectives* (2014) 161.

8 However, see in general *Bhe v Magistrate, Khayelitsha* 2007 (1) SA 580 (CC); see also *Mkhatsywa* (n 1); *Shilubana & Others v Nwamitwa* (n 1).

9 For the nature and peculiarity of traditional leadership, see Bennett (n 7) 101-106; see also TW Bennett *Human rights and customary law under the South African Constitution* (1995) 5.

10 C Rautenbach *Introduction to customary law in South Africa* (2021) 193-197.

11 *BaPedi Marota Mamone v Commission on Traditional Disputes and Claims & Others* [2014] ZACC 36 para 56.

Shaka is the foremost exception to this principle. He was born 'off the mat'¹² – contrary to custom – and had to use force and violence to take and maintain power.¹³ Despite some discernible common features, there are distinctive regional and cultural nuances in South Africa where primogeniture is concerned. For that reason, the custom has not been (and still is not) practised uniformly in the various traditional communities in the country.¹⁴ The process seems to have depended on one of two considerations, namely, (a) the ranking of the women in a deceased (or deposed) leader's homestead; or (b) whether the conjugal arrangement in that homestead was monogamous or polygynous.¹⁵ In the latter instance, the chronology of the marriages did not (and still does not) count for much. What determined the person's eligibility and suitability for kingship was whether his mother was assigned to the *Indlunkulu* (main house), *iQadi* (right-hand house) or *iKhohlo* (left-hand house).¹⁶ If there were no male children in any of the houses, affiliate houses would be created, of which the main purpose was to provide the main houses with male offspring.¹⁷ These women were known, variously, as *seantlo* or *lefeyelo*.¹⁸ It is this kind of arrangement that created bad blood between King Cetshwayo and his brother Mbuyazi,¹⁹ and between Sekhukhune and his half-sibling Mampuru.²⁰ Mbuyazi – who is presumed to have been Shaka's own son – was the product of a kindred custom, known as *ukuvusa*.²¹ This is a custom in terms of which the estate of a deceased widower is utilised to resuscitate his homestead, clan name and totems.²² As in the case of the levirate custom, a sister or cousin of one of the deceased wives was preferred – provided she consented to that arrangement.²³

12 During an illicit liaison between the then Prince Senzangakhona and Nandi Mhlongo. See J Laband *Eight Zulu Kings: From Shaka to Goodwill Zwelithini* (2018) 18-19. On the status of children under African customary law, see Bekker (n 7) 230-233; see also Bennett (n 7) 307-310, 337-344.

13 The was relied upon by the parties on both sides of the dispute in *BaPedi Marota Mamone* (n 11), in an attempt to support the claim that the traditional leadership of the BaPedi resorts under the house of Sekhukhune I and not Mampuru II; see para 32. In the case of Cetshwayo and Mbuyazi, there were white people involved, with the Boers fighting on the side of Sekhukhune I, and the British on Mampuru II's side.

14 Bekker (n 7) 273.

15 Bekker (n 7) 273-278.

16 *Sigcau & Another v President of the Republic of South Africa & Others* [2022] ZASCA 121 para 9.

17 Bekker (n 7) 286-294.

18 The levirate (*ukungena, kenela, tsenela*) custom was resorted to for this purpose.

Bekker (n 7) 273-290.

19 This precipitated the Battle of Ndongakusuka circa 1856; see Laband (n 12) 175-176.

20 The involvement of the Boers and the British administrators of the time; see *BaPedi Marota Mamone* (n 11) paras 72-78.

21 This means to 'raise' or 'resuscitate' in Nguni languages.

22 See Bekker (n 7) 293-294; AJ Kerr *The customary law of immovable and of succession* (1991) 141-142.

23 Bekker (n 7) 175-176.

Except for *Bolobedu*,²⁴ in the Limpopo Province, where succession to traditional leadership has always been matrilineal, pre-colonial South African monarchs almost exclusively were males who had ascended to the throne through other males within their clan. However, in some communities he still had to have been involved in some or other military skirmish to qualify for kingship.²⁵ This 'blood and might'²⁶ method appears to have been one of the catalysts that, from time to time, were relied upon to upset the genealogical sequence and bloodlines within a particular dynasty.²⁷ For instance, Sekhukhune descended from a line of kings that ruled the BaPedi relatively peacefully, until Thulare usurped power, by force, from his elder brother Dikotope.²⁸ By custom, Thulare was supposed to be succeeded by his son Malekutu whom he had had with his *timamollo* (main) wife.²⁹ However, the latter was poisoned and replaced by his brother Matsebe. Matsebe, himself, was killed by his brother Phetedi.³⁰ Even though Sekwati – Thulare's only surviving son at the material time – is often credited with cobbling together the BaPedi into a strong community under very difficult circumstances,³¹ he was merely meant to be a place holder for his nephew, Malekutu, or his sons, however they might have been procreated.³² In other words, Sekwati also had an obligation to resuscitate (*vusa*)³³ his brother Malekutu's homestead. For that specific purpose, he married a *timamollo* wife, and from that union a son, Mampuru, was born.³⁴ To complicate matters even further, Sekwati had a son of his own, Sekhukhune. In the fullness of time, as with their ascendants, their natural, biogenetic connection did not seem to count for much;

24 The Modjadji dynasty has been at the helm of that community for more than two centuries. See KO Motasa & SJ Nortje 'Patriarchal usurpation of the Modjadji dynasty: A gender-critical reading of the history and reign of the Modjadji rain queens' (2021) 102 *Pharos Journal of Religions* 1-2.

25 In respect of AmaZulu, reference is often made to Shaka and his brothers Dingane, Mhlangana and Sigujana, and Cetshwayo and Mbuyazi. Among the BaPedi, the battles and skirmishes between Sekhukhune and his brother Mampuru are the result of the protracted litigation that has been ongoing between the descendants of Sekhukhune and Thulare, which in recent times has attracted attention. See *BaPedi Marota Mamone* (n 11) para 72; see also *Chief Lenchwe v Chief Pilane* 1995 (4) SA 686 (B); *Pilane v Pilane & Another* 2013 (4) BCLR 431 (CC); *Sigcau* (n 16); *Ludidi v Ludidi & Others* [2018] ZASCA 104.

26 See *BaPedi Marota Mamone* (n 11) paras 84-86, and para 107 on whether the forcible usurpation of power in this manner constituted a custom. See also Laband (n 12) 169-170.

27 The 'indirect rule', with its concomitant divide-and-rule ideological component, was another. As Bennett (n 9) 6 puts it, 'traditional rulers were specifically protected by the policy of indirect rule'.

28 See *BaPedi Marota Mamone* (n 11) para 72.

29 As above.

30 As above.

31 *BaPedi Marota Mamone* (n 11) para 73.

32 As indicated above, customs such as *ukungena* and *ukuvusa* were often resorted to in these circumstances.

33 In isiZulu.

34 *BaPedi Marota Mamone* (n 11) para 55-59.

instead, as indicated below, it precipitated an acrimonious contest for the BaPedi throne.³⁵ In other words, absent usurpation, only the status of their mothers, in Sekwati's homestead, could turn their royal fortunes.³⁶ As Jafta J stated in *BaPedi Marota Mamone*, paternity was not 'an overriding consideration in determining succession to kingship'.³⁷ In order to succeed, therefore, those who for some reason considered themselves disqualified resorted to spilling the blood of any of their brothers or agnates who stood in their way to the throne.

However, since the arrival of white people in South Africa – and the advent of colonialism and apartheid – this mode of transfer of power has had limited significance, if at all.³⁸ It now is only of evidentiary relevance, and helps to provide some historical perspective on the claims and disputes between siblings or relatives in matters of this nature. Instead, 'indirect rule'³⁹ (also known as the 'Shepstone system'),⁴⁰ which was the hallmark of colonial rule on the continent of Africa, dictated who became a king, queen or traditional leader at any particular time.⁴¹ In many ways, the chosen person had to fit into the ideological and political mould of the ruling elite in order to enjoy gubernatorial support.⁴² In many ways, this system was the precursor to the 'homeland system' in South Africa,⁴³ the main objective of which it was to deprive black South Africans of their rights to citizenship and genuine self-rule – and many other concomitant rights.⁴⁴ The consequences of this system were succinctly described

35 As above.

36 *BaPedi Marota Mamone* (n 11) para 56.

37 As above.

38 However, it is important to note that the Boers, the British and the missionaries were involved on one or another side of these royal battles. See Laband (n 12) 172-178; see also X Mangcu *Biko: A biography* (2012) 49-54.

39 Named after Sir Theophilus Shepstone who at that time was a representative of the British government in Natal. Some commentators describe the system as 'intermediary domination'. See V Chakunda & AF Chikerema 'Indigenisation of democracy: Harnessing traditional leadership in promoting democratic values in Zimbabwe' (2014) 2 *Journal of Power, Politics and Governance* 69 and authorities cited therein; see also K O'Regan 'Tradition and modernity: Adjudicating a constitutional paradox' (2017) 6 *Constitutional Court Review* 108 109.

40 However, Sir Frederick Lugard, not Shepstone, was the originator of this system. See Laband (n 12) 246.

41 *BaPedi Marota Mamone* (n 11) para 11; see Bennett (n 7) 109.

42 *BaPedi Marota Mamone* (n 11) para 9.

43 See *Tongoane v Minister of Agriculture & Another* 2010 (6) SA 214 (CC) paras 23-26; see also SF Khunou 'Traditional leadership and independent bantustans of South Africa: Some milestones of transformative constitutionalism beyond apartheid' (1999) 12 *Potchefstroom Electronic Journal* 86-105.

44 On the adverse effects of apartheid – and the homeland system – on the rights of black people to equality and dignity, and the right to freedom of movement, conscience, assembly, association and other similar rights and freedoms, see *Ex Parte Moseneke* 1979 (4) SA 884 (T); see also J Dugard *Human rights and the South African legal order* (1978) 53-201.

by the Constitutional Court, per Ngcobo J, in *Tongoane v Minister of Agriculture and Another*⁴⁵ in the following terms:⁴⁶

African people would, as a consequence, have no claim to any land in 'white' South Africa. African people were tolerated in 'white' South Africa only to the extent that they were needed to provide labour to run the economy. They had precarious title to the land they occupied to remind them of the impermanence of their residence in 'white' South Africa.

During that period, the Governor-General (under colonialism) – or the State President (during the apartheid era) – was the statutory 'supreme chief' of all the black people in South Africa.⁴⁷ In effect, he had very wide legislative powers where black people were concerned; a legal and constitutional paradox. Except for one insignificant procedural bump,⁴⁸ the State President ruled these communities by decree.⁴⁹ He could, therefore,⁵⁰ alter the territorial borders of black communities;⁵¹ appoint, recognise or remove any person as chief or headman of a particular community;⁵² or expel any person from a particular area. These powers were open to abuse and, indeed, were abused. The head of state could issue a banishment order (*trekpas*), forcing persons or a family that he considered rebellious or recalcitrant out of a particular area.⁵³

When a traditional leader was to be chosen for a particular community, the wishes of the members of that community were often ignored.⁵⁴ The leader could only be appointed or recognised by the Governor-General or State President.⁵⁵ In the words of Jafta J in *BaPedi Marota Mamone v Commission*, this development marked the beginning of the 'de-legitimisation of traditional leadership' in South Africa, and the stunting of the customary law as a system of

45 *Tongoane* (n 43).

46 *Tongoane* (n 43) para 26; see also *BaPedi Marota Mamone* (n 11) paras 5-9.

47 See secs 1 and 25 of the Black Administration Act 38 of 1927; see also *BaPedi Marota Mamone* (n 11) paras 4-9.

48 Sec 26 of the Black Administration Act enjoined him to table the proclamations before Parliament before the regulations could be promulgated.

49 See secs 2, 5, 25 and 26 of the Black Administration Act; see also *Western Cape Provincial Government & Others: In re DVB Behusing (Pty) Ltd v North West Provincial Government* [2000] ZACC 2; 2001 (1) SA 500 (CC) para 41.

50 *Tongoane* (n 43) paras 23-26; see also *Maxwele & Another v Premier Eastern Cape & Others* [2020] ZAECMHC para 33.

51 Sec 5(1)(a) Black Administration Act

52 Sec 5(1)(b) Black Administration Act. Cumulatively, these provisions account for much of the litigation in which many South African traditional communities have been involved for almost a century.

53 Under the current constitutional dispensation, sec 9 protects the right to equality (and not to be unfairly discriminated against); sec 10 is concerned with the right to human dignity; sec 18 protects the right to freedom of association; and sec 21(3) the right to enter, remain and reside in South Africa.

54 *BaPedi Marota Mamone* (n 11) para 22; see also Bennett (n 7) 109.

55 As above.

normative values.⁵⁶ It is for this reason that Laband made the following observation in relation to King Goodwill Zwelithini kaBhekuZululu Zulu:⁵⁷

Even so, it is not hard to conceive the incredulous derision with which Shaka, the formidable and all-powerful founder of the Zulu kingdom, would have viewed the present King's emasculated royal prerogatives, closely constrained as they are by the constitution of a constitutional republic. Indeed, for all the royal protocol and prestige that lap him about, [he] is essentially no more than a ceremonial figure embodying Zulu traditions and customs.

In a sense, the position of traditional leadership has now been hollowed out and eviscerated of all its traditional and cultural essence.

3 Current constitutional and statutory framework

3.1 Provisions of the Constitution

The position as stated in the previous rubric persists, albeit subject to the provisions of the Constitution of the Republic of South Africa, 1996 (Constitution) and the Bill of Rights.⁵⁸ It is important to note that it is the Constitution Act, 1993 (interim Constitution)⁵⁹ that set South Africa on this path. For instance, section 181 of the interim Constitution regulated the recognition and application of customary law in the context of constitutional democracy and the then still nascent human rights culture. Its provisions were the following:

- (1) traditional authority which observes a system of indigenous law, and which is recognised by existing law, shall continue to exercise its powers and functions;
- (2) subject to modification or repeal of such law by a competent authority.

In addition, section 211 of the Constitution is on all fours with section 181 of the interim Constitution. Its provisions serve to buttress the recognition of the institution of traditional leadership. Of course, the recognition was to be subject or subservient to the Constitution and applicable legislation.⁶⁰ An example of such legislation is the Traditional Leadership and Khoisan Act (TLKA).⁶¹ The other Act is

⁵⁶ *BaPedi Marota Mamone* (n 11).

⁵⁷ Laband (n 12) 7.

⁵⁸ Secs 30, 31 & 211 South African Constitution.

⁵⁹ Act 200 of 1993.

⁶⁰ Sec 211(3).

⁶¹ Act 3 of 2019. The TLKA repealed the Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA).

the Reform of the Customary Law of Succession and Regulation of Related Matters Act.⁶² However, the latter Act does not apply to succession to traditional leadership and the inheritance of property connected therewith.

It would seem as though the reconfiguration of the of constitutional and statutory framework was intended to ensure that traditional leaders (and their communities) are not lured into becoming members (or supporters) of a particular political party through financial or political inducements.⁶³ In other words, the relevant royal family should not be induced by any political party (or any of its members or a faction within it) into recommending a particular member of that family with an eye on elections or similar event, nor is the family supposed to subvert the process or suborn anyone with an eye on patronage and other similar benefits from the governing party.⁶⁴

3.2 Requirements for identification and recognition of a traditional leader

Like its precursor, the South African Constitution – seminal though it be – it does not set out the requirements for eligibility for the position of a king, queen or any other type of traditional leader.⁶⁵ That task has been left to Parliament to set out the modalities or mechanics of it all.⁶⁶ It is for that reason that Parliament has enacted two pieces of legislation in that regard: the Traditional Leadership and Governance Framework Act (TLGFA)⁶⁷ and the TLKA. The provisions of the TLKA must also be read together with the equivalent provincial enactments in this regard.⁶⁸

However, it is important to mention that the TLKA – which came into operation on 1 April 2021 – was recently declared unconstitutional

62 Act 11 of 2009, particularly sec 6. Its effect is not to abolish any rule of customary law of which the purpose is to regulate the disposal of any property that a deceased traditional leader held in his official capacity on behalf of his community.

63 The provisions of sec 2(4)A of the TLGFA – and sec 2(2) of the TLKA – appear to have been enacted with this malaise and mischief in mind.

64 See in general *Mamadi & Another v Premier of Limpopo Province & Others* [2022] ZACC 26 para 6.

65 See, in particular, sec 181 of the interim Constitution, and sec 211(1) of the final Constitution.

66 See secs 30, 31 & 211(3) of the Constitution.

67 Act 41 of 2005.

68 An example of this type of legislation is the KwaZulu-Natal Traditional Leadership Governance Framework Act 5 of 2005. As indicated above, these Acts are specifically intended to provide for local specifications and nuances.

and invalid by the Constitutional Court.⁶⁹ The Court came to the conclusion that Parliament had ‘failed to comply with its constitutional obligation to facilitate public involvement before passing the [TLKA]’; and that, as a consequence, the TLKA was ‘adopted in a manner that is inconsistent with the Constitution’.⁷⁰ However, the Constitutional Court ordered that its order be suspended for 24 months – in order to give Parliament an opportunity to consult, properly, with the members of the affected traditional communities. For that reason, where relevant, and for completeness, the provisions of the TLKA are discussed in this article together with those of the TLGFA and provincial equivalents.⁷¹

Section 8 sets out, albeit in broad terms, what must be done in the event of a vacancy occurring in a particular traditional community. The first requirement is for the family⁷² of the deceased traditional leader to meet ‘within 90 days after the need arises for the position ... to be filled’,⁷³ a reasonable time after the need for such a meeting to be held has arisen, in order to identify and recommend one among their number as the preferred successor.⁷⁴ In some traditional communities there are other structures, such as the Royal Council, that play a very important role and, therefore, must be part of such a meeting.⁷⁵ However, due to a lack of clarity and for a variety of other reasons, some people straddle these structures.⁷⁶ In pre-colonial times, one such role for these structures was to decide whether, in a particular instance, the usurpation of power through violent means

69 See in general *Mogale & Others v Speaker, National Assembly & Others* [2023] ZACC 14.

70 Para 87.

71 Particularly where the Eastern Cape, KwaZulu-Natal, Limpopo, Mpumalanga and North-West provinces are concerned.

72 See *Yende v Yende* (n 1) para 11; see also *Mphephu v Mphephu-Ramabulana & Others* [2019] ZASCA para 38. Therefore, only the royal family is required to meet for this purpose.

73 See sec 8(1)(a) of the TLKA.

74 This is a positive development, if one considers the fact that secs 9, 10A and 11 of the TLGFA required the meeting to be held ‘within a reasonable time after a need arises to fill in the position ... to be filled’ (my emphasis).

75 Even though there may in the past have been some confusion, the TLKA places the matter beyond doubt. Sec 1 defines ‘royal family’ as the ‘core customary institution or structure consisting of immediate relatives of ruling family within a traditional [community], who have been identified in terms of customary law and customs; and includes, where applicable, other family members who are close relatives of the ruling family’. See *Netshibumpfe & Another v Mulaudzi* [2018] ZASCA 98 paras 14-15.

76 Eg, the role of Prince Mangosuthu Buthelezi in the Zulu royal household has always been an intriguing one, particularly in relation to King Misuzulu kaZwelithini. See W Phungula ‘King Misuzulu accuses Buthelezi of “sabotaging” his court battle with Prince Simakade’, iol.co.za/dailynews/news/king-misuzulu-accuses-buthelezi-of-sabotaging-his-court-battle-with-prince-simakade-dee330d5-ddd5-487f-82 (accessed 30 June 2023). Prince Simakade is the incumbent King’s elder brother. He is alleged to be the late King Goodwill Zwelithini’s extramarital child, who still considers himself the worthy challenger to Misuzulu for the Zulu throne.

was one of the qualifying criteria for that purpose.⁷⁷ Moreover, it is the members of the relevant community who give credence and legitimacy to these structures and attendant processes. For that reason, in some communities the main wife is known as *Masechaba* – the Mother of the Community (or Nation).⁷⁸ This is because that community would have provided *lobolo* in respect of such a wife, who eventually would give birth to a traditional leader. In other words, the person who is identified at such a meeting must be a blood relative of the deceased leader. That is implicit in the manner in which the provisions of the TLGFA⁷⁹ and the TLKA are couched.⁸⁰ Needless to say, this complex statutory arrangement behoves royal families, and other related structures, such as the Royal Council,⁸¹ to keep abreast of the latest legislative developments.⁸²

In many traditional communities the process often leads to the eldest son of the deceased⁸³ (or the one born of his *Indlunkulu*⁸⁴ or *timamollo* wife being chosen for this purpose).⁸⁵ As indicated above, she is often referred to as the Mother of the Nation or *Dzekiso*

77 *BaPedi Marota Mamone* (n 11) paras 58-59.

78 See *Mamadi* (n 64) para 6.

79 Secs 9, 10A & 11 TLGFA.

80 See sec 8(1) TLKA. Also, on the text-context-purpose triad of statutory interpretation, see B Bekink & C Botha '*Maccsand v City of Cape Town, Minister for Water Affairs and Environment, MEC for Local Government, Environmental Affairs and Development Planning, Western Cape Province, Minister for Rural Development and Land Reform, and Minister for Mineral Resources 2012 4 SA 181 (CC)*' (2015) 2 *De Rebus* 463-466.

81 These structures seem to be covered under the definition 'traditional council' and 'traditional sub-council' as defined in secs 16 and 17 respectively.

82 See *Yende v Yende* (n 1) paras 18-21; see also *Shilubana v Nwamitwa* (n 1) paras 43-49. However, caution should be exercised so as not to elevate a single event or an isolated event to a custom.

83 That would be in the case where the marriage was monogamous, or a simple version of polyandry. However, see sec 2 of the TLKA – a re-enactment of sec 2A (4) of the TLGFA – that provides as follows: 'A kingship or queenship, principal traditional community, traditional community, headmanship, headwomanship and Khoi-San community *must transform and adapt* customary law and customs relevant to the application of this Act so as to – comply with the relevant principles contained in the Bill of Rights in the Constitution, in particular by (a) preventing unfair discrimination; (b) promoting equality; and (c) *seeking to progressively advance gender representation in the succession to traditional and Khoi-San leadership positions*' (my emphasis).

84 In isiZulu.

85 See *BaPedi Marota Mamone* (n 11) paras 54-59; see also *Sigcau* (n 16) para 9; and *Mphephu v Mphephu-Ramabulana* (n 72) paras 29-32. Even though one of the contested resolutions of the royal house, in *Mphephu*, was clearly discriminatory in nature and purport, in that it excluded women for consideration, it submitted that the provisions of sec 2 of the TLKA – and sec 2A(4) of the TLGFA – were intended to be applied in a gradual, and incremental manner so as not to abruptly destroy the fabric of the affected traditional community. The word 'adapt' seems to suggest modifying something with a view to making it suitable for use in the fullness of time. As the Constitutional Court stated in *Shilubana v Nwamitwa* (n 1) para 49, 'deference should be paid to the development by a customary community of its own laws and customs where this is possible, consistent with the continuing effective operation of the law'.

wife⁸⁶ and should be chosen and recommended for this purpose. Also, it could happen that the family is not of one mind as to the eligibility of the person or persons who are contesting for leadership. There also could be a dispute as to whether the identification of a particular person was in accordance with the applicable customary law. In that case, the appropriate course to follow would be to make representations to the President⁸⁷ or the premier of the relevant province in terms of section 8(4)(a) of the TLKA,⁸⁸ to set up an investigative committee⁸⁹ (which has since replaced the Commission on Disputes and Claims of Traditional Leadership).⁹⁰ Another point of disagreement could be that an old custom, sought to be relied on by one or some of the members of the family, has undergone some transmutation, or been completely discarded.⁹¹ Invariably, the provincial High Court is the forum of first instance.⁹² In order to succeed, the applicant⁹³ will have to demonstrate that the existing custom (for example, male primogeniture) has been replaced by another custom, and that the new custom complies with the spirit, purport and objects of the Bill of Rights.⁹⁴ However, the decision

86 In TshiVenda. On the place and role of the *Dzekiso* wife in Venda law, see *Mphephu v Mphephu-Ramabulana* (n 72) paras 28 and 40.

87 In the case of a king or a queen.

88 In the case of a principal traditional leader, senior traditional leader, headman or headwomen. However, the community's own internal structures have an important role play in this regard, and Parliament has acknowledged that; see sec 21 of the TLGFA. Sec 8(4)(a) makes no reference to these structures. However, there is nothing reprehensible about their involvement and participation in this process and, unless the language of the statute under consideration is clear, the legislature is presumed not to intend changing existing law (including customary law and the common law) more than is necessary. The only qualification is that that the law must be in accordance with the provisions of the Constitution. See C Botha *Statutory interpretation* (2005) 44; see also L du Plessis *Re-interpretation of statutes* (2002) 177-182, and sec 39 of the Constitution.

89 The investigative committee can be established only if there is evidence of or an allegation that the process of identifying a particular person was not in accordance with customary law.

90 On the establishment and functions of the Commission, see secs 21-25 of the Traditional Leadership Government Framework Act 41 of 2003.

91 *Shilubana v Nwamitwa* (n 1) paras 44-49; see also *Yende v Yende* (n 1) para 11, and *Mphephu v Mphephu-Ramabulana* (n 72) para 38.

92 Prior to the promulgation of the TLKA, in 2021, whenever there was a dispute or conflicting claims with regard to a vacant position, the court had to refer the matter to the national or provincial Commission on Traditional Disputes and Claims. However, it is important to note that the Commission has now been replaced by the national and provincial investigative committees the status of which seems to be *ad hoc* in nature; see secs 8(4) and (5) of the TLKA.

93 The application could be for an order declaring one of the preferred persons to be the king, queen or senior traditional leader of that particular community, or there could be a counter-application lodged, interdicting the applicant or a particular group or faction within the royal family from convening a meeting; or preventing anyone among the group (or particular faction) from touting himself or herself as the rightful claimant to the throne. The application could also be for an order compelling the different factions within the royal house and related traditional structures to meet in one venue, not as separate, disparate groups. See *Yende v Yende* (n 1) paras 30-31.

94 *Shilubana v Nwamitwa* (n 1) paras 45-49.

in *BaPedi Marota Mamone*⁹⁵ serves as a reminder that the historical context remains an important consideration in the adjudication of these matters.

3.3 Excursus: *Bapedi Marota Mamone v Commission*

This case had its genesis in an application for review and setting aside of a determination and decision made by the Commission on Disputes and Claims of Traditional Leadership (Commission), namely, that the traditional leadership of the BaPedi resorted with the house of Sekhukhune I, not that of Mampuru II. The matter ultimately came before the Constitutional Court, the Supreme Court of Appeal having dismissed the appeal from the North Gauteng High Court. The main issue to be determined was whether kingship could, as a matter of custom and tradition among the BaPedi, be usurped through 'might and bloodshed', and whether, if it did happen, it constituted a deviation from the customary law rules of succession. Stated otherwise, the legal question was whether there was any point of distinction between what Sekhukhune did when he deposed Mampuru, and what the latter did to the former, killing him, two decades later.

In his minority judgment Jafta J (Nkabinde J concurring) stated that the Commission had misconstrued its statutory obligation and had failed to take into account the applicable customs and customary law, namely, that the son of the *timamollo* wife had the right to succeed his father.⁹⁶ In other words, the Commission ignored the evidence relating to events that took place after the death of Sekhukhune (and Mampuru being installed in that position by the Boers).⁹⁷ Jafta J stated that such evidence could not be ignored (despite it having been raised for the first time in the Constitutional Court). His view was that the Commission would not have been prejudiced if such evidence were to be admitted.⁹⁸ He stated that 'the new ground of review raises a question of law that does not depend on new facts not on record already [and that] it can hardly be argued that the Commission would be prejudiced by its determination'.⁹⁹ The report formed part of the court record, the judge said, and that the applicant was not adding new facts.¹⁰⁰ In his view, the 'the acquisition of kingship through violence did not translate into an automatic transmission of power to

95 *BaPedi Marota Mamone* (n 11).

96 Para 55.

97 Para 50.

98 As above.

99 Para 51.

100 Paras 50-51.

the offspring of a king who assumed kingship by violent means'.¹⁰¹ In other words, only the usurper or the aggressor benefited from his violent conduct; not his offspring or descendants. The justice of the apex court also said that the Commission, in its investigations and the resultant report, had failed to consider BaPedi law on succession to traditional leadership as it existed at the time when the events under investigation occurred.¹⁰² While acknowledging the fact that any person could, by custom, acquire kingship through violence and usurpation, Jafta J emphasised the point that such a person 'did not acquire it for his own house and could not, therefore, pass kingship on to his successors'.¹⁰³ Therefore, even though Sekwati was Mampuru's actual biological father, he was disqualified by custom from being the rightful heir to the BaPedi throne after the death of Malekutu (his brother's son). In the particular circumstances, he was merely a regent, a place holder, for Malekutu's children. Moreover, paternity was not even a factor; it still is not a factor.¹⁰⁴ Although fathered by Sekwati, Mampuru, in terms of custom, was Malekutu's child, and none of Sekwati's descendants, such as Sekhukhune, was entitled to step into his traditional shoes. Jafta J concluded by holding that the decision of the Commission was irrational, in that it was not connected to the 'common cause facts' or 'undisputed facts'¹⁰⁵ that were presented to it.¹⁰⁶ In his view, the BaPedi kingship ought to resort to the house of Sekhukhune.¹⁰⁷

Kamphephe J, for the majority, stated that there was 'no reason to unsettle the Commission's decision',¹⁰⁸ and that the appeal should fail. In the course of her judgment, she emphasised the importance of deference, on the part of the courts, when they consider reports compiled by expert bodies,¹⁰⁹ and that they should be careful not to substitute their own decisions for those that have been made by bodies such as the Commission.¹¹⁰ She also stated that respect and due regard should be given to factual findings made by such 'specialist' bodies, which are made up of men and women with the necessary knowledge and expertise.¹¹¹ However, it is important to point out that deference should not be confused with judicial timidity that often takes refuge behind the doctrine of *trias politica* at every

101 Para 61.

102 Paras 40-41.

103 Para 61.

104 As above.

105 As above.

106 As above.

107 As above.

108 Para 67.

109 Para 79.

110 As above.

111 Para 79 and the authorities cited therein.

turn.¹¹² On the statutory scope¹¹³ of the Commission's duties and functions, the judge said that not only was the Commission tasked 'with applying the relevant customary law to the case before it, but also with determining what that law was at the relevant time'.¹¹⁴ The applicable customary law, she said, depended 'primarily on historical and social facts, which the Commission must establish through evidence led before it and its own investigation'.¹¹⁵ Kamphephe J stated that the Commission could not be faulted for failing to cover something that was never an issue before it.¹¹⁶

On the usurpation of power as a customary law practice, Kamphephe J stated that when Mampuru fled after having been challenged by Sekhukhune, the latter '[legitimately] took the throne'.¹¹⁷ However, she was really at pains to tell apart that occurrence from the killing of Sekhukhune by Mampuru, 20 years later, under somewhat similar circumstances. The justice was of the view that Mampuru's position 'was different in a material respect'.¹¹⁸ Her view was that '[Mampuru] did not exert authority over the BaPedi nation', and that he just decided to flee.¹¹⁹ Also, endorsing the view of the Supreme Court of Appeal on this point, she stated that Mampuru's ascension to the BaPedi throne 'was inconsequential as it was a unilateral act, inconsistent with Bapedi customary law, and intended merely to fulfil that government's policy'.¹²⁰ She also stated that Mampuru's coronation was not even sanctioned by the *Bakgoma* and *Bakgomana*.¹²¹ For that reason, she said, Sekhukhune was able to legitimately reclaim his position as soon as he was released from custody. However, it is important to point out that Mampuru did not only abdicate from his position. Sekhukhune, with the support of the Boers, was on his heels – in hot pursuit. The role of the Boers and the British, on either side of the dispute, cannot easily be discounted. Like all the African leaders of their time, the brothers ruled at the pleasure of their colonial rulers.¹²² An impression should not be created that being supported by the British, as Sekhukhune was, was less of an evil. The brothers were both in the throes of 'indirect

112 *Mphephu v Mphephu-Ramabulana* (n 72) para 14.

113 See sec 25(3)(a) of the TLGFA.

114 Para 79.

115 As above.

116 Para 105.

117 Para 88.

118 Para 89.

119 As above.

120 Para 94.

121 As above. These are the royal advisors whose task it was (and still is) to identify suitable persons for positions of traditional leadership in terms of BaPedi law and customs.

122 They were, in effect, civil servants in their administrative machinery, or tools in the political machinery of the time and, as indicated below, very little has changed in this regard.

rule' as described above. The original traditions and the correlative customary law practices of their community did not matter much.¹²³ Further, in pre-colonial times, the matter seemed to revolve on who was more capable of spilling blood and then ascend the throne – and remain ensconced in it – for the time being. It was not so much the nature of the act that resulted in the deposition of the incumbent as the point of time at which it occurred. As the English adage teaches us, 'he laughs best who laughs last'.

4 Eligibility, statutory formalities and processes

From the foregoing it clear that South Africa has moved from pre-colonial times to colonialism, and later to apartheid, with the Black Administration Act as its statutory cornerstone.¹²⁴ The Constitution and the Bill of Rights (and the resultant jurisprudence) are a major consideration in situations of this nature.¹²⁵ Needless to say, the process of recommending any person, for this specific purpose, has changed significantly. It takes the form of an application to the President of South Africa or the premier of a particular province.¹²⁶ Where the predecessor was a king or queen, such an application must be made to the President. Also, where the person to be replaced was a principal traditional leader, senior traditional leader, headman or headwoman, the application must be submitted to a premier.¹²⁷ In all instances, the application should indicate that the royal family did, indeed, meet for this specific purpose¹²⁸ and, importantly, due regard should be paid to the 'applicable customary law and customs'

123 This position persists even under the Constitution.

124 Act 38 of 1927 and other related statutes.

125 Secs 2, 30, 172 & 211(3) of the Constitution.

126 Sec 8(1)(a)(ii) of the TLKA.

127 When the process relates to a principal traditional leader, senior traditional leader, headman or headwoman, the application should be submitted to the premier of the relevant province. What can reasonably be implied from these provisions is that they set out some of the requirements that the candidate or heir-apparent must satisfy. The requirements under (a) and (c) appear to be peremptory; and those under (b) permissive. However, it is not only the word 'must' or 'may' on its own that should be decisive in this regard, but also the context in which its appears, nor should the language used and the general scheme of the statute itself be ignored. It would, therefore, seem as though the *ratio legis* of the provisions of sec 9, as whole, was intended to ensure that the person who is recommended for the position of traditional leadership is fit for that purpose. He or she must also possess the capacity to administer the affairs of his or her community, and utilise the resources that are intended for their benefit conscientiously. See *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; *Capitec Bank Holdings & Another v Coral Lagoon Investments 194 (Pty) Ltd & Others* [2021] ZASCA 99 para 25; *Macingwane v Masekwameng & Others* [2022] ZASCA 174 paras 21-22, and *Bekink & Botha* (n 80) 456-466. In these decisions the SCA sought to emphasise the 'triad' of juridical interpretation in these circumstances – the text, context and purpose.

128 In terms of sec 8(1)(a), such a meeting must be held within 90 days after the need has arisen for that position to be filled. Its provisions differ from those of secs 9(1)(a), 10A(1)(a) and 11(1)(a) of the TLGFA, which required the royal

of that particular community when such a person is identified (and recommended).¹²⁹

In considering the application, the President or the premier, as the case may be, must ensure that the candidate meets certain statutory, customary law and ethical standards.¹³⁰ The President or the premier, as the case may be, must then consider the recommendations submitted by the particular royal family, and the reasons provided for identifying and recommending such a person. If the President decides to accept the application as submitted, and the reasons proffered therefor, he may, after having consulted the premier and the Minister (of Cooperative Governance and Traditional Affairs),¹³¹ appoint such a person as the premier may, after considering the requirements set out in section 8(1)(a) of the TLKA – on eligibility and adherence to process – appoint the person identified and recommended. The language of these provisions is permissive; and the President or the premier, as the case may be, is not obliged or compelled to recognise and appoint that person. However, if satisfied, the President or premier must indicate such recognition and appointment by notice in the national or provincial *Government Gazette*.¹³² A certificate signifying that fact must be issued to the person.¹³³ The premier of the relevant province is required to notify the Provincial House of Traditional Leaders of the person's recognition and appointment.¹³⁴

5 Evaluation

African traditional leadership no longer is exclusively an incident of birth, nor is it likely to be a function of gender for long. This area of the law now is a constitutionalised version of the original one. There also is the 'living' version of this body of law to consider.¹³⁵ There is a catalogue of constitutional rights (and duties) to contend with. In other words, South African lawyers and academics now have to rely on the Constitution and the jurisprudence flowing from it to support their arguments. As indicated above, the exercise requires a sound grasp of the provisions of the Constitution, TLKA and the

family concerned to meet 'within a reasonable time' after the need to identify such a person had arisen.

129 As above.

130 Including that he or she is a South African citizen who resides within the jurisdiction of a traditional community in respect of which he or she is to be appointed; secs 16(11)(a) and (h) and 16(14)(a) and (k).

131 Sec 8(1)(b) TLKA.

132 Sec 8(3)(a).

133 Sec 8(3)(b).

134 Sec 8(3)(a).

135 Sec 2 TLKA.

provincial equivalents thereof. However, the historical legal context cannot easily be ignored. That includes the significance of the ‘blood and might’ mode of usurpation of power. Needless to say, the violent usurpation of power now is only of limited relevance. However, there are a few factors that need to be considered, and constantly borne in mind. First, in the same way that a failed *coup d’état* would be dealt with, legally, violent usurpation could lead to several charges – including murder¹³⁶ – being preferred against him or her. Second, it actually lost its currency and potency with the advent of ‘indirect rule’. However, it is important to note that there was military and violent meddling – in the affairs of African traditional communities – by both the Boer *Volksraad* and the British administration on either side of the royal bloodline.¹³⁷ In a sense, Cetshwayo and Mbuyazi, and Sekhukhune and Mampuru – and their contemporaries – ruled at the pleasure of the successive Boer and British administrators.¹³⁸ That is why the view of the Supreme Court of Appeal – which was endorsed by the Constitutional Court in *BaPedi Marota Mamone* – seems incongruous. As indicated above, Kamphephe J, for the majority, stated that ‘Mampuru II’s conduct in clandestinely killing Sekhukhune I and thereafter fleeing was entirely inconsistent with an intention to conquer and take over kingship and was sheer murder for which he was accordingly convicted by a court of law and executed’.¹³⁹ However, there really is no substantive difference between the alternate acts of the royal siblings, Sekhukhune and Mampuru, in their respective or alternate attempts at usurping power.

Also, it really would have made no sense at all for anyone to spill blood under those circumstances, without any future plan or purpose in mind. The distinction between the respective positions of these royal siblings actually lay in the genesis of their entitlement to kingship, and who, between them, was the last to usurp power in that manner. Mampuru was the son of King Sekwati’s *timamollo* wife, and Sekhukhune ascended the throne by force of arms. In a sense, the latter was the more fortunate; and the one who ‘laughed last’. The majority proffered no plausible reason as to why the Commission would suffer prejudice if the court granted the applicant the

136 See sec 277 of the Criminal Procedure Act 51 of 1977 (as amended).

137 See Laband (n 12) 175-177; see also X Mangcu *Biko: A biography* (2012) 49-54; LA Thompson *History of South Africa: From the earliest known human inhabitants to the present (revised by L Berat)* (2014) 122-124.

138 Laband (n 12) 175-177; see also Mangcu (n 137) 49-54; Thompson (n 137) 122-124.

139 *BaPedi Marota Mamone* (n 11) para 36.

opportunity to file additional papers in support of its contention.¹⁴⁰ It is submitted, therefore, that the decision of the Commission fell to be declared irrational and set aside, for excluding the facts that the applicant sought to present for consideration and ventilation. Third, the role of the 'blood and might' mode of usurpation, under the current South African constitutional order, is limited only to providing a historical matrix for the justification of the practice.¹⁴¹ Fourth, even though 'the blood and might' method is sometimes described as having been a frequent occurrence or permanent feature of that period and landscape,¹⁴² the instances in which it was resorted to were very few and far between.¹⁴³ The military skirmishes or bloody battles appear to have been so periodic or episodic to constitute a concrete custom. Moreover, the decision as to whether usurpation, in the particular circumstances, was constitutive of kingship depended on the approval and ratification of very powerful structures within a particular community.¹⁴⁴

It would appear as though a will – be it a testamentary document or a verbal dying declaration – was another method in terms of which dynasties and bloodlines could be altered in terms of customary law.¹⁴⁵ Therefore, if a deceased traditional leader has executed a valid will during his or her lifetime, its provisions would have to be interpreted and given effect to.¹⁴⁶ A will, therefore, remains the only way – closest to usurpation – through which such a change can be effected.¹⁴⁷ Therefore, in that specific context, the wishes of

140 It was in the interest of justice that the issues and applicable principles be ventilated by counsel, and the Court pronounced on them – for posterity. On the role of the court in such instances, see *Tsambo v Sengadi* [2020] ZASCA 46 para 32.

141 *BaPedi Marota Mamone* (n 11) para 79.

142 That kingship was not something that a man received on a silver platter; he had to have fought valiantly to earn it. See Laband (n 12) 169-170.

143 Laband (n 12) 19-29, 89-94, 172-177; see also Mangcu (n 137) 49-64.

144 Eg, the *Bakgoma* and *Bakgomana* among the BaPedi – see *BaPedi Marota Mamone* (n 11) paras 100, 108.

145 See sev 23 of the Black Administration Act of 1938, and the regulations made thereunder. In terms of the original version of customary law, wills took the form of a dying declaration made by the deceased on his deathbed; see Rautenbach (n 10) 193; Himonga & Nhlapo (n 7) 158, 167.

146 See, eg, secs 19(1)(a)(iii) and 19A of the KwaZulu-Natal Traditional Leadership Governance Framework Act 5 of 2005. The identification of the current Zulu monarch, King Misuzulu Zulu's name is believed to have been stipulated in a will that allegedly was executed by his mother, Queen Mantfombi Dlamini. She, in turn, is said to have been appointed by her husband, the late King Goodwill Zwelithini kaBhekuZululu Zulu; see K Singh 'AmaZulu throne: Expert claims late King Goodwill Zwelithini's signature on will is a forgery', <https://www.news24.com/news24/southafrica/news/amazulu-throne-expert-claims-late-king-goodwill-zwelithinis-signature-on-will-is-a-forgery-20220113> (accessed 28 June 2023).

147 As happened after the death of King Dinizulu of the AmaZulu royal house. His younger son, Solomon, seemingly with the help of Lady Colenso, ascended the Zulu throne instead of his older son, David. Lady Colenso claimed to have been in possession of a letter, apparently written by Dinizulu, expressing his

the deceased monarch should be the overriding consideration.¹⁴⁸ In all the other instances, the rules of select, which regulate intestate succession, are almost fixed, and somewhat rigid.¹⁴⁹

Where the recognition and appointment of a particular person turns on gender and sex, care and caution would have to be exercised. Except where, as in *Shilubana v Nwamitwa*,¹⁵⁰ there is glaring unfair discrimination, women should not abruptly displace their brothers or cousins from these positions, merely because they are women. As against that, the strand of customary law of the affected community would have to be gradually adapted. Otherwise, the social fabric and moral fibre of that community would be torn asunder. It would seem that Van der Westhuizen J was alive to that reality when he delivered his judgment in *Shilubana v Nwamitwa*.¹⁵¹ The judge specifically stated that 'deference should be paid to the development by a customary community of its own laws and customs where this is possible, *consistent with the continuing effective operation of the law*'.¹⁵² That is what the provisions of section 2(1) of TLKA actually enjoin the courts to do in these circumstances. Therefore, while gender transformation is paramount in this context, it must be characterised by gradual '*adaptation*' of the existing local body of customary law. That process of adaptation should also ensure that every member of the royal family, male or female – extramarital or not – is part of the meeting where one among them is likely to be identified – and recommended – for the position of traditional leadership.¹⁵³

6 Conclusion

In 1994 the institution of traditional leadership and the status of the persons involved became fully constitutionalised. That position persists to this day. For that reason, the legal history in this regard is now of limited significance. It only serves to provide the judges with a rear view perspective of the politico-legal terrain as they search for viable juridical solutions to the problems that are associated with traditional leadership. The Constitution behoves the courts to rid South Africa of all the vestiges of colonialism and apartheid, particularly as they relate to customary law and traditional leadership. Legislation has been enacted for that specific purposes,

preference for Solomon. However, no one has ever had sight of that letter; Laband (n 12) 308.

148 Bennett (n 4) 362-363.

149 Bennett (n 7) 335.

150 *Shilubana v Nwamitwa* (n 1).

151 *Shilubana v Nwamitwa* (n 1) paras 44-49.

152 *Shilubana v Nwamitwa* (n 1) para 49 (my emphasis).

153 See in this regard the *dictum* of Molemela J in *Yende v Yende* (n 1) para 22.

namely, to ensure that the institution comports to the values of the Constitution. There have also been legislative attempts at insulating traditional communities and their leaders from political inducement and manipulation. Traditional leaders should not be at the beck and call of the government or any of its functionaries.

However, a measure of caution is required; and a delicate balance would have to be struck between the right to culture (which encompasses traditional leadership and related customs) and the right of every affected person not to be unfairly discriminated against. In other words, the change that is agitated for, in this regard, would have to be gradual and adaptive, and not be imposed on the affected communities in an overly hasty manner, lest there be constitutionally compliant, yet dysfunctional, communities.