



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 19891/2022

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.
DATE: 11 DECEMBER 2023
SIGNATURE

In the matter between:

PRINCE MBONISI BEKITHEMBA KA BHEKUZULU	First Applicant
PRINCE VULINDLELA KA BHEKUZULU	Second Applicant
PRINCE MATHUBA KA BHEKUZULU	Third Applicant
PRINCE GAYLORD MXOLISI KA BHEKUZULU	Fourth Applicant
PRINCESS LINDIWE KA BHEKUZULU	Fifth Applicant
PRINCE ZWELIYAZUZA KA NINGI KA SOLOMON	Sixth Applicant
PRINCE BUKHOSIKABUPHELI KA NKUNZIYEZAMBANE KA SOLOMON	Seventh Applicant
PRINCE BHEKINKOSI ERNEST KA NKUNZIYEZAMBANE KA SOLOMON	Eighth Applicant
PRINCESS THEMBOKUHLE KA NGQINDA KA SOLOMON	Ninth Applicant

PRINCESS SILUNGILE KA BHEKUZULU	Tenth Applicant
PRINCESS GUGULETHU KA NGQINDA KA SOLOMON	Eleventh Applicant
PRINCESS ZANELE KA NKUNZIYEZAMBANE KA SOLOMON	Twelfth Applicant
PRINCESS THEMBELIHLE CYNTHIA KA NINGI KA SOLOMON	Thirteenth Applicant
PRINCESS LINDIWE KA BHEKUZULU	Fourteenth Applicant
PRINCE NOKWETHWMBA BHEKINKOSI KA NKUNZIYEZAMBANE KA SOLOMON	Fifteenth Applicant
PRINCESS SIHLOBOSENKOSI LINDUZALO KA ZWELITHINI ZULU	Sixteenth Applicant
PRINCESS PHUMUZUZULU MZOMUHLE KA ZWELITHINI ZULU	Seventeenth Applicant
PRINCESS THANDEKA KA ZWELITHINI ZULU	Eighteenth Applicant
PRINCESS KHONZINKOSI SBAMBISILE KA ZWELITHINI ZULU	Nineteenth Applicant
PRINCE NHLANGANISO KA ZWELITHINI ZULU	Twentieth Applicant
PRINCE BAZABAZI MBUZELI ZWELITHINI ZULU	Twenty-first Applicant
PRINCESS SIBUSILE KA ZWELITHINI ZULU	Twenty-second Applicant
PRINCESS KHETHOKUHLE ZULU	Twenty-third Applicant

and

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
PRINCE MISUZULU KA ZWELITHINI ZULU	Second Respondent
PRINCE MANGOZUTHU BUTHELEZI	Third Respondent
MINISTER OF COOPERATIVE GOVERNMENT AND TRADITIONAL AFFAIRS N.O	Fourth Respondent
PREMIER OF KWAZULU-NATAL PROVINCE	Fifth Respondent
PRINCESS THEMBI NDLOVU	Sixth Respondent
PRINCE THULANI ZULU	Seventh Respondent
QUEEN BUHLE MATHE	Eighth Respondent
QUEEN THANKDEKILE JANE NDLOVU	Ninth Respondent
QUEEN NOMPUMELELO MCHIZA	Tenth Respondent
QUEEN ZOLA ZELUSIWE MAFU	Eleventh Respondent
QUEEN SIBONGILE WINNIFRED ZULU	Twelfth Respondent
MEMBERS OF THE ROYAL FAMILY AS LISTED IN ANNEXURE “A”	Thirteen Respondent
PRINCESS THANDEKA KA ZWELITHINI ZULU	Fourteenth Respondent
PRINCESS NOMBUSO KA ZWELITHINI ZULU	Fifteenth Respondent
PRINCE SIHLANGU KWENZAKWENKOSI KA ZWELITHINI ZULU	Sixteenth Respondent
PRINCESS NTANDOYENKOSI KA ZWELITHINI ZULU	Seventeenth Respondent
PRINCESS SINETHEMBA KA	

ZWELITHINI ZULU	Eighteenth Respondent
PRINCESS NQOBANGOTHANDO KA ZWELITHINI ZULU	Nineteenth Respondent
<u>PRINCE KHETHOKUHLE KA LETHU ZULU</u>	Twentieth Respondent

CASE NO: 38670/2022

PRINCE SIMAKADE KA-ZWELITHINI ZULU Applicant

and

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
PRINCE MISUZULU KA-ZWELITHINI ZULU	Second Respondent
THE MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Third Respondent
PREMIER KWAZULU-NATAL PROVINCE	Fourth Respondent
NATIONAL HOUSE OF TRADITIONAL LEADERS	Sixth Respondent
MEMBERS OF THE ZULU ROYAL FAMILY IDENTIFIED IN ANNEXURE “A”	Seventh Respondent
PRINCE MANGOSUTHU BUTHELEZI	Eighth Respondent

Summary: *This judgment is not about who should be king of the AmaZulu. The applicants didn't ask the court to determine that issue. The applicants brought two review applications and the court was required to determine those. The first was whether the incumbent*

king, King Misuzulu Ka Zwelithini Zulu has been appointed as king in terms of Zulu custom and the second was whether the President had correctly recognised the present king in terms of the Traditional and Khoi-San Leadership Act 3 of 2019 (the Leadership Act). In respect of the first question Madondo AJP had already pronounced in related litigation in the Kwazulu-Natal Division, Pietermaritzburg on 2 March 2022 that King Misizulu is the rightful heir to the throne. Even if that decision is being attacked, this court cannot sit as a court of appeal and that decision is regarded as *res iudicata* (something which has already been decided). Regarding the second question, it was found that the President has not lawfully recognised the King as the President has not followed the peremptory procedure provided for in section 8 of the Leadership Act. The recognition of King Misizulu by the President and the publication of that recognition in the Government Gazette is therefore reviewed and set aside and the President is directed to take the necessary steps to have an investigative committee appointed as contemplated in section 8(4) of the Leadership Act.

ORDER

1. It is declared that the recognition by the first respondent of the second respondent as Isilo of the Zulu Nation as contained in Government Gazette no 46057 of 17 March 2022 (the recognition decision) was unlawful and invalid and the recognition decision is hereby set aside.

2. The matter of the recognition of the Isilo of the AmaZulu is remitted to the first respondent who is directed to act in terms of Sections 8(4) and 8(5) of the Traditional and Khoi-San Leadership Act 3 of 2019 and to appoint an investigative committee as contemplated in that Act to conduct an investigation and to provide a report in respect of allegations that the identification of the second respondent was not done in terms of customary laws and customs.
3. The first respondent is ordered to pay the Applicants' costs of their applications, including the costs of two counsel, where employed.
4. In respect of applications for condonation for late filling of papers or to strike out allegations in affidavits, each party is ordered to pay its own costs.

J U D G M E N T

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

Introduction

[1] Wena weZulu! Bayede! Wena weNdlovu! These were some of the cries that reverberated around the packed courtroom at every adjournment of the hearing of this matter over three days. Such cries should also have been raised in unison by the izinduna and the amabutho (many who attended the hearing)

and indeed the whole AmaZulu nation throughout the Zulu Kingdom. But there were disputes and dissention regarding the succession to the throne. This led to litigation between members of the extended Royal Family, the President and the incumbent King, among others, both in the Kwazulu-Natal Division of the High Court and in this Division.

[2] The question that came before this court was not to make a determination as to who should be king of the AmaZulu. The applicants didn't ask the court to determine that issue. The applicants brought two review applications and the court was required to determine those. The first was whether the incumbent king, King Misuzulu Ka Zwelithini Zulu (King Misizulu) has correctly been appointed as King in terms of Zulu custom and the second was whether the President had correctly recognised the King in terms of the Traditional and Khoi-San Leadership Act 3 of 2019 (the Leadership Act). In respect of the first question Madondo AJP had already pronounced in related litigation in the Kwazulu-Natal Division, Pietermaritzburg on 2 March 2022 that King Misizulu is the rightful heir to the throne. This court had to decide whether that decision is *res iudicata* (something which has already been decided) as this court cannot sit as one of appeal. Only once it has been found that the decision of Madondo AJP is not *res iudicata* could the first review application be proceeded with. The second review application was whether the recognition of the King by the President had been lawfully made in terms of the Leadership Act or not.

Parties

[3] There were two applications before the Court which were heard jointly. In Case no. 19891/2022 Prince Mbonisi Bekithemba ka Bhekuzulu (Prince Mbonisi) was the first applicant. He is the half-brother of the late Isilo, his Majesty King Zweletini Goodwill Zulu who passed away on 12 March 2021.

Prince Mbonisi is joined by 22 other Princes and Princesses of the extended Zulu Royal Family as co-applicants.

[4] The first and second respondents in Case no. 19891/2022 are the President of the Republic of South Africa (the President) and King Misuzulu respectively. The late Prince Mangosuthu Buthelezi was cited as third respondent. The Minister of Cooperative Government and Traditional Affairs (the Minister) and the Premier of the KwaZulu-Natal Province (the Premier) feature as the fourth and fifth respondents respectively. The sixth to twentieth respondents are other Princes, Princesses and Queens of the Royal Family as well as members thereof listed in an annexure to the Notice of Motion.

[5] It appears from the initial and later filed papers that some of the citations of the lesser involved applicants and respondents have changed, but nothing turns on this.

[6] The applicant in Case no. 38670/2020 is Prince Simakade ka-Zwelithini Zulu (Prince Simakade). The respondents in that application are again the President, King Misuzulu, the Minister, the Premier and the members of the Zulu Royal Family identified in an annexure to the Notice of Motion. The National House of Traditional Leaders and the late Prince Mangosuthu Buthelezi feature as the sixth and eighth respondents therein.

[7] When the matters were argued before the Court, the parties were represented by four sets of counsel. Adv. T. Masuka SC with Adv. M Similane and Adv N M Nyathi represented Prince Mbonisi and the other applicants in his application, Adv. A Dodson SC with Adv. S Pudifin-Jones and Adv C N Seme represented Prince Simakade while Adv. M Moerane SC with Adv. N Mavunga and Adv N Chesi-Buthelezi represented the President and Adv. C E Puckrin SC,

Adv M A Badenhorst SC and Adv J A Klopper represented King Misuzulu and the members of the Royal Family siding with him.

Relief sought

[8] In the Prince Mbonisi matter the following relief was sought namely a review and setting aside of a meeting of 14 May 2021 “... *on the basis that it was not a lawfully constituted meeting of the Royal Family for the purpose set out in section 8(1)(a) of the Leadership Act read with section 17(3) of the KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005*” (the KwaZulu-Natal Act), the review and setting aside of the same meeting “ ... *on the basis that it was not procedurally fair, alternatively unlawful for the purpose set out in section 8(1)(a) of the Leadership Act*”, a review and setting aside of the decision “... *of those who were present in the meeting of 14 May 2021 to identify the Second Respondent as King of the Zulu Kingdom and to apply to the President for the recognition of the Second Respondent ...*” (a reference to the Second Respondent is a reference to King Misuzulu). Furthermore the review and setting aside of the decision of the President to recognize King Misuzulu in terms of Section 8(3)(a) and (b) of the Leadership Act was also sought on the basis that it was unlawful and therefore unconstitutional. A direction was also sought that a meeting of the Royal Family “as defined” in the Leadership Act together with the “ruling family” in consultation with the Zulu Royal Council be held for the sole purpose of identifying a successor to the throne. Certain mechanisms to facilitate such a meeting were also sought as part of a court order. As an alternative, a direction to the President was claimed to cause an investigation to be conducted by an investigative committee designated in terms of Section 8(4)(a) of the Leadership Act.

[9] In Prince Simakade's application similar relief was sought, formulated in respect of the meeting of 14 May 2021 as follows: "*declaring that the identification of the second respondent as Isilo of the Zulu nation by the seventh respondent, meaning the persons attending a meeting on 14 May 2021, convened by the eighth respondent, and purporting to be the AmaZulu Royal Family, is unlawful and invalid*". The recognition by the President of King Misuzulu and the publication thereof in General Notice no. 1895 contained in Government Gazette no. 46067 of 17 March 2020 was also sought to be reviewed and set aside as unlawful and invalid. As set out in the introduction to this judgment the relief sought to recognize Prince Simakade as Isilo was not proceeded with but the alternative, namely a remittal to the President with a direction to act in terms of Sections 8(4) and 8(5) of the Leadership Act was sought.

Summary of relevant preceding facts

[10] The succession to the throne of the AmaZulu Kingship was precipitated by the passing of the late Isilo His Majesty King Goodwill Zwelithini KaBhekuzulu on 12 March 2021. At the time he was 72 years old and the leader of the AmaZulu. He was the son of King Cyprian Bhekuzulu Nyangayezizwe kaSolomon and Queen Thomozile Jezangani, the daughter of Thayisa of the Endwandwe people. At the time of his untimely departure the late Isilo was the longest reigning Zulu monarch since King Mpande kaSenzangakhona and he was a direct descendant of the legendary King Shaka KaSenzangakhona.

[11] The internment of the late Isilo was attended by members of the AmaZulu Royal Family, clergy and an entourage comprising of Amakhosi, isithombi and amabutho on the afternoon of 17 March 2021 at the KwaKhethomthamdayo Royal Palace. Immediately thereafter the traditional Prime Minister to the AmaZulu, the late Prince Mangosuthu Buthelezi wrote a letter to the Premier

informing the latter about the nomination of her Majesty Queen Shiyiwe Mantfombi Dlamini Zulu (Queen Mantfombi), nominated as successor of the late Isilo according to his will which had been read on 24 March 2021. Tragedy struck yet again and Queen Mantfombi, then the Great Wife of the late Isilo, passed away on 29 April 2021. On 14 May 2021 members of the Royal Family convened during which meeting King Misuzulu was identified as the new King of the AmaZulu. It is alleged that approximately 130 people attended this meeting. There are substantial factual disputes raised by Princes Mbonisi and Simakade in their papers as to whether that meeting complied with the prescripts of Zulu custom and the Leadership Act.

[12] On 3 June 2021 the late Princess Thembizulu Ndlovu (Princess Thembi) directed a letter to the President disputing the nomination and identification of King Misuzulu. This dispute was lodged in terms of Sections 8 and 12 of the Leadership Act.

[13] After the President had been approached by several individuals to mediate and resolve the issues, he requested the Minister to attend to the matter and to advise him accordingly. The Minister in turn requested an *ad hoc* Mediation Panel led by Mr Willies Mchunu “... *to attend to the dispute within the AmaZulu Royal Family (and) to reach an agreement on the person to be submitted to the President for recognition as King of the Amazulu Kingship*”. The Mediation Panel sought to be independent and autonomous and saw its primary responsibility to “... *undertake the necessary consultations to bring all the parties and the Royal Family together to reach an agreement on who should be recognized as the King in terms of the AmaZulu Kingship customary laws and customs*”.

[14] The Mediation Panel conducted extensive investigations, performed sterling work and produced a report spanning 43 pages. The Mediation Panel

had consultations with the late Prince Mangosuthu Buthelezi and the late Princess Thembi as well as Prince Mbonisi and many other members of the Royal Family as well as the Amazinyane Ase Naleni, the Amazinyane akwa Dlamahlaha and Naleni, the Amazinyane of Linduzulu, the Izinyane of Usuthu, the Abantwana Baka Bhusha and uNdlunkulu waseMatheni and the Queen of KwaKhethomthandayo, the Queen of KwaDlamahlaha, the Queen of Linduzulu, the Queen of oSuthu/ eNyokeni and the Queen of Ondini. Prince Simakade's mother was also interviewed. The Mediation Panel also, in addition to her complaint, received further submissions from the late Princess Thembi as well as a report from the late Prince Mangosuthu Buthelezi. It also had a meeting on 20 November 2021 with what it termed to be the "core family".

[15] Prior to the commencement of the mediation proceedings, three court applications had already been launched in the KwaZulu-Natal High Court. The first of these was an application dated 28 April 2021 by Queen Sibongile Winifred Zulu seeking relief against the President to interdict him from recognizing the Great Queen as regent and to give effect to the will of the late Isilo.

[16] The second application was launched on 28 April 2021 by Princesses Zulu and Zulu Duma who also sought relief against the President regarding the determination of the validity of the last will of the late Isilo. The Premier was sought to be interdicted and restrained under Section 17 of the KwaZulu-Natal Act to issue a certificate of recognition of the then Prince Misuzulu and directing the President to refer the matter for identification of the successor to the throne back to the Zulu Royal Family for reconsideration and resolution.

[17] Whilst these applications were pending and during the course of the mediation process a third application was launched, by Prince Mbonisi on 17 November 2021, whereby he sought to interdict and restrain the Premier from

recognizing the then Prince Misuzulu as the King pending the final determination of the applications referred to above.

[18] The three applications were set down for purposes of a joint hearing and postponed for argument before Madondo AJP on 12 January 2022. Madondo AJP heard argument in all three applications and delivered his judgment on 2 March 2022. I shall resort later to the contents of that judgment, but for now the relevance of this litigation is that it featured in the recommendations of the Mediation Panel.

Recommendations of the Mediation Panel

[19] I find the recommendations of the Mediation Panel not only instructive for purposes of considering the conduct of the President thereafter but also important for purposes of providing context regarding the succession dispute. It also appeared from the hearing of the matter that the parties thereto had little regard to these recommendations which, in my view, could stand them all in good stead. For these reasons and as further litigation and/or investigative proceedings are envisaged as will appear from the conclusion of this judgment, I deem it necessary to quote the recommendations in full:

“7.1 Court cases

The Minister and President are advised to wait for the court cases to conclude before proceeding with any other action. What needs to be done will be much clearer after the judges have pronounced on the issues challenged, which include the challenge to the authenticity of the will itself;

7.2 Medium to long term mediation process

The process of appointing a successor to King Goodwill has left the Royal House badly bruised and cracked. It is important for the Minister and President to consider whether a medium to long term mediation process is necessary. The judgments may even add to the current divisions. We could see a similar process to the Shembe Church where the judgment favours the less militant and not the politically backed but most remain intransigent. This may even require skilled senior mediators;

7.3 Appointment of acting king acceptable to all

The court challenge may prove to be very long. Some has proved so in the past where there are court appeals of decisions right up to the Constitutional Court. This may be far-fetched thinking, but experience has taught us to expect such acts of desperation. It however may also prove to be contentious.

Interdict

7.4 It is very important for the Government to closely monitor the judgment on the interdict against Shenge and the King elect from purporting to have a King in place in the midst of contestation and dispute challenge by the other backers of another nominee. There could again be defiance of a judgment if it favours the smaller contender.

7.5 Appointment of investigation team per legislation

It is deemed by us, the Panel, that before the President implements any person, he ought to first investigate through

a legally formed investigation team. Issues to be investigated must include: whether Prince Simakade and ililobomvu is true as well as his institution into the Khangela Palace. If true, can it be undone or overlooked when the appointment is made? Remembering that Queen Mantfombi is known to her tribe to persuade the installer, the King but only managed to anger the King. It was therefore never undone.

7.6 The core Close Royal House

The legislation that covers the traditional leadership cannot be implemented without implementation as a whole. The law calls for the close core of the Royal Family. This also calls for relatives to be invited. The Panel can talk to this issue if requested to for clarity. The Department of COGTA, the Investigating Team or State Law Advisory must also investigate how to practically apply the objects of the clause in Zulu Royal Family. It also could be considered a good enough issue to begin the medium to long term mediation. The definition of the core close royal house is contested in the circumstances. It is in the long term interest of the Department and Government if this can be properly defined now while the opportunity has presented itself”.

[20] It needs to be pointed out that the Constitutional Court has recently in *Mogale & Others v Speaker of the National Assembly & Others*¹ declared the Leadership Act to be invalid. The order of invalidity was however suspended for a period 24 months to enable Parliament to re-enact the statute in a manner

¹ 2023 ZACC 14

that is consistent with the Constitution or to pass another statute in a manner that is consistent with the Constitution. This order was made on 30 May 2023.

The judgment of Madondo AJP

[21] The three applications mentioned in paragraph 17 above were not only heard jointly by Madondo AJP, but he delivered a consolidated judgment incorporating his findings and the orders in respect of all three applications. Of these, only the application in Case no. 10879/2021 is relevant to these proceedings. Prince Mbonisi was the applicant in that application. The respondents thereto were King Misuzulu, the late Prince Mangosuthu Buthelezi, the President, the Premier, the House of Traditional and Khoi-San Leaders of KwaZulu-Natal Province, the House of Traditional and Khoi-San Leaders National and as the seventh and eighth respondents “other persons who may be members of Umndeni weSilo” and “members of the Royal Family” as listed in an annexure to the Notice of Motion.

[22] Although Madondo AJP had referred to aspects relating to the succession in his analysis of the other two applications, he dealt with Prince Mbonisi’s application in Case no. 108792/21 separately in his judgment. In the introduction thereto it was confirmed that Prince Mbonisi in that application sought to interdict the coronation of then Prince Misuzulu as the Isilo of the Zulu Nation. It was erroneously assumed by Prince Mbonisi that the coronation was scheduled to take place on 3 December 2021.

[23] After referring to the passing of the late Isilo and the late Queen Mantfombi Madondo AJP referred to an assembly of the Royal Family on 14 May 2021 where at then Prince Misuzulu was identified as the successor to the Zulu throne. Reference was also made to a nomination of Prince Simakade as “contender” to the throne by a faction of members of the Royal Family by way

of reference to the dispute lodged on 3 June 2021 with the President by the late Princess Thembi.

[24] Madondo AJP identified four issues raised in affidavits and argument before him which required his decision. The first was whether a coronation implicating public funds was on the way and the second was whether the applicants in that application had *locus standi* “... and valid reasons to stay the process leading to the identification, recognition and coronation of Prince Misuzulu”. The third and fourth issues were whether “Prince Misuzulu was legitimately and appropriately identified and nominated as the successor to the late Isilo and (whether) there is any dispute as to the Zulu kingship”.

[25] Under a separate heading in the judgment as “*Identification and nomination of Prince Misuzulu as the successor to the Zulu throne*”, Madondo AJP referred to Sections 8(1) and 8(3) of the Leadership Act which he quoted in his judgment.² Reference was also made to Section 17(3) of the KwaZulu-Natal Act, the provisions of which are not relevant to this matter.

[26] Madondo AJP further referred to Section 1 of the Leadership Act which defines “the Royal Family” as the “*core customary institution or structure consisting of immediate relatives of the ruling family within a traditional or Khoi-San community who have been identified in terms of customary law or customs and includes, where applicable, other family members who are close*

² “8(1) Whenever the position of a King or Queen is to be filled or the successor to a principal traditional leader is to be identified, the following process applies – (a) the Royal Family concerned must within the 90 days after the need arises for the position of a King or Queen or principal traditional leader to be filled and with due regard to the applicable customary laws and customs – (i) identify a person, who qualifies in terms of customary law and customs to assume the position of King or Queen (ii) apply to the President or relevant Premier as the case may be for the recognition of the person, so identified as King or Queen subject to Section 3(2) ... which application must be accompanied by – (aa) the particulars of the person, so identified to fill the position of King or Queen ... and (bb) the reasons for the identification of that person, as King or Queen or principal traditional leader. (b) the President may, after consultation with the Minister and the Premier concerned and subject to sub-sections 3 and 4 recognise as a King or Queen a person, so identified ... 8(3) Whenever the President recognises a King or Queen the President must – (a) publish a notice in the Gazette recognising such a person, as King or Queen ... (b) issue a certificate of recognition to such person and (c) inform the National House of the recognition of the King or Queen”.

relatives of the ruling family". He went on to find that the Royal Family is the fabric of traditional leadership. It is responsible for the identification of traditional leaders³. The Royal Family must identify the King or Queen, in terms of customary law, customs and traditions and must identify a suitable person for the position.⁴

[27] Madondo AJP in his judgment further referred to the actual proposal of then Prince Misuzulu as the successor to the late Isilo by the late Prince Mangosuthu Buthelezi in his capacity as a member of the Zulu Royal Family through Princess Magogo kaDinuzulu. He further was of the view that Prince Simakade had disavowed that he had expressed any wish to contend for the throne. He also referred to a letter addressed to the late Prince Mangosuthu Buthelezi by Prince Simakade dated 11 May 2021 with the request that the letter be read out at the Zulu Royal Family meeting on 14 May 2021 as basis for this disavowal. I interpose to state that there is some dispute in the present matter as to the interpretation of the contents of this letter and how it came about that Prince Simakade had addressed it. Madondo AJP however went ahead and considered any entitlement which Prince Simakade may have had to the throne.

[28] Madondo AJP dealt with the issue of identification of a successor to the throne with reference to then Prince Misuzulu's mother, the late Queen Manfombi as follows:

"Prince Mangosuthu Buthelezi who was in attendance at the meeting stated that before proposing and nominating the name of Prince Misuzulu as a successor to the late Isilo he explained the

³ *Mphephu v Mphephu-Ramabulana & Others* 2019 (7) BCLR 862 SCA confirmed in *Mphephu v Ramabulana & Another v Mphephu* 2022 (1) BCLR 20 (CC).

⁴ *Maxwell Royal Family & Another v Premier of the Eastern Cape Province & Others* [2021] ZAECMHC 10 at par. [30]

criteria which are to be taken into account when identifying a person as a successor to the throne. Such criteria are laid down by the Zulu customary law and customs. The following criteria are taken into account whether the lobolo of that person's mother was contributed wholly or in part by the relevant tribe or nation and the status of the maternal grandfather of such person. In the present case, it is common cause that the late Queen's lobolo was paid by the Zulu nation and that she was born of Eswatini royalty being a daughter of King Sobhuza II. On the ground of the contribution of her lobolo by the Zulu nation alone she precedes otherwise in polygamous marriages and becomes a Great Wife who is expected to bear a successor to the throne ...".

[29] After having dealt with the parental lineage of Prince Simakade, Madondo AJP concluded that then Prince Misuzulu was in terms of the customary law and customs "... *the rightful heir to the throne*". Continuing in dealing with the issue as to whether there is a basis "... *for interdicting the process leading to the recognition and coronation ...*" Madondo AJP concluded his judgment as follows:

"The evidence establishes that there is no contender to the throne who professes or is professed to have a better right, entitlement or title to succeed to the throne than Prince Misuzulu. The applicant has not made out any case that the identification of Prince Misuzulu as the successor to the throne was not in accordance with Zulu customary law and customs and the provisions of Section 8(1) of the Leadership Act read with Section 17 of the KZN Act. The applicant has, accordingly, failed to establish any right which is protectable by an interdict".

Res judicata

[30] The *exceptio res judicata* (the taking of the point that a dispute had already been decided or adjudicated on) is based on the irrebuttable presumption that a final judgment on a claim submitted to a competent court is correct. This presumption is founded on public policy which requires that litigation should not be endless and on a requirement of good faith which does not permit “the same thing” being demanded more than once.⁵

[31] Insofar as the proceedings before Madondo AJP were for an interim interdict and the principle that generally, an order given in interim interdict proceedings or an order that is subject to variation cannot be relied upon for the defence of *res judicata*, it is trite that the refusal of an interdict (which is what Madondo AJP had ordered) is final.⁶ Therefore the principle of *res judicata* could find application.

[32] The arguments of the applicants in the present matter were however that because the application before Madondo AJP was for an interim interdict while the cause of action in the present matter was for a review, the principle of *res judicata* should nevertheless not apply. Having regard however to the disputes which Madondo AJP had to resolve in order to determine whether the applicants in the interdict application before him had any *prima facie* or clear right to an interdict, he decided the same cause of action on which Princes Mbonisi and Simakade rely in the present applications, namely that the decision taken on 14 May 2021 to identify King Misuzulu as successor to the throne had improperly been taken. In particular, an issue before Madondo AJP was whether that decision had been taken in terms of Zulu law and customs. It is that same point

⁵ Harms, “Amlers Presidents of Pleadings” 8th Edition under the heading *Res judicata* with reference to *African Farms & Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 A at 564 and *National Sorghum Breweries (Pty) Ltd t/a Vivo African Breweries v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA).

⁶ *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 A and *Cronshaw v Coin Security* 1996 (3) SA 686 (A).

which the applicants in the present application raise, albeit on a slightly different factual basis.

[33] It has been held that for a plea of *res judicata* to succeed the requirements for the “same cause of action and the same thing to be claimed” should not be understood in a literal sense as immutable rules.⁷ The “same cause of action” issue also gives rise to the ancillary principle of issue estoppel. This is where, as in the present matter, although the causes of action may differ in nature, the issues which have to be decided in both causes of action, are the same. In such a case, a party is estopped from asking a court to decide that issue for a second time.⁸ That is the case here.

[34] As to the question of whether the same dispute had been decided between “the same parties”, there can be no dispute about the identities of Prince Mbonisi and the President in the two sets of litigation but it appears from the citation of the parties referred to above that all interested members of the Royal Family were cited in both the application before Madondo AJP and in the current applications. Insofar as Prince Simakade may not have been a directly or individually cited party in the litigation before Madondo AJP, he delivered a confirmatory affidavit in support of Prince Mbonisi’s application. In respect of this issue I find the following dictum by Wallis JA in *Caesarstone* apposite regarding the relaxation of the “same party requirement”:

“Subject to the person concerned having had a fair opportunity to participate in the initial litigation, where the relevant issue was litigated and decided, it seems to me to be something odd in permitting that person to demand that the issue be litigated all over again with the same witnesses and the same evidence in the hope of a different outcome,

⁷ *Caesarstone SDOT-AIM Ltd v World of Marble and Granite* 2000 CC & Others 2013 (6) SA 499 SCA at para. [21] and [22].

⁸ *Smith v Porritt & Others* 2008 (6) SA 303 (SCA) para [10].

*merely because there is some difference in the identity of the other litigating party*⁹.

[35] Both Prince Mbonisi and Prince Simakade argued that there were factual and interpretational issues which were not canvassed before Madondo AJP, such as the investigation of the identity of the members of the Royal Family who attended the meeting of 14 May 2021, a letter of Prince Simakade referred to above and other issues relating to the agenda of that meeting and who in fact called it. Whilst this may be so, this court can neither sit as court of review or appeal on the judgment of Madondo AJP nor can it be ignored.

[36] I therefore find that the plea of *res judicata* raised on behalf of the respondents is good and it is not open for this court to overturn the judgment of Madondo AJP which is what would happen if the principal relief, namely the review and setting aside of the identification decision of 14 May 2021, were to be ordered.

The recognition decision

[37] For purposes of adjudicating the lawfulness of the President's decision taken on 16 March 2022 to recognize King Misuzulu as the duly appointed King of the AmaZulu, it is necessary to have regard to the chronology of the events surrounding that decision (the recognition decision).

[38] The starting point, as also referred to in the report of the Mediation Panel is the raising of disputes by the late Princess Thembi. This was initially by way of a substantive document spanning 88 pages dated 28 May 2021. In that document extensive reference is made to various aspects regarding the Zulu monarchy and in particular the proceedings at the meeting of 14 May 2021. Objections had been raised at that meeting against the manner in which the late

⁹ *Caesarstone* at par. [43]

Prince Mangosuthu Buthelezi had conducted that meeting and how, for example Prince Thokozani had been silenced and removed from the meeting.

[39] The President denied that he had received this document due to an error in his email address noted thereon but he acknowledged having received Princess Thembi's later letter of complaint dated 3 June 2021 wherein a reference was made to this document as an annexure. Be that as it may, the President noted from Princess Thembi's letter of 3 June 201 that she contended that a preceding meeting of 7 May 2021 did not amount to a meeting of the Zulu Royal Family and that the meeting of 14 May 2021 was called under false pretences and that its agenda did not indicate that it was called for purposes of identifying a successor to the throne. The President further conceded in his affidavit that Princess Thembi had contended that King Misuzulu "... *cannot be recognized, appointed and be coronated in terms of the Constitution, customary law and both the National and Provincial legislation*".

[40] In his answering affidavit, the President also indicated that, according to the Premier "... *it became clear that during the process of nominations, the Royal Family was divided on the final decision as to who should be the successor ...*".

[41] In the President's letter to the Minister dated 16 August 2021, requesting her assistance, he advised "... *that it was apparent from the correspondence I received that there were concerns and a disarray within the Royal Family about the nomination of the king elect ...*".

[42] The President indicated in his answering affidavit that he had regard to the recommendations of the Mediation Panel and that after he had become aware of the judgment of Madondo AJP dated 2 March 2022, he had received a

letter from Prince Mbonisi's attorneys of record on 9 March 2022. In this letter, so the President says, he was advised that:

“63.1 The process of identifying and selecting a king was now hampered by Madondo AJP judgment which erroneously recognized 14 May 2021 as a meeting envisaged in section 8(1)(a)(ii) of the Act.

63.2 They hold instructions to appeal the judgment and to overturn its recognition of a meeting that does not comply with the requirements of section 8(1)(a)(ii) of the Act;

63.3 As long as there are legal proceedings over the legal validity of the meeting of 14 May 2021 and the selection of Prince Misuzulu the President should not endorse any application and submission to him by anyone in terms of section 8(1)(a)(ii) of the Act for the recognition of a king”.

[43] Shortly hereafter on 12 March 2022 the President received a letter from the late Prince Mangosuthu Buthelezi who advised the President that the then Prince Misuzulu's appointed to the throne was announced in the regent's will and by law the regent had the authority to make such an announcement, that such announcement was not unexpected as it had been understood from the time of the late Isilo's marriage to the late Queen Mantfombi that the Isilo's heir would come from the house of Queen Mantfombi, that when the Zulu Royal Family convened on 14 May 2021, the decision in accordance with the Zulu customary law and traditions was unanimous as to the successor of the throne and that no dissention was recorded and no query was raised and no grievances were lodged. The letter also advised the President of the judgment of Madondo AJP. The late Prince Mangosuthu Buthelezi requested that “the necessary arrangements” be made for the commencement of King Misuzulu's reign.

[44] There was also a resolution of a purported meeting of all the houses of the Royal Family which took place on 29 September 2021 but as the validity of that meeting was so hotly contested, the parties in the present matter did not attach much weight to that resolution as part of the decision-making process. In particular the late Princess Thembi had declined to attend that meeting because she did not recognize the authority of King Misuzulu.

[45] After having received the letter from the late Prince Mangosuthu Buthelezi the President waited for four days. By that time he had also received a letter from the Minister supporting the recognition of the King based on the judgment of Madondo AJP. The President said that during these four days he kept in mind the intention to institute appeal proceedings against the judgment and order of Madondo AJP as mentioned in the letter by Prince Mbonisi's attorneys but having waited and not been informed of such an application by 16 March 2022, he took the decision to recognize the then Prince Misuzulu as the King of the Zulu Kingdom in terms of Section 8(3)(a) and (b) of the Act. For this purpose, he deemed the late Prince Mangosuthu Buthelezi's letter of 12 March 2022 to constitute an application as contemplated in Section 8(1)(a)(ii) of the Act. This decision was published the next day in the Government Gazette, constituting the "recognition decision" referred to earlier in this judgment.

[46] The 15 day period within which to lodge an application for leave to appeal in respect of the judgment of Madondo AJP only expired on 24 March 2022 and an application for leave to appeal was timeously delivered on 18 March 2022. The argument on behalf of the President before this court was that when the recognition decision was taken on 16 March 2022 the order of Madondo AJP had not yet been suspended by the appeal process (that appeal process had since lapsed due to the fact that it has since been withdrawn as the

coronation which Prince Mbonisi had sought to interdict had now taken place in any event).

[47] The present applicants, in particular Prince Simakade, contended that in the circumstances as set out above, the President's decision was unlawful and contrary to the Leadership Act. Sections 8(4) and (5) of that Act provide as follows:

“(4) Where there is evidence or an allegation that the identification of a person as a King or Queen ... was not done in terms of customary laws and customs, the President ...

(a) must cause an investigation to be conducted by an investigative committee designated by the President ... which committee must, in the case of committee designated by the President include at least one member of the National House ... to provide a report on whether the identification or election of the relevant person was done in accordance with the customary law and customs and if not which person should be so identified or whether a new election should be held; and

(b) must, where the finding of the investigative committee indicate that the identification or election of the person referred to in sub-sections 1 and 2 was not done in terms of the customary laws and customs forward the report contemplated in paragraph (a) to the Royal Family ... for its comments;

- (5) *The President ... may, after having considered the report of the investigative committee as well as the comments of the Royal Family, subject to sub-section (3) recognize a person as King or Queen ... as the case may be*".

[48] The applicants placed specific emphasis on the above underlined wording of the relevant sub-sections as well as the threshold requirement set out therein.

[49] In addition to the above, reference was made to Section 59 of the Leadership Act which provides as follows:

"Disputes

- (2) *Any traditional leadership dispute relating to a king ... must be dealt with by the President ... and the President ... must –*
- (a) *cause an investigation to be conducted by an Investigative Committee designated by him/her which committee must, in the case of a dispute concerning a king, queen, kingship or queenship include at least one member of the National House and in the case of any other dispute include at least one member of the relevant provincial house to provide a report as well recommendations on the matter in dispute within 60 days from the date of resignation of the Investigative Committee; and*
- (b) *refer the report to the relevant Royal Family ... for its written commentments which must be submitted to the*

President ... within 60 days from date of such referral”.

[50] There are two important distinctions between the procedures contemplated in Section 8 and those contemplated in Section 59. The first is that Section 59 resorts under Chapter 5 of the Leadership Act dealing with general provisions while Section 8 resorts under Chapter 2 of the Leadership Act dealing specifically with leadership and governance of traditional communities. Even more specific is the fact that Section 8 deals with the recognition of a king. The second important distinction is that as a “trigger event” for an investigation contemplated in Section 8(4), the existence of “evidence or an allegation” is sufficient whilst Section 59 contemplates the existence of “a dispute”.

[51] In interpreting these sections and, more importantly, the distinction between them, the principles of interpretation that are by now trite should be applied. These are that, having regard to the instrument to be interpreted (in the present instance an Act of Parliament), one should have regard to the language used, the context in which it was used and the purpose for which it was used. The further principle is that the consideration of these three interrelated aspects should be done as a unitary exercise without applying it in a mechanical fashion.¹⁰

[52] Applying the above principles and starting with the chapters of the Leadership Act under which the sections resort, it is both linguistically and textually clear that Section 59 deals with a generalized situation which may occur at any stage during the existence of a kingship. In contrast, Section 8(4) deals specifically with the issues applicable at the time when a (new) king is to

¹⁰ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) (*Endumeni*) and *Capitec Bank Holdings Ltd & Another v Coral Lagoon Investments 194 (Pty) Ltd & Others* 2022 (1) SA 100 SCA at par. [25]

be recognized. It is abundantly clear that the latter situation is applicable in the present instance and that this is the section that was binding on the President when he took the recognition decision. It was therefore incorrect for the President to consider the matter as requiring the existence of a “dispute”, being the language employed by the inapplicable section 59.

[53] It appears that the President at least partially appreciated the applicability of Section 8(4) as he refers to it in his answering affidavit. Having correctly identified the applicable section, the President however did not follow it. In fact, he had become obliged to act in terms of this section even before Prince Mbonisi had lodged his application which came before Madondo AJP.

[54] Although the attempt at mediation, being the route followed by the Minister in appointing the *ad hoc* Mediation Panel was a laudable one, it was not one contemplated in the Leadership Act. Had mediation successfully taken place, that might have ended the dispute and would have justified the existence of the Mediation Panel. This, however, was not the case and the President explained the consequences of unsuccessful mediation as follows:

“The objective of a dispute Mediation ad hoc Panel was to bring together all the parties in the family to resolve the dispute and to make recommendations to advise me”.

[55] Once the mediation had failed and the Mediation Panel had produced its report, all the President did was to wait for the conclusion of the litigation before Madondo AJP and to thereafter conclude as follows:

“There was insufficient evidence that was placed before me. in respect of a dispute to persuade me to cause an investigation in terms of section 8(4) of the Act”.

[56] Princes Mbonisi and Simakade attack this conclusion of the President. Firstly, the reference to “a dispute” is misplaced as Section 59 (wherein a reference to a “dispute” is to be found), as already indicated, does not find application. Section 8(4) contemplates two thresholds or triggers namely either “evidence” or “an allegation”. The use of the word “allegation” denotes a very low threshold and denotes something somewhat less than “evidence”. It indicates that the mere making of an assertion that traditional laws and customs had not been followed to be sufficient. Either way, whether one would resort to the definition of “evidence” or “an allegation” the Leadership Act does not contemplate an evaluative process to be performed by the President. The Act simply provides for the existence of a trigger event before its peremptory provision is activated.

[57] The language used by the Legislature in determining this low threshold was used in the context of the inception of a new leadership reign. The purpose is further clearly that any uncertainty regarding the validity of such a leader’s appointment should be dispelled and set aside prior to recognition. The purpose is clearly to recognize only a leader without any outstanding issues regarding his/her entitlement to a throne.

[58] When the three elements of language, context and purpose are then by way of unitary exercise applied to the section in question, the route to have been followed by the President becomes abundantly clear and it is this (as extracted from the relevant section):

“where there is ... an allegation that the identification of a person as a king ... was not done in terms of customary laws and customs, the President ... must cause an investigation to be conducted by an investigative committee ...”

[59] There can further be no doubt that the use of the word “must” clearly denotes a peremptory provision. There can also be no doubt that the threshold of “allegations” regarding the lawfulness of the election process, has been met.

[60] The President therefore erred in law in performing an evaluative function regarding what he deemed to be “the evidence”. The Leadership Act clearly contemplates that an investigative committee is the statutory body created to perform such evaluative function. The Mediation Panel was not such an investigative committee and the President also did not claim that it was. The President therefore erred in law in not having followed the peremptive provisions of the Leadership Act. This renders his recognition decision susceptible to review.

[61] Much was also made in argument by, in particular Adv. Puckrin SC who appeared for King Misuzulu, that once Madondo AJP had pronounced on the issue, everyone, including the President and whatever committee may be appointed, was bound by that pronouncement. This particularly concerned the applicants and Adv. Masuku SC who appeared on behalf of Prince Mbonisi, whose argument had been that the AmaZulu people had not yet “been heard” on the issue of kingship, having regard to how the meeting of 14 May 2021 had taken place. The finality of the pronouncement on the kingship by Madondo AJP beyond the application of the principles of *res judicata* in the context of litigation, need not be determined here. It is sufficient to resort to the powers of the investigative committee set out in Section 8(4)(a). In terms thereof it is notionally possible that, should the investigative committee have regard to material which had not been placed before Madondo AJP within the strictures of the application that had served before him, it may either reach a different conclusion or may determine a re-election as a more appropriate course. Such a

course, should it be advised, would render any adjudication on the meeting of 14 May 2021 moot.

Conclusion

[62] I therefore conclude that the decision by the President to recognize King Misuzulu is reviewable in terms of the provisions of Section 6(2)(d) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) in that he had failed to comply with mandatory procedures in the empowering provisions of the Leadership Act, in particular Sections 8(4) and 8(5) thereof.

[63] Having reached the above conclusion, I need not deal with the remainder of the attacks on the recognition decision nor with the subsequent coronation.

[64] I further conclude that this is clearly not a case where any substitution of this Court's decision for that of the President should take place as contemplated in Section 8(1)(c)(ii)(aa) of PAJA. It is clearly a matter which calls for a remittal but, in the circumstances of the case and in view of the various allegations which had been made back and forth between the parties, it would be just and equitable if such a remittal takes place with the necessary direction. That direction should be that an investigative committee must be established. That is what the Leadership Act requires.

Costs

[65] The general rule is that costs follow the event, that is that the successful party in litigation is entitled to recover its costs from the unsuccessful party.¹¹ Having secured a review and a setting aside of the recognition decision, the applicants in the respective applications were substantially successful. However, not all the respondents contributed to the actual decision which is to be set aside. Essentially, only the President as decisionmaker took the

¹¹ *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1984 (1) SA 839 (A).

administrative action. The further applicable general rule as to costs is that the award thereof is always within the discretion of the court¹². Exercising that discretion, I am of the view that only the President should be liable to pay the applicants' costs. Taking into account the nature of the litigation and the identity of the parties, I am further of the view that an order limiting the liability for costs to this effect and not ordering the remaining respondents to contribute thereto, would be fair and just in the circumstances. In respect of applications for condonation for the late filing of papers or to strike out allegations in affidavits, each party is to pay its own costs.

Order

[66] The following order is made:

1. It is declared that the recognition by the first respondent of the second respondent as Isilo of the Zulu Nation as contained in Government Gazette no 46057 of 17 March 2022 (the recognition decision) was unlawful and invalid and the recognition decision is hereby set aside.
2. The matter of the recognition of the Isilo of the AmaZulu is remitted to the first respondent who is directed to act in terms of Sections 8(4) and 8(5) of the Traditional and Khoi-San Leadership Act 3 of 2019 and to appoint an investigative committee as contemplated in that Act to conduct an investigation and to provide a report in respect of allegations that the identification of the second respondent was not done in terms of customary laws and customs.

¹² *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (SCA) at 22D, *Erf One Six Seven Orchards CC v Greater Johannesburg Metropolitan Council* 1999 (1) SA 104 (SCA).

3. The first respondent is ordered to pay the applicants' costs of their applications, including the costs of two counsel, where employed.
4. In respect of applications for condonation for late filling of papers or to strike out allegations in affidavits, each party is ordered to pay its own costs.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 16, 17 & 18 October 2023

Judgment delivered: 11 December 2023

APPEARANCES:

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