CONSTITUTIONAL COURT OF SOUTH AFRICA

Mphephu-Ramabulana Royal Family v Premier, Limpopo Province and Others

CCT 373/22
Date of judgment: 21 June 2024

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Friday, 21 June 2024 at 10h00, the Constitutional Court handed down judgment in an application for direct leave to appeal against the judgment and order of the High Court of South Africa, Limpopo Division, Thohoyandou (High Court). The parties are the Mphephu-Ramabulana Royal Family (applicant), the Premier, Limpopo Province (first respondent), the Member of the Executive Council, Co-operative Governance, Human Settlement and Traditional Affairs (second respondent), the Minister of Co-operative Governance and Traditional Affairs (third respondent), Mr Toni Peter Mphephu-Ramabulana (fourth respondent) and Ms Masindi Clementine Mphephu (fifth respondent).

On 14 August 2010, the applicant identified the fourth respondent as the King of the Vhavenda and on 21 September 2012, the President recognised the fourth respondent as the King of the Vhavenda. As a result of this appointment, the fifth respondent instituted review proceedings in the Limpopo Division of the High Court, Thohoyandou in December 2012. The fifth respondent sought to have the identification and recognition of the fourth respondent as the King of the Vhavenda reviewed and set aside. The High Court dismissed the application. Thereafter, the fifth respondent appealed to the Supreme Court of Appeal.

The Supreme Court of Appeal declared the decision of the applicant of 14 August 2010, to identify the fourth respondent as a suitable person to be appointed as the King of the Vhavenda Community, unlawful, unconstitutional and invalid. The Supreme Court of Appeal remitted the matter to the High Court for further adjudication on the outstanding issues before another Judge and stayed the withdrawal of the certificate of recognition of the fourth respondent as King of Vhavenda, pending the final determination of the proceedings.

The fourth respondent and the applicant appealed to this Court, asking it to overturn the decision of the Supreme Court of Appeal. This Court, in *Mphephu-Ramabulana v Mphephu* 2022 (1) BCLR 20 (CC), dismissed the main application as it refused condonation for the late filing of the application, but upheld the cross-appeal and set aside paragraph 3(f) of the Supreme Court of Appeal's order (stay order). In setting aside the stay order, this Court held that the order would not be just and equitable given that: it was unclear why the Supreme Court of Appeal ordered the stay; it was paradoxical to say that a decision is unlawful and must be set aside and then stay the order; and it did not vindicate the rule of law or the fifth respondent's right to administrative justice.

Consequently, a vacancy was created in the position of the Vhavenda Kingship. On 17 February 2022, the second and third respondents informed the applicant that they will implement the Constitutional Court's decision. That involved no longer recognising the fourth respondent as King and withdrawing his benefits. On 1 March 2022, the applicant convened a meeting where Mr Mavhungu David Mphephu (Mr Mphephu) was recognised as the acting King. On 1 April 2022, the applicant requested that the first respondent recognise Mr Mphephu as the acting King.

On 8 April 2022, the first and second respondents allege that the Mulambilu and Nndwakhulu families contacted the first respondent, disputing the appointment and recognition of Mr Mphephu as the acting King. These families claim that they were wrongly excluded from the nomination of the acting King, despite being members of the Royal Family. On 11 April 2022, the first respondent received a letter from the fifth respondent disputing the appointment and recognition of Mr Mphephu as the acting King. The fifth respondent held the opinion that Mr Mphephu should not be recognised as the acting King as: he does not believe women can succeed; he has committed perjury; and as he is biased against the fifth respondent.

Eight months after the identification by the applicant of Mr Mphephu as the acting King, the first respondent did not recognise this appointment. As a result, the applicant approached the High Court on 29 November 2022 on a "semi-urgent" basis. The applicant launched an application in terms of section 6(2)(g) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), read with rule 6(12) of the Uniform Rules of Court, to review and set aside the first respondent's failure to recognise Mr Mphephu as acting King of Vhavenda. It contended that the delay in recognising Mr Mphephu as acting King was unreasonable. It sought an order declaring the first respondent's failure to make a decision unconstitutional, unlawful and invalid and that it be replaced with a recognition of Mr Mphephu as the acting King.

The High Court held that there was no adequate explanation and no proper circumstances placed before it to justify the matter being heard on an urgent basis. It concluded that the matter fell short of compliance with rule 6(12) and struck the matter off the roll. The High Court nevertheless went on to hold that the application was premature on the basis that the judgment of the Supreme Court of Appeal states that a King could not be identified, even in an acting capacity, until the review application before the High Court has been finalised. The High Court reasoned that it was bound by this *ratio decidendi*. It thus dismissed the applicant's application.

In this Court, the applicant contends that this matter engages our constitutional jurisdiction as it concerns the review of the exercise of public power and the functioning and appointment of traditional leadership. It submits that it is in the interests of justice that leave to appeal directly to this Court be granted. It argues that it is necessary to bypass the Supreme Court of Appeal as it is its order that is being challenged, the matter solely concerns constitutional issues and as there is currently a vacuum in traditional leadership. The first and second respondents deny that our jurisdiction is engaged, and allege that this case raises factual disputes. The first, second and fifth respondents contend that the applicant has failed to establish exceptional circumstances which warrant leave to appeal directly to this Court being granted.

In a unanimous judgment penned by Theron J (Zondo CJ, Bilchitz AJ, Chaskalson AJ, Majiedt J, Mathopo J, Mhlantla J and Tshiqi J concurring), the Constitutional Court held that this matter engaged its constitutional jurisdiction as it concerned the review of the exercise of public power and the determination of who should hold a position of traditional leadership.

However, the Court found that it was not in the interests of justice for this Court to grant leave to appeal directly to it. The applicant advanced no good reason why the Supreme Court of Appeal and the Full Court should be bypassed. The contention of the applicant, that the Supreme Court of Appeal had already made a pronouncement on this matter, was unfounded, as it had not pronounced on whether the Premier unjustifiably failed to make a decision.

This Court also found that the relief sought by the applicant was incompetent. In its notice of motion, the applicant sought, among other thing, that the matter be remitted to the High Court for determination of the merits of the application. The High Court has already dealt with the merits of the application: it found that the matter was premature and dismissed the application. Therefore, this Court found that the relief sought by the applicant was not competent as the High Court was *functus officio* (its authority over the matter was over).

Further, this Court found that the relief sought by the applicant in its heads of argument, for the order of the High Court to be set aside and replaced with an order directing the first respondent to recognise Mr Mphephu as the acting King, was impermissibly raised for the first time in the applicant's written submissions. This was prejudicial to the respondents and, this Court found that this relief was not properly before it.

This Court made clear that this was not the end of the road for the applicant. It could still pursue its application for leave to appeal in the High Court.

Lastly, this Court found that it was not appropriate to make a costs order in this Court, given the circumstances of the matter.