CONSTITUTIONAL COURT OF SOUTH AFRICA

Tshivhulana Royal Family v Nditsheni Norman Netshivhulana

CCT 48/16

Date of hearing: 1 November 2016
Date of judgment: 14 December 2016

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.

Today the Constitutional Court handed down judgment in a matter concerning whether the applicant (Tshivhulana Royal Family) was required to exhaust the internal remedies prescribed by section 21 of the Traditional Leadership and Governance Framework Act (Framework Act) before instituting review proceedings.

The Tshivhulana Royal Family brought an application in terms of the Promotion of Administrative Justice Act (PAJA) before Limpopo Local Division, Thohoyandou (High Court) to review and set aside the decision of Premier of the Limpopo Province (Premier) to recognise Mr Nditsheni Norman Netshivhulana as the traditional headman of Tshivhulana settlement and substitute it with the recognition of Davhana Elias Mulaudzi in terms of section 12(1)(b) of the Limpopo Traditional Leadership and Institutions Act (Limpopo Act).

In opposing the relief Mr Netshivulana raised two submissions at the outset. The first was that Mr Mulaudzi was an interested party in the proceedings and ought to have been joined in the application. But this point was rejected. The second was that the Royal Family had to exhaust internal remedies as provided for in section 21 of the Framework Act prior to relying on PAJA. The Court held that section 21 contained internal dispute resolution mechanisms including disputes relating to the appointment of a headman. Accordingly, it held that the issues to be adjudicated could be resolved by the section 21 remedies and dismissed the application. The Supreme Court of Appeal dismissed an application for leave to appeal on the ground that it lacked prospects of appeal.

In this Court, the Royal Family contended that the review application concerned a dispute between the applicant and the Premier and not a dispute within a traditional community. Therefore, it contendend that section 21 of the Framework Act did not apply. They also argued that the matter implicated their constitutional rights of access to the courts and just administrative action. Mr Netshivulana submitted that the applicant was not entitled to approach the courts before attempting to resolve the matter internally in terms of section 21. He submitted that firstly, the applicant had failed to show that the Premier had acted contrary to the legislative framework for the recognition and appointment of traditional leadership. Secondly, if the applicant did not agree with the Premier's appointment, it should have first raised the matter with the Premier.

In a unanimous judgment by Musi AJ (Nkabinde ACJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J and Zondo J concurring), the Court held that a dispute or claim that falls within section 21 of the Framework Act is one between or within traditional communities or customary institutions as defined in the Framework Act. The Court further held that it is highly unlikely that the Legislature would have contemplated a dispute between the Premier and a traditional community or a customary institution to fall within the purview of section 21(1)(a) of the Framework Act because the Premier is part of the internal dispute resolution institutions or persons in section 21. The Court concluded that there is no internal appeal or review procedure against the Premier's decision prescribed in the Framework Act or the Limpopo Act. Therefore, there is no internal remedy available for challenging the Premier's decision.

The Court granted condonation and leave to appeal. The order of the High Court was set aside. The matter was remitted to the High Court to proceed in accordance with the judgment.