IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO. CCT 121/ 20

In the matter between:

KHOSIKHULU TONI PETER MPHEPHU-RAMABULANA	First Applicant
MPHEPHU-RAMABULANA ROYAL FAMILY COUNCIL	Second Applicant
and	
MASINDI CLEMENTINE MPHEPHU	First Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Second Respondent
THE MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Third Respondent
PREMIER: LIMPOPO PROVINCE	Fourth Respondent
NATIONAL HOUSE OF TRADITIONAL LEADERS	Fifth Respondent
LIMPOPO HOUSE OF TRADITIONAL LEADERS	Sixth Respondent
COMMISSION ON TRADITIONAL LEADERSHIP DISPUTES AND CLAIMS	Seventh Respondent

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NOTICE OF MOTION:

FIRST RESPONDENT'S APPLICATION FOR A VARIATION ORDER AND CONDITIONAL APPLICATION FOR LEAVE TO CROSS-APPEAL AND DIRECT ACCESS

TAKE NOTICE THAT the first respondent applies for the following relief:

1. The interlocutory order staying the withdrawal of the first applicant's certificate of recognition, in paragraph 3(f) of the order of the Supreme Court of Appeal of 12 April 2019, is discharged with immediate effect.

2. The applicants' application for leave to appeal is dismissed.

3. In the event of this Honourable Court referring the applicants' application for leave to appeal for an oral hearing or granting such application, then the first respondent counter-applies for the following relief:

    3.1. The first respondent is allowed direct access to seek an order substituting the decisions of the second applicant and the second respondent with a decision identifying and recognising the first respondent, Ms Masindi Clementine Mphephu as the queen of the Vhavenda queenship, and consequential relief;

    3.2. The first respondent is granted leave to cross-appeal against the order of the Supreme Court of Appeal of 12 April 2019 to the extent that it is inconsistent with the relief set out in –

        3.2.1. paragraph 2 and subparagraphs (c), (d), (e) and (i) of annexure A hereto; and

        3.2.2. paragraphs 2 and 3 and subparagraphs (c), (d), (e), (f), (g) and (h) of annexure B hereto;

3.3. The order of the Supreme Court of Appeal of 12 April 2019 is set aside and is substituted with an order as set out in **annexure A**, alternatively, **annexure B** hereto.

4. The applicants shall bear the first respondents' costs in respect of all of the proceedings in the Constitutional Court, including the costs of three counsel.

TAKE NOTICE FURTHER that the first respondent relies on the accompanying affidavits of **MASINDI CLEMENTINE MPHEPHU** and **JOHANNES HAMMANN** in support of their application.

TAKE NOTICE FURTHER that, within 10 days from the date on which this application is lodged, the applicants and second to seventh respondents may respond thereto in writing indicating whether the application for a variation, the conditional application for direct access and the conditional application for leave to cross-appeal is being opposed and if so the grounds for such opposition.

Dated at JOHANNESBURG on this the 17th day of JULY 2020.

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TO: THE REGISTRAR OF THE ABOVE
HONOURABLE COURT
JOHANNESBURG

AND
TO: **NKHUME MAKHAVHU ATTORNEYS**
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ANNEXURE A

1. *The appeal is upheld.*

2. *The first to fourth and eighth respondents are ordered to pay all of the appellant's costs of the appeal, jointly and severally, including the costs of the applications for leave to appeal, such costs to include the costs of three counsel where employed.*

3. *The order of the High Court is set aside and replaced with the following:*

"(a) It is declared that the decision of the eighth respondent of 14 August 2010 to identify the first respondent as a suitable person to fill the position of "King of the Venda Traditional Community" is unlawful, unconstitutional and invalid and is reviewed and set aside.

(b) It is declared that the decision of the second respondent dated 14 September 2012 to recognise the first respondent as "a King of Vhavenda Community" (published in Government Notice No. 766 of 2012 in Government Gazette No. 35705) is unlawful, unconstitutional and invalid and is reviewed and set aside.

(c) *It is declared that the rule of male primogeniture as it applies in customary law to succession to the position of traditional leader is inconsistent with the Constitution and invalid to the extent that it precludes women from succeeding to the position of traditional leader.*

(d) *In terms of section 172(1)(b)(i) of the Constitution, the order in paragraph (c) shall not invalidate any succession to the position of traditional leader that is completely effected and not presently subject to any legal challenge, unless it is established that when such succession was completed, the successor or the persons entitled to appoint the successor were on notice that the rule was subject to constitutional challenge.*

(e) *It is declared that the word "progressively" in the Preamble and in sections 2(3)(c), 2A(4)(c) and 2B(4)(c) of the Traditional Leadership and Governance Framework Act 41 of 2003 (as amended) and in sections 2(1)(c) and 36(1)(a)(viii)(cc) of the Traditional and Khoisan Leadership Act 3 of 2019 is inconsistent with the Constitution and invalid, and is struck out from these provisions.*

(f) *It is declared that the just and equitable remedy pursuant to the reviewing and setting aside of the decisions of the second and eighth respondents (referred to in paragraphs (a) and (b)*

above), is substitution by this court of its decision in paragraph (g) below;

(g) Ms Masindi Clementine Mphephu is identified and recognised as queen of the Vhavenda queenship;

(h) The second respondent is directed to give notice in the Gazette in terms of section 9(2)(a) and to issue a certificate in terms of section 9(2)(b) of the Traditional Leadership and Governance Framework Act No. 41 of 2003 in respect of the identification and recognition of the first applicant as queen of the Vhavenda queenship.

(i) The first, second, third, fourth and eighth respondents are directed to pay the costs of the application, including the application for separation in terms of rule 33(4), jointly and severally, such costs to include the costs of two counsel."

ANNEXURE B

1. *The appeal is upheld.*

2. *The first to fourth and eighth respondents are ordered to pay all of the appellant's costs of the appeal, jointly and severally, including the costs of the applications for leave to appeal, such costs to include the costs of three counsel where employed.*

3. *The matter is referred back to the Limpopo Division of the High Court, Thohoyandou for further adjudication before another judge, on whether the applicant is entitled to the relief sought in prayers 6.1 and 7.1 of the amended notice of motion.*

4. *The Limpopo Division of the High Court, Thohoyandou, shall in the adjudication of the relief sought in prayers 6.1 and 7.1 of the amended notice of motion, consider the reports filed by the fifth and sixth respondents pursuant to paragraph 3 (d) of the order of the Supreme Court of Appeal dated 12 April 2019.*

5. *The order of the High Court is set aside and replaced with the following:*

"(a) It is declared that the decision of the eighth respondent of 14 August 2010 to identify the first respondent as a suitable person to fill the position of "King of the Venda Traditional Community" is unlawful, unconstitutional and invalid and is reviewed and set aside.

(b) It is declared that the decision of the second respondent dated 14 September 2012 to recognise the first respondent as "a King of Vhavenda Community" (published in Government Notice No. 766 of 2012 in Government Gazette No. 35705) is unlawful, unconstitutional and invalid and is reviewed and set aside.

(c) It is declared that the rule of male primogeniture as it applies in customary law to succession to the position of traditional leader is inconsistent with the Constitution and invalid to the extent that it precludes women from succeeding to the position of traditional leader.

(d) In terms of section 172(1)(b)(i) of the Constitution, the order in paragraph (c) shall not invalidate any succession to the position of traditional leader that is completely effected and not presently subject to any legal challenge, unless it is established that when such succession was completed, the successor or the persons entitled to appoint the successor were on notice that the rule was subject to constitutional

challenge.

(e) It is declared that the word "progressively" in the Preamble and in sections 2(3)(c), 2A(4)(c) and 2B(4)(c) of the Traditional Leadership and Governance Framework Act 41 of 2003 (as amended) and in sections 2(1)(c) and 36(1)(a)(viii)(cc) of the Traditional and Khoisan Leadership Act 3 of 2019 is inconsistent with the Constitution and invalid, and is struck out from these provisions.

(f) The matter is postponed to a date to be determined by the Registrar for the hearing of the relief sought in prayers 6.1 and 7.1 of the amended notice of motion.

(g) In the event of the court granting the relief sought in prayers 6.1 and 7.1 of the amended notice of motion, such relief shall, in terms of section 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act No. 3 of 2000, be substituted for the decisions referred to in paragraph (a) and (b) above.

(h) The first, second, third, fourth and eighth respondents are directed to pay the costs of the application, including the application for separation in terms of rule 33(4), jointly and severally, such costs to include the costs of two counsel."

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COMMISSION ON TRADITIONAL LEADERSHIP DISPUTES AND CLAIMS	Seventh Respondent

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FIRST RESPONDENT'S ANSWERING AFFIDAVIT

AND FOUNDING AFFIDAVIT IN CONDITIONAL APPLICATION FOR LEAVE TO CROSS-APPEAL AND DIRECT ACCESS

I,

MASINDI CLEMENTINE MPHEPHU

state as follows under oath:-

1 I am an adult female currently residing at 25 Nentabos Street, Rooihuiskraal, North Centurion, Pretoria. I am the first respondent and the first applicant in the court *a quo*. I am 28 years of age.

2 The facts deposed to in this affidavit are within my own personal knowledge, except where the context indicates otherwise, and are, to the best of my belief, true and correct. Where I make legal submissions I do so on the advice of the my legal representatives whose advice I believe to be correct.

3 A confirmatory affidavit from my attorney of record, Mr Johann Hammann Snr will be filed with this affidavit, to confirm the facts set out below pertaining to the litigation history and engagement between the parties' legal representatives in this matter.

BACKGROUND AND CITATION OF THE PARTIES

4 I am the only child born of Paramount Chief Tshimangadzo Mphephu and his *dzekiso* (heir-bearing) wife, Fulufhelo Mphephu. My father reigned as, and under the name of, Paramount Chief Dimbanyika of the Vhavenda from 1994 to 1997 when he passed away tragically in an accident. I am entitled to succeed as queen of the Vhavenda, but have over many years been wrongfully denied my entitlement to reign over the Vhavenda people. The basis of this denial is

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the customary law rule of male primogeniture. I am the only contender for the throne among Dimbanyika's children.

5 In December 2012, I instituted an application to review and set aside the decisions of the so-called "Mphephu Ramabulana Royal Family Council" and the erstwhile President of the Republic, Mr Jacob Zuma, that purported to identify and recognise the first applicant as the King of the Vhavenda people. Those decisions were taken in August 2010 and September 2012 respectively, without my prior knowledge and without prior notification to me. Those decisions were made by unlawfully applying the customary law rule of male primogeniture that precluded the recognition of my entitlement to succeed as queen of the Vhavenda.

6 In bringing my application to review in the High Court, I was initially supported by my uncle, Mbulaheni Charles Mphephu, who was cited as the second applicant in the High Court. He is the eldest surviving son of Dimbanyika's father, Paramount Chief Patrick Ramaano Mbulaheni Mphephu Ramabulana (who reigned as king of the VhaVenda from 1950 until his death in 1988).

7 However, Charles Mphephu subsequently withdrew as an applicant. I believe that he was either pressurised or enticed to withdraw his support for me and for the application. His withdrawal came not long after he persuaded me and my legal team not to introduce new evidence about the inappropriate relationship between the first applicant and then-President Zuma, involving VBS Mutual Bank. This arose out of President Zuma having been granted a loan by VBS Mutual Bank in the sum of R8,581,854 in order to satisfy the judgment granted against him by this Court in the Nkandla matter. At the time, the first applicant

controlled Dyambeu Investments, which, together with the Public Investment Corporation, had a controlling stake in VBS Mutual Bank. The loan to President Zuma was on unusually favourable terms, where closer scrutiny of the documentation showed that what was put up as security for the loan was no real security at all. The loan was announced at more or less the same time as then-President Zuma and the first applicant tried unsuccessfully to force through a coronation ceremony, despite my review application (i.e., these proceedings) being pending. I had to obtain an urgent interim interdict to prevent the coronation ceremony from proceeding. I subsequently learned that there had been a rapprochement between Charles and the first applicant and they had been meeting with each other without my knowledge.

8 I applied to introduce this evidence on appeal before the Supreme Court of Appeal (**SCA**) , but by the time of the hearing, President Zuma had resigned and there was no need to consider it. The first applicant disputed the inappropriate relationship with President Zuma and involvement with the loan.

9 I face continuing, undue pressure outside of the court from certain quarters to withdraw my application. This pressure is exacerbated by the fact that I am a young woman, now acting alone without the support of my uncle, in what is in many respects still a very patriarchal society. My mother passed away on 6 April 2013, so I have since then enjoyed no parental support.

10 In instituting this application for leave to appeal, I note that Mr Makhavhu has surreptitiously sought to change the citation of the parties in the court *a quo.* He has cited the first applicant in this Court as 'Khosikhulu Toni Peter Mphephu-Ramabulana', not as 'Regent Toni Peter Mphephu Ramabulana' as

he was cited in the court *a quo*. He has cited the second applicant as the Mphephu Ramabulana Royal Family Council, not as "the Mphephu Ramabulana Royal Family Council" (with the quotation marks included).

11 I dispute that first applicant is the *khosikhulu* (king) of the Vhavenda people. As I set out in my review application, and as the Supreme Court of Appeal correctly found, the first applicant was not lawfully identified and recognised as the king of the Vhavenda people by the royal family and the President. His identification as the *khosikhulu* by the so-called "Mphephu-Ramabulana Royal Family Council" was premised on the unconstitutional application of the rule of male primogeniture. The first applicant's identification as *khosikhulu* was also in breach of Vhavenda customary law rules on the procedure for identifying the heir, and of the customary law rule that prohibits an *ndumi* (senior advisor in the royal family to the king) from succeeding as king. There is no dispute that the first applicant was the *ndumi* to my father, king Dimbanyika – this is admitted by the first applicant. I accordingly referred to the first applicant as 'Regent' in the proceedings *a quo*. This accords with his appointment as regent or acting paramount chief after my father's untimely passing in 1997, for such time until I came of age.

12 The second applicant, the Mphephu Ramabulana Royal Family Council is an entity that is not recognised in Vhavenda customary law. Nevertheless, a group of persons convened under this title and purported to identify the first applicant as king of the Vhavenda people on 14 August 2010, and referred a request to the President to have the first applicant recognised as king by the President. Both the constitution of this body, and the process that it followed in

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purporting to identify the first applicant as king is illegitimate under Vhavenda customary law, and is, in part, the subject of my review. I used quotation marks in citing the eighth respondent in the High Court to indicate that the title has been assumed by a group, but that the entity is not recognised under Vhavenda customary law. The SCA found correctly that such a group has no say in matters of succession to the throne; the correct group is the royal family.

13 A further aspect of the background to the matter that bears mentioning is that some time before the hearing in the High Court, I brought an application for separation of issues in terms of rule 33(4) of the Rules of the High Court. Disputes of fact arose on the papers around issues of customary law and its application, which potentially required oral evidence. However, there were a number of issues that did not require oral evidence, particularly the constitutional issues. They formed the subject matter of the hearings in the High Court and the SCA. They included, *inter alia* –

13.1 various points *in limine* taken by the (current) applicants and the state respondents;

13.2 the unlawfulness and invalidity of the identification and recognition of the first applicant as king by the "Mphephu Ramabulana Royal Family Council" and the President respectively;

13.3 the unconstitutionality of the rule of male primogeniture in succession to traditional leadership positions;

13.4 the unconstitutionality of certain provisions of the Traditional Leadership and Governance Framework Act (**TLGFA**); and

13.5 whether, in the event I am successful in the review of the decisions to identify and recognise the first applicant as king, there should be substitution by the High Court of a decision on my appointment as queen, or whether the matter should be remitted to the Commission on Traditional Leadership Disputes and Claims or the royal family and the President.

14 The separation order was ultimately granted by consent of all the parties, but only after the (current) applicants and the state respondents had opposed the application for separation of issues (changing their position at the doors of court).

OUTLINE OF THIS AFFIDAVIT

15 This affidavit has two parts. In the first part, I set out the grounds for objecting to the application for leave to appeal instituted by the applicants. I explain why there is no merit in any of the grounds of appeal. I also address the applicants' extraordinary delay in approaching this Court – the application is nearly 15 months out of time. I explain that this is the latest in a pattern of conduct that is clearly designed to frustrate the finalisation of my review application. As a stratagem aimed at frustrating the administration of justice, I ask that the application be dismissed with a punitive costs order.

16 In the second part of the affidavit, I set out the grounds for the conditional application to cross-appeal and direct access that I have instituted. The Court need only consider the conditional application to cross-appeal and direct access if the Court decides to hear or to grant the applicants' application for

leave to appeal. I do, however, seek the setting aside of the SCA's stay order (in paragraph 3(f) of its order) regardless of whether this Court hears or grants the applications for leave to appeal or cross appeal, as explained below.

THE APPLICATION FOR LEAVE TO APPEAL HAS NO MERIT AND IS NOT IN THE INTERESTS OF JUSTICE

17 There is considerable duplication in the applicants' grounds of appeal.[1] I shall deal with them thematically as follows:

17.1 First, I shall address the SCA's remittal of the merits of the matter to the High Court, and explain why the grounds on which the applicants attack this part of the SCA's order have no merit. The applicants' grounds of attack are:

17.1.1 that the remittal is inconsistent with the SCA's concurrence with the High Court that my claim under the TLGFA had "prescribed";

17.1.2 the assertion that I never sought relief in the form of "adjudication on the merits", i.e. a substituted decision recognising me as queen, and never argued this point;

17.1.3 the assertion that only the royal family (for which the applicants ask the Court to read "second applicant"), not a court, can identify the traditional leader in terms of section 9(1) of the TLGFA; and

[1] Founding affidavit para 2.

17.1.4 the assertion that absent an expert Commission for traditional leadership disputes, *"the [first respondent] cannot assert her claim"*.

17.2 Second, I shall address the contention that the SCA erred in finding that I possessed remedies under section 9(3) of the TLGFA;

17.3 Third, I shall deal with paragraph 3(d) of the SCA's order, referring issues of customary law to the National and Provincial Houses of Traditional Leaders *"for opinion and advice to be submitted to the high court"*;

The SCA's remittal to the High Court

18 The applicants' challenge to the SCA's remittal of the matter to the High Court is misconceived because it fails to appreciate the effect of the SCA's orders upholding my constitutional ground of review and setting aside the decisions recognising the first applicant as king.

19 In my review application, the primary ground of review was that my entitlement to succeed as queen was not considered because the customary law rule of male primogeniture was applied. I contested the constitutional validity of the rule, as an unjustifiable infringement of my right to equality. I sought a declarator that the rule is unconstitutional and invalid to the extent that it precludes women from succeeding to the position of traditional leader, and I sought to review and set aside the decisions of the so-called 'Mphephu Ramabulana Royal Family Council' and the President recognising the first applicant as king, on this ground. The SCA correctly upheld this ground of

review (amongst others), and set aside the aforesaid decisions.

20 The effect of the setting aside order is that the question of a just and equitable remedy in my review application falls to be determined, notwithstanding the SCA's findings on the procedural matters concerning the TLGFA.

21 In the amended notice of motion in the High Court, I sought as the primary consequential relief following a successful review, a substitution order recognising me as the rightful heir. In the alternative, I sought an order remitting the determination of the rightful heir to –

21.1 the Commission on Traditional Leadership Disputes and Claims ('the Commission") or, alternatively,

21.2 the royal family[2] and the President for a decision subject to directions that, in complying with the court's order–

"9.3.1 the declaratory relief in paragraphs 4 and 5 must be taken into account [i.e. which includes the order declaring the rule of male primogeniture unconstitutional];

9.3.2 it must be recognised that in terms of the customary law of the Vhavenda kingship/queenship, a person who was ndumi or khotsimunene to a king may not be appointed as his or her successor;

9.3.3 it must be recognised that in terms of the customary law of the Vhavenda kingship/queenship, a person who is born of the former king and of his most senior dzekiso

[2] As noted, this is the correct entity, not the 'Mphephu Ramabulana Royal Family Council' (i.e. not the second applicant).

wife is entitled to be appointed unless a valid reason under customary and statutory law exists not to appoint such person;

9.3.4 *the Mphephu-Ramabulana royal family must make its recommendation to the Second Respondent [i.e., the President of the Republic] within 4 months of the date of the court's order;*

9.3.5 *the Second Respondent must make his decision within 60 days of receiving the recommendation referred to in the preceding paragraph or, failing such recommendation, within two months of the expiry of the period for doing so".*

22 The question of my final identification and recognition as queen was not one of the questions referred for decision by the High Court (or the SCA) in terms of the separation order because of the outstanding disputed issues of customary law. However, as pointed out in paragraph 13.5 above, one of the separated issues to be decided was which of the three – the High Court (through substitution), the Commission, or the royal family/President – were to decide that question following adjudication of the remaining disputed issues of customary law.

23 I agree with the applicants at paragraph 18.10 of their founding affidavit that the SCA, in remitting the matter to the High Court for *"further adjudication on the merits before another judge"*, decided that it is the High Court, by way of substitution, that must decide the ultimate question of my recognition as queen, once it has heard evidence on the issues of customary law. Where I differ with the applicants, is that I say that the SCA was correct in so holding. The

ultimate question of my entitlement to queenship cannot feasibly or lawfully be decided by either of the remaining two mechanisms because:

23.1 The Commission no longer exists; and

23.2 As the SCA correctly found at paragraphs 37 and 38 of its judgment, the second applicant is not the royal family (as contemplated in section 9(1)(a), read with the definition of that term in section 1 of the TLGFA), yet it persists still in wrongly seeking to hold itself out as such;

23.3 Several members of the royal family (as defined in section 1 of the TLGFA, being the immediate and close relatives of the ruling family) have cast their lot with the applicants and I would have no prospect whatsoever of a fair procedure in their hands.

23.4 The second applicant (which includes members of the royal family, amongst others) has never renounced the minutes of its meeting of 14 August 2010, quoted at paragraph 28 of the SCA's judgment, where it was accepted by all that *"in the Mphephu-Ramabulana family in particular the chief or king must come or must be a man (sons)"*; and

23.5 The second applicant has shown, and by its participation in this application to the Constitutional Court, again shows itself to be, hopelessly biased in favour of the first applicant. If its members wished to hold themselves out as honest and impartial identifiers of traditional leaders, they should always have abided the outcome,

whether in the High Court, the SCA or this Court. Yet they have actively joined forces with the first applicant throughout.

24 The SCA reasoned that the remedial question as to whether or not I should be recognised as queen could not be determined until the customary law questions it identified and related disputes of fact had been determined. For that reason, it remitted the matter to the High Court for determination, and directed the National and Provincial Houses of Traditional Leaders to assist the High Court by furnishing it with an opinion on the customary law issues.

25 The effect of the applicants' contention in this Court that the High Court may not determine the merits of the matter, would be to deprive me of a just and equitable remedy pursuant to my successful review of the decisions taken to recognise the first applicant as king. That could never be correct, as it would deprive me of my constitutional rights under section 8, 9, 33, 34 and 38 of the Constitution.

26 As noted, the applicants base their attack on the SCA's decision to remit the matter to the High Court for adjudication on the merits, on the following four grounds.

26.1 the SCA's concurrence with the High Court that my claim had "prescribed" (paragraphs 2.2, 2.7 and 18.1 of the founding affidavit);

26.2 the assertion that I never sought relief in the form of "adjudication on the merits" i.e. a substituted decision recognising me as queen, and never argued this point (paragraphs 2.4 and 18.4 of the founding affidavit);

26.3 the assertion that only the royal family (for which the applicants ask the Court to read "second applicant"), not a court, can identify the traditional leader in terms of section 9(1) of the TLGFA (paragraph 18.10 of the founding affidavit); and

26.4 the assertion that absent an expert Commission for traditional leadership disputes, *"the [first respondent] cannot assert her claim"* (paragraphs 18.9 and 18.11 of the founding affidavit).

27 I deal with each of these in turn.

Prescription

28 The SCA was incorrect in its reasoning to go along with the High Court's finding that my claim had "prescribed" under s 25(5) of the TLGFA.[3] That provision deals with the right to refer a new dispute to the new Commission, and provided a six-month window period in which to do so (between 1 February 2010 and 1 August 2010). However the expiry of the right to bring a new dispute before the Commission does not mean that a dispute as contemplated in s 25 is irresoluble. It means only that the courts, as the arbiters of legal disputes, will have to deal with disputes arising after 1 August 2010, as opposed to the Commission. Thus, all that may have "prescribed" under s 25(5) was the right to refer a dispute *to the Commission*, not the constitutional right in terms of section 33(3)(a) of the Constitution to bring review

[3] SCA judgment para 27. See also High Court judgment para 60. Section 25(5) reads –

> *"Any claim or dispute contemplated in this Chapter submitted after six months after the date of coming into operation of this chapter [i.e. six months after 1 February 2010] may not be dealt with by the Commission."*

proceedings, or the right in terms of section 34 of the Constitution to have *"any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial forum".*

29 The purpose of the TLFGA's provisions for the submission of traditional leadership claims and disputes to the Commission was a temporary measure to address a historical lacuna in the recognition of traditional leaders. It was certainly not intended to prohibit any and all future claims, as the applicants would have it.[4] Given that the first applicant's recognition has now been set aside, I am entitled to assert my claim as I do in the review application.

30 Moreover, the time bar under s 25(5) applies only to new claims and disputes lodged with the new Commission, not claims that were before the old Commission. It was argued on my behalf (at length and with specific reference to the rule 53 record) that the Commission was seized with determining the incumbent. But even if the issue was not already before the new Commission, I had no reason, nor opportunity, to refer "a dispute" to the new Commission, because the decision of the second applicant to identify the first applicant as king was only taken on 14 August 2010 – that is after the six-month window period for lodging disputes with the new Commission had expired.

31 Moreover, as regards section 21 of the TLGFA, this Court held in *Tshivhulana*

[4] See especially paragraph 18.11 of the founding affidavit, where the applicants contend that: "Absent a legislative framework for the resolution of a traditional leadership dispute, namely a Commission established for that purpose (the Seventh respondent), the appellant [sic] cannot assert her claim".

Royal Family v Netshivhulana[5] that an application to review and set aside administrative action taken under the TLGFA is not subject to a duty to exhaust the processes prescribed in s 21 of that Act. The import of this judgment of the Constitutional Court was overlooked by both the High Court and the SCA, despite it being drawn to their attention by my legal representatives.[6] In *Tshivhulana,* this Court explained that –

31.1 "The dispute or claim that should be subjected to the internal remedies prescribed in section 21 must be one between or within traditional communities or customary institutions as defined in the Framework Act".[7]

31.2 "Even if it was a dispute as envisaged by section 21, there is no internal remedy that the Tshivhulana Royal Family had to exhaust in terms of that section."[8] In other words a party is not compelled before instituting review proceedings to resort to a s 21 remedy, even if that was open to him or her.

32 In *Tshivhulana's* case, a dispute existed "between or within traditional communities or customary institutions" – specifically, between the Netshimbupfe Royal Council and the Tshivhulana Royal Family (the appellant) over the recognition by the Premier of the province of the respondent as headman, rather than another person favoured by the appellant. This Court

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[5] *Tshivhulana Royal Family v Netshivhulanas* [2016] ZACC 47; 2017 (6) BCLR 800 (CC) ("*Tshivhulana*").

[6] SCA judgment para 21.

[7] *Tshivhulana* at para 35.

[8] *Tshivhulana* at para 48.

accepted that there was an "underlying dispute" that fell within the bounds of s 21,[9] but found that the underlying dispute within the traditional community was "elevated" beyond an internal dispute when the Premier took his decision. At that point, it became a matter involving the Premier that could no longer be resolved internally under s 21 of the TLGFA.[10] The Premier's decision was reviewable under PAJA, and no obligation to exhaust any remedies under s 21 applied to reviewing this decision.[11]

33 This case is no different. Given the President's decision to recognise the first applicant as king, the dispute over his entitlement to such recognition was no longer capable of being resolved internally by the royal family. As in *Tshivhulana*, the primary relief sought in this matter was, therefore, the review of the President's decision to recognise the first applicant as the King, which the SCA correctly found is reviewable under PAJA.[12] The President's decision to recognise the first applicant as king was not subject to the internal dispute resolution process under s 21; and I was entitled – and indeed required – to review the President's decision, irrespective of whether the dispute resolution process in s 21 was followed.

34 This finding of the High Court and the SCA also overlooks the clear wording of section 21. In its express terms, its processes must be followed and exhausted before a dispute is referred to the Commission, not before a dispute is brought

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[9] *Tshivhulana* at para 37.

[10] See the dictum of Mogoeng JP (as he then was) in *Mamogale v Premier, North West* [2006] ZANWHC 63, quoted with approval by the Constitutional Court in *Tshivhulana* at para 44.

[11] At para 38.

[12] SCA judgment para 18.

before a Court. Once the Commission can no longer receive disputes i.e. from 1 August 2010, section 21 is a dead letter, along with many other extant provisions relevant to the Commission. To the extent that the SCA's decision in *Netshimbupfe & Another v Mulaudzi and Others* [2018] ZASCA 98; [2018] 3 All SA 397 (SCA) holds otherwise (or is in conflict with any of the other submissions in this affidavit), it is, with respect, wrong and stands to be overturned.

35 It must also be borne in mind in this regard that I only turned 18 on 22 April 2010. Therefore during almost half of the six month period in which I was meant to refer a (not yet existent) dispute to the Commission, I was a child. The harsh criticism directed against me by the SCA for failing to do so (including refusing me my costs) was, in the circumstances, particularly unfair.

36 Moreover, the SCA failed to have adequate regard to the evidence in the record that demonstrated that the Commission was indeed seized with the issue of identifying the incumbent. This included the Commission's statements at the hearing that it was seized of the issue; submissions that were made to the Commission on this issue; and the President's public statement of 29 July 2010, where he stated that for the Vhavenda kingship/queenship, *"the Commission must still decide who the two rightful incumbents are",* and that *"the incumbents will be determined by a new Commission which will be established soon".* The new Commission was duly established under the amended TLGFA, and was mandated to complete the work of the previous Commission (under ss 25(4) and 28(11) of the amended TLGFA). The new

Commission started its work in January 2011, but never determined the rightful incumbent of the Venda kingship/queenship.

37 There was thus no reason for me to institute a dispute or a claim under s 25(2)(a) or (b) of the TLGFA, because the Commission was already seized with the issue of identifying the rightful incumbent of the VhaVenda kingship or queenship.

38 Even if I was incorrect in this understanding, then I nevertheless had a legitimate expectation that the determination of the rightful incumbent would be addressed by the new Commission. At the very least, I ought to have been given notice and an opportunity to be heard before any decision was taken to recognise the first applicant as king without the issue being determined by the new Commission. But I was not. As I have indicated, I did not know that any representations had been made to the President for the first applicant's recognition, nor that the President was contemplating taking a decision on the matter. The SCA's suggestion that I ought to have approached the President to assert my claim ignores this crucial fact and my reasonable reliance on the President's own public statement about the task of the Commission to make this determination (and the Commission's failure to correct that statement).

Relief not sought

39 The applicants also contend that, in remitting the matter to the High Court *"for adjudication on the merits"*, the SCA granted relief that was not sought or argued. This is incorrect.

40 First, my notice of motion of motion included the following relief:

"6. Declaring that in terms of customary law ... the First Applicant is the sole Queen of the Vhavenda Queenship.

7. Substituting for the Second and Eighth Respondents' decisions ... a decision that ... the First Applicant is recognised as the sole Queen of the Vhavenda Queenship."

41 Second, as pointed out above, in terms of paragraph 16 of the separation order, granted by consent, the High Court and, therefore, the SCA, were expressly required to determine whether, when the balance of the issues were determined by the High Court, the issue of my entitlement to be queen should be dealt with by an order of substitution by the High Court or remitted to the Commission or the President/royal family.[13] Since the High Court failed to deal properly with the issue, it was appropriate and obligatory for the SCA to do so. The SCA opted for substitution and correctly remitted the matter to the High Court for adjudication on the merits.

42 Third, to the extent that it is suggested that this issue was not argued, this is simply not true. The issue is dealt with at length in paragraphs 91 to 101 of the heads of argument filed on my behalf in the SCA.

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[13] Para 16 of the separation order reads:

"if the applicants succeed in reviewing and setting aside the decisions of the Second and Eighth Respondents, whether –

16.1 substitution of an order by the Court as contemplated in prayers 6 and 7 of the amended notice of motion, read with section 8(1)(c)(ii)(aa) of PAJA, would be appropriate and just and equitable; alternatively,

16.2 the matter must be remitted to the Second, Seventh, and/or Eight Respondent for determination as contemplated in prayers 8, alternatively, 9 of the amended Notice of Motion read with section 8(1)(c)(i) of PAJA".

The role of the royal family

43 The applicants also contend that the SCA's remittal of the matter to the High Court is incompetent because only the royal family can identify the heir to the Vhavenda throne under section 9(1) of the TLGFA.[14]

44 This ground of appeal is misconceived because it fails to recognise that when a Court substitutes its order for that of the decision-maker, as the SCA has correctly ordered, the Court acts in terms of the provision that the relevant body was meant to act under – here section 9(1). This is expressly permitted by section 8(1)(c)(ii)(aa) of PAJA.

45 The second applicant is, as already pointed out above, in any event in no position to act in terms of section 9(1) as it is improperly constituted and hopelessly biased.

No Commission means no claim

46 The applicants contend that in the absence of a statutory remedy before a specialist statutory commission, there is no forum in which I can assert my claim to the queenship. This is in conflict with sections 8, 33, 34 and 38 of the Constitution, along with section 6 of PAJA.

47 There is accordingly no merit in these grounds of appeal.

[14] Founding affidavit para 18.10.

My remedy under section 9(3) of the TLGFA

48 The applicants contend that the SCA erred in finding that I had a remedy to approach the President under s 9(3) of the TLGFA.[15]

49 This ground of appeal is misdirected, because the SCA did not rely on or seek to enforce my remedy under s 9(3) of the TLGFA. To the contrary, the SCA found that I had failed to exhaust my remedy under section 9(3) of the TLGFA before the President took a decision to recognise the first applicant as king.[16] I am advised that this finding by the SCA is incorrect because –

49.1 There is no duty imposed in the TLGFA to make representations to the President under s 9(3) prior to instituting a review application;

49.2 An internal remedy is a remedy in relation to the decision subject to review. Section 9(3) is not an internal remedy following a decision that is later sought to be reviewed. It is a component of the decision-making process of the President. It is clear from the wording of s 9(3)(b) and (c) of the TLGFA that this is a process that is also not available once the President had taken a decision to recognise the king or queen; and

49.3 It was, in any event, impossible for me to resort to s 9(3) and make representations to the President, as I was given no prior notice of the President's impending decision. I had no prior knowledge that the

[15] Founding affidavit para 18.2. The reference to section 11(3) in paragraph 2.3 at p 6 of the founding affidavit (under listed grounds of appeal) is an error, as section 11(3) of the TLGFA does not apply to the recognition of traditional kings or queens.

[16] SCA judgment para 26.

Mphephu Ramabulana Royal Family Council had made representations to the President regarding the first applicnat's recognition as Vhavenda king, nor that the President was considering making any decision in that regard – indeed, the President had publicly stated that the matter was before the Commission. The first time I learned of the President's decision was when my attorneys advised me of the Gazetted notice of the President's decision in November 2012.

50 The SCA also overlooked the fact that there were court judgments of which the President must or ought to have been aware, that did indeed reveal that there was evidence and that there were allegations that the identification of the first applicant in terms of section 9(1) was not in accordance with customary law.

51 None of this need detain this Court in this application however, because the SCA's findings on s 9(3) of the TLGFA had no bearing on its order. This ground of appeal is therefore inconsequential.

Referral of customary law issues to the National and Provincial Houses of Traditional Leaders for opinion and advice

52 The applicants contend that the SCA erred by directing the National and Provincial Houses of Traditional Leaders to furnish the High Court with an opinion and advice on the customary law questions it identified, when remitting the matter back to the High Court. They contend that this is "inconsistent with the legislative framework" because the two houses of traditional leaders are

"there to give advice to the executive branches of government".[17] They also appear to contend that, by doing so, the SCA allowed the Houses to usurp the court's function of determining the issues, and further that it has created evidentiary difficulties due to the uncertain status of the opinion evidence.[18]

53 None of these contentions have merit. It is plain from section 212(2) of the Constitution[19] and the provisions of the TLGFA (ss 9(3)(a), 11(3)(a) and chapter 4), that the National and Provincial Houses of Traditional Leaders ('**the Houses**') are bodies established with expertise in customary law and matters relating to traditional leadership. In the absence of an extant Commission with similar expertise to determine disputes over traditional leadership, it falls to the court to resolve such disputes. Since the court does not have expertise in these matters, it was entirely appropriate for the SCA to call upon the only other state institutions that do have expertise in such matters to furnish the Court with an opinion and advice. Nothing in the TLGFA precludes the Houses from doing so.

54 In its order, the SCA clearly did not invite the Houses to usurp the court's decision-making authority; it required the submission of no more than an opinion and advice. Similarly, in submitting its report to the High Court, the Houses did not issue any binding or final decision, but provide only an expert

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[17] Founding affidavit paras 18.5 and 21

[18] Founding affidavit paras 18.6 and 18.7

[19] Section 212(2) of the Constitution provides: *"(2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law –*

(a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and

(b) national legislation may establish a council of traditional leaders".

opinion for consideration by the Court. That opinion is open to any party to contest, like any other expert opinion. The applicants appear now to accept that the Houses' report is not final or binding in effect (and is open to challenge in the proceedings by leading contrary expert evidence or otherwise) as they have abandoned a threatened application to review the Houses' report.

55 The suggestion that the SCA's order creates evidentiary difficulties is not explained and is contrived. The ordinary rules pertaining to expert evidence apply to the Houses' opinion.

56 There are, accordingly, no prospects of success in any of the grounds of appeal. There are also no other reasons of public importance justifying the appeal. It is thus not in the interests of justice for the application to be heard.

CONDONATION OF THE APPLICANTS' DELAY SHOULD NOT BE GRANTED

57 In addition to having no merit, the application for leave to appeal should be dismissed for being brought out of time – indeed, almost 15 months out of time, and on the eve of the set down of the matter in the High Court for oral evidence on the outstanding issues. This application is an expedient and blatant attempt to obstruct the set down of the matter in the High Court and to delay the final resolution of this matter, which has been delayed already for some 8 years now. The application should, for this reason alone, be dismissed with punitive costs.

58 In substantiating the above, I set out:

58.1 a brief chronology of the extensive delays in this matter, which have greatly prejudiced me and the Vhavenda community who require finality on the crucial matter of the rightful incumbent of the Vhavenda queenship or kingship; and

58.2 the incorrect and misleading factual assertions made by the applicants in this Court.

The history of delays in this matter

59 My review application was launched in December 2012, shortly after I learned of then President Zuma's decision to recognise the first applicant as Vhavenda king. After I had filed my founding and supplementary founding papers, the first applicant and 'the Mphephu Ramabulana Royal Family Council' (collectively 'the Mphephu respondents' *a quo*) and the second, third and seventh respondents a quo ('the State Respondents' *a quo*) each took 6 months to file their answering papers, in October 2013.

60 After the replying affidavits were filed and pleadings closed (which was delayed due to my lack of funding and Legal Aid's initial refusal to support my application), I was advised that it would be convenient to separate the purely legal questions for determination prior to referring the disputes of fact and customary law issues to oral evidence. One of the main causes of the delay in this matter was the respondents' totally unwarranted refusal to agree to the separation of issues that did not require the leading of oral evidence. This led to the wasteful and costly preparation and exchange of affidavits and written argument on this issue, and the appearance by all parties' counsel at the High Court in Thohoyandou to address only the issue of whether the separation of

the issues was convenient. That the objection to separation was unwarranted is evidenced by the fact that, after all this, the respondents' counsel conceded in Judge's chambers to the separation order, which was made on 31 August 2015 – more than six months after separation was proposed.

61 The hearing on the separated issues was also delayed by the respondents. Initial agreement was reached amongst all counsel that the matter would be heard in the first week of March 2016. My legal representatives proceeded to have the matter allocated for hearing accordingly, but were then told that the State respondents' senior counsel had become unavailable and that the matter would have to be reallocated. The Mphephu respondents also caused delay by filing their heads of argument on the separated issues nearly two months' late (in breach of the timeframes in the separation order). This delay meant that the matter was only reallocated to 14 December 2016.

62 Shortly before the hearing on the separated issues, the Mphephu respondents filed a spurious application to strike out portions of the replying affidavit and for leave to file further supplementary affidavits. While this application was ultimately abandoned, it required my legal representatives to waste time and costs answering and preparing argument on the application.

63 The application on the separated issues was finally heard on 14 December 2016. Justice Makgoba dismissed my entire review application on the day of the hearing without reasons (which were subsequently given on 30 January 2017) and despite only being called upon to decide the separated issues. Justice Makgoba made findings against me on the merits of my claim to title under Vhavenda customary law, although the issue was not before him (having

been separated for later determination) and the material facts were disputed on the papers. In light of Justice Makgoba's premature determination of my case, I asked the SCA to remit the matter to another judge in the Limpopo High Court, which the SCA duly did.

64 The appeal in the SCA was heard on 30 November 2018, and the SCA issued its order and judgment on 12 April 2019. In terms of the rules of this Court, the applicants ought to have appealed the SCA order within 15 days of the SCA order – that is, by 9 May 2019 (allowing for the public holidays in that period). Instead, they have delayed 15 months before instituting this application for leave to appeal.

65 After the 15-day period for appealing came and went, and with no correspondence from the respondents a quo advising of any intention to appeal, I and my legal representatives proceeded on the understanding that the remaining issues would now be decided in the High Court on oral evidence. We have been preparing fact and expert witnesses to that end.

66 After the report of the Houses was filed on 6 November 2019, my legal representatives invited the parties to settle the matter. That invitation was refused by the Mphephu respondents. Since then, my legal representatives have sought to obtain a preferential trial date from Judge President Makgoba in accordance with the court's practice directives and in light of the Judge President's enquiries about trial readiness.

67 On 25 November 2019, the Judge President directed the parties to convene a pre-trial conference in terms of rule 37 before allocation of the matter. I attach the letter from the JP's Secretary conveying this direction as "**MCM1**". My legal

representatives' efforts to convene the pre-trial conference in the new year were repeatedly frustrated by the unavailability of respondents' counsel for the pre-trial conference.

67.1 On 20 January 2020 my attorneys and counsel proposed two dates in February for the holding of the pre–trial conference. When the State Respondents indicated that they were not available on those dates, my attorneys requested them to provide alternative dates. When no response was forthcoming, my attorneys wrote another letter to both attorneys (on 30 January) proposing six alternative dates in February and beginning of March. Again, the request was made that should the parties not be available on these dates, that they propose alternative suitable dates. On 31 January 2020 the State respondents' attorneys advised that their counsel would be available for the pre–trial conference on 25 February. However, on 4 February 2020, Mr Makhavhu wrote to advise that Adv. Machaba would only be available during March for the pre–trial conference. He undertook to revert within ten days with the proposed dates but failed to do so. These letters are attached in a single bundle marked "**MCM2**".

67.2 The pre-trial conference was then scheduled by agreement between all for 2 April 2020 and my legal representatives circulated a pretrial agenda for the meeting.

67.3 However, on 24 March 2020, subsequent to the President's announcement of the national lock down on 23 March 2020, my attorneys received emails from the attorneys of both the Mphephu

respondents a quo and the State respondents requesting that the pre trial conference scheduled for 2 April be postponed. My attorneys replied the same day to propose that the pre-trial conference be convened via a Skype conference. No response was received to this request. I attach a copies of the emails in a bundle marked "**MCM3**".

67.4 On 1 April 2020, my attorneys wrote a letter to both attorneys regarding their proposed postponement of the pre-trial. The letter recorded that they did not accept that it is not possible to hold the pre-trial conference because of the lockdown, and noted the lengthy delays already occasioned that were prejudicing me. It called upon the parties to agree urgently on a new date for the pre–trial conference and that the parties agree to hold the conference by technology platforms. New dates in April were proposed for the conference. A copy of this letter is attached to the applicants' founding affidavit as "**KTM13**".

67.5 The parties then agreed to hold a pretrial conference on 22 April 2020. However, when the lockdown period was extended to 30 April 2020, my attorneys again received emails from the current applicants' attorneys and the State respondents' attorneys proposing that the pre–trial conference which was scheduled for 22 April be again postponed. I attach copies of the attorneys' emails in a bundle marked "**MCM4**". On 15 April 2020 my attorneys wrote a letter to both attorneys responding to their emails. In that letter, my attorneys

essentially repeated what was recorded in annexure "KTM13" above. A copy of this letter is attached marked "**MCM5**".

67.6 On 13 May 2020, my attorneys wrote another letter to the respondents' attorneys proposing yet further alternative dates for the pre–trial conference, and advising the parties that courts around the country are convening hearings by video conference and there is no reason why the legal representatives in this matter cannot convene a pre-trial conference by video–conference or teleconference.

67.7 On 14 May 2020 the State respondents' attorneys confirmed that their counsel would be available to attend the pre–trial conference via video–conference or teleconference in the first week of June 2020. On 18 May 2020, Mr Makhavhu advised simply that he had referred the proposed dates to his counsel. I attach copies of my attorneys' letter and the attorneys' responses in a bundle marked "**MCM6**".

67.8 On 19 May 2020, Mr Dodson engaged with the lead counsel for the respective respondents' teams by SMS to arrange a suitable date. They all agreed on 1 June 2020 as a suitable date. However, on 22 May 2020, Mr Machaba (counsel for the Mphephu respondents) advised that he was not available and proposed the dates of 4 or 5 June 2020. The parties then agreed on 4 June 2020 to accommodate Mr Machaba. On 25 May 2020 my attorney wrote a letter to all the parties confirming that the applicants' counsel were available for the pre–trial conference on 4 June 2020. I attach a copy of my attorneys' letter confirming the arrangement in a bundle marked "**MCM7**".

67.9 On 30 May 2020, after the seemingly endless effort to convene the pre-trial conference, Mr Makhavhu addressed a letter to all the parties' legal representatives advising, for the first time, that he had *"just received instructions"* to review the reports filed by the Houses of Traditional Leaders on 6 November 2019, and for this reason did not consider that the pre-trial conference could proceed "*until the review process is finalised*". I attach a copy of this letter marked, "**MCM8**".

67.10 My attorneys replied to Mr Makhavhu by letter and refused to postpone the pre-trial conference and advised that it would be proceeding whether or not the Mpephu respondents' legal representatives attended. That letter is attached as "**MCM9**".

67.11 On 4 June, the pre–trial conference was finally convened and attended by my legal representatives and the representatives of the State respondents. A pre–trial minute was subsequently prepared and forwarded to all the parties, and is attached to the applicants' founding affidavit as **KTM16**. The minute records the views of my legal representatives and that of the State respondents on the threatened review of the Houses' opinion, as follows:

> *"3.4.1 The Mphephu respondents' proposed review of the Houses' Report is inappropriate. The Houses' Report is not reviewable but "advice and opinion" furnished on the instruction of the Supreme Court of Appeal (SCA), and the appropriate forum for challenging the Report is the trial on the merits contemplated in the order of remittal of the SCA.*
>
> *3.4.2 The stance adopted by the applicant [first respondent in these*

proceedings] in its letter of 31 May 2020 was correct. The pre–trial conference should not be delayed due to the anticipated review application.

3.4.3 *If the Mphephu Respondents instituted the review, the pre-trial preparations should nevertheless proceed in parallel and in accordance with an agreed timetable."*

68 Following the pre-trial conference, my legal representatives filed the minute with a request to Makgoba JP for a preferential allocation in October 2020. The Judge President's secretary advised that the first available dates are in the first and second terms of 2021.

69 On 22 June 2020, my attorney requested the respondents' representatives to advise if they were available for a hearing over the period 12 April to 30 April 2021 (when my counsel are all available and by when it is hoped that air travel will be resumed). The State respondents have agreed to that date, and my attorney has since submitted a request for the allocation to the Judge President.

70 However, Mr Makhavhu's response, for the Mphephu Respondents, has been to oppose the allocation of the hearing in the High Court, with the present application for leave appeal as the pretext. Accordingly, in a letter dated 23 June 2020, Mr Makhavhu advised my attorney for the first time that the present application for leave to appeal was being instituted, and asserted that *"we are obliged to await the finalisation of the Appeal proceedings"* before any allocation can be made.

71 This chronology makes it plain, I submit, that this application is nothing more than a delaying tactic, and an abuse of court process to obstruct the

administration of justice and the realisation of my rights under section 9, 33, 34 and 38 of the Constitution. The reason for the delaying tactics is clear. The first applicant is well-aware that his prospects of success in the proceedings are low and that mine are high. For as long as the proceedings remain pending, he is protected by the SCA's interim order (see para (f) of the order of the SCA) staying the coming into force of the setting aside of his kingship. This relief was not sought by any party, yet was wrongly granted by the SCA. It has created a perverse incentive for the applicants to draw out the pending proceedings for as long as possible (an issue I address further below), and it means that this belated application for leave to appeal is an abuse of court process, warranting a punitive costs order.

72 It bears emphasis that a difficulty that has hampered me throughout the prosecution of my review application has been to secure funding for this protracted litigation. Since I do not have the means to cover the legal fees in the matter, it has been necessary for me to apply to the Legal Aid Board for financial assistance. For a long time, the Legal Aid Board refused to fund the litigation. Now that they have come around to doing so, every time a new interlocutory application or appeal is launched, I must reapply to the Legal Aid Board, and stand at risk of not obtaining funding. My reliance on Legal Aid is known, and is being exploited by the applicants in this litigation. They are all the while using the Vhavenda queenship or kingship's revenue to litigate for the first applicant, who has been found to have been unlawfully appointed and has no entitlement to these resources. The first applicant's capacity to litigate and draw out the litigation is also boosted by his and his attorney's receipt of stolen money from VBS Mutual Bank in the amounts of R17,729,758 and

R30,461,788 respectively. I refer in this regard to the Investigator's Report to the Prudential Authority in respect of the affairs of VBS Mutual Bank led by Adv. Terry Motau SC, assisted by Werksmans Attorneys, at pages 134-135 (amongst others),[20] which extract is attached as annexure "**MCM10**".

The incorrect factual assertions

73 The condonation application includes incorrect and misleading factual allegations, which stand to be corrected. Specifically:

73.1 The allegation in paragraph 34 of the applicants' founding affidavit that I have *"resolved... to commence acting as queen of the Vhavenda*", and did so by partaking in a traditional walk, is false. I have not held myself out as the queen, and accept that I cannot do so until I am recognised as such. I did not attend, partake in or seek to usurp any "walk" conducted by the first applicant. His allegation is also vague. It may be that he is referring to a ceremony that I attended in the Nwamitwa/ Bolubedo region near Tzaneen. I attended that function on the express invitation of senior traditional leaders in the region and was fully entitled to do so. I am advised that my attorneys did not receive the letter referred to in this paragraph (KTM5). These facts are, in any event, irrelevant to the applicants' explanation for the delay.

73.2 I also strenuously deny the allegation in paragraph 37 that I "commenced conducting myself in an unbecoming manner". Mr

[20] The report can be found at the website referred to below and I ask that it be read as an annexure to this affidavit:
https://www.resbank.co.za/Lists/News%20and%20Publications/Attachments/8830/VBS%20Mutual%20Bank%20-%20The%20Great%20Bank%20Heist.pdf

Makhavhu appears to be referring to the settlement proposal I made to Regent Toni Mphephu-Ramabulana on 15 November 2019. There was nothing untoward in me having done so following the SCA's judgment and the Report of the National and Provincial Houses of Traditional Leaders. The letter was respectful of the first applicant, sought to accommodate him in an appropriate way and was motivated by my wish to restore stability to the affairs of the Vhavenda nation.

73.3 It is correct that my attorneys advised the Judge President in November 2019 that the matter was not ripe for allocation. I believe they did so responsibly, as the parties had not yet met to reach agreement on narrowing the issues in light of the SCA's judgment and the Report filed by the National and Provincial Houses, nor exchanged lists of witnesses or notices and summaries of the expert witnesses that would be called, nor even engaged on the duration of the set down required.

73.4 The statements in paragraphs 39 and 40 of the founding affidavit that *"the parties unsuccessfully attempted to arrange a pre-trial conference with a view to deal with the administrative aspects of the matter"*, and that this was due simply to "*coordination difficulties*" are patently misleading. As detailed in the chronology above, my attorneys and counsel sought repeatedly to arrange the pretrial conference, only to have these efforts frustrated by Mr Makhavhu on spurious grounds. Ultimately, the pretrial conference was convened without their attendance.

73.5 Mr Makhavhu's continued reliance (in paragraphs 42 to 48 of the founding affidavit) on the Covid-19 lockdown as justification for failing to hold the pretrial conference is most unconvincing given the technology available, as articulated in my attorney's correspondence to him. Further, had access to the papers filed in the matter been a real difficulty for his counsel, I would have expected Mr Makhavhu or his counsel to request an electronic copy of the papers from my attorney or counsel, and these would have been provided. No such explanation was given at the time.

73.6 There was no "cross-communication", "conflicting messages" or "miscommunication" from my legal representatives in their repeated efforts to schedule the pretrial conference. Any suggestion that there was (in paragraphs 49-50 and 58) is categorically denied. To the extent that this occurred as between Mr Makhavhu's counsel, this is his failing and responsibility. It is certainly no excuse for the delay that resulted. I refer to the chronology above and the correspondence attached thereto.

74 The applicant's grounds for condonation are also unacceptable for the following reasons:

74.1 The <u>contents</u> of the House's opinion is not a basis to appeal the SCA's order directing that the Houses' opinion be furnished to the High Court in the first place. That the applicants waited until the Houses' opinion was filed only confirms the expediency of this application for leave to appeal. It is clear that they have only sought to challenge the SCA's order requiring the House's opinion because that opinion, it turns out, does not

favour the first applicant; not because of any genuine concern about the correctness of the SCA's order.

74.2 It is clear that the applicants have had the advice of both their attorney and one senior counsel , Mr T. Machaba SC (albeit the junior counsel on their team) who have been well aware of the Houses' opinion since November 2019. The applicants and their legal representatives have, therefore, known of the House's opinion since then and elected not to act.

74.3 Furthermore, since the Houses' opinion was issued in November 2019, my legal representatives have been in repeated communication with Mr Makhavhu and both his counsel – through email and cellphone messages – in seeking to arrange the pre-trial conference and in correspondence with the Judge President on matters of set-down. That correspondence unequivocally contemplated the matter proceeding to oral evidence in the High Court. The current applicants could thus have been under no illusion as to the status of this matter, and our intentions to proceed to have the outstanding issues in dispute heard and finally determined in the High Court in accordance with the SCA's order. At no point did Mr Makhavhu or his counsel indicate any intention to appeal the SCA order remitting the matter to the High Court.

74.4 To the contrary, as Mr Makhavhu admits in his founding affidavit, he personally submitted a letter to the Judge President on 21 November 2019 – i.e., after both Mr Makhavhu and Adv. Machaba had received a copy of the Houses' report – to seek a preferential allocation of the

matter for hearing in the High Court. This puts paid to Mr Makhavhu's claim in this Court that his delayed decision to appeal is informed and justified by the Houses' report.

75 For all these reasons, the application for condonation must be dismissed – with I submit a punitive costs order.

THE COUNTER-APPLICATIONS

Introduction

76 My primary submission is that the applicants' application should be dismissed outright with a punitive costs order.

77 However, if an oral hearing is afforded to the applicants or if their application is otherwise to be entertained by this court, then I apply –

77.1 in terms of section 167(6)(a) of the Constitution read with Rule 18 of this Court's Rules to consider directly, and to grant, the relief sought in terms of prayers 6 and 7 of the amended notice of motion, which would have the effect of finally recognising me as queen and doing away with the need for the SCA's remittal of the matter to the High Court to deal with this issue; and

77.2 for leave to cross-appeal the following aspects of the SCA's order:

77.2.1 the stay of the withdrawal of the first applicant's certificate of recognition as king of the Vhavenda pending the final determination of proceedings;

77.2.2 the failure to declare that the rule of male primogeniture as it applies in customary law to the succession to the position of traditional leader is inconsistent with the Constitution and invalid to the extent that it precludes women from succeeding to the position of traditional leader (relief sought in prayer 4 of the amended notice of motion and referred for adjudication in the separation order);

77.2.3 the dismissal of my application for an order declaring that the word "progressively" in the Preamble and in section 2(3)(c), 2A(4)(c) and 2B(4)(c) of the TLGFA is inconsistent with the Constitution and invalid (paragraph 5 of the amended notice of motion and referred for adjudication in the separation order);

77.2.4 to the extent that this Court may hold that the SCA did not rule that the High Court must substitute a decision on my identification and recognition as Vhavenda queen,[21] that component of the SCA's order; and

77.2.5 the dismissal of my claim for costs of the appeal and the order that the remainder of the costs be costs in the cause, along with, to the extent necessary, the holding of the SCA that my claim had "prescribed" with reference to sections 9, 21 and 25 of the TLGFA.

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[21] This relief is sought in the alternative to the substitution order sought in my application for direct access.

78 Even if this Court does not grant, or refer for hearing, the applicants' application for leave to appeal or my conditional application for leave to cross-appeal, I ask this Court to exercise its remedial powers under section 172 of the Constitution and its inherent procedural powers under section 173, to set aside the order granted by the SCA that stays the withdrawal of the first applicant's certificate of recognition as Vhavenda king.

Direct access

79 The applicants in paragraph 73 of the founding affidavit in this application say the following:

> *"We aver further that this case is significantly important to the parties and the entire Venda nation as it continues to attract media attention. It is a highly-charged matter as it implicates their customs and traditions which have been practiced from time immemorial. It is submitted that the nation expects that a final word would come from this Court."*

80 Whilst media attention is of little consequence, there is merit in the other points made by the applicants in this paragraph. I will elaborate below. Before doing that, however, it is necessary to point out that the issue of my final recognition as queen was not the subject of the High Court or the SCA's decisions because it was not one of the separated issues referred for adjudication. That is why the SCA was correct to remit this matter to the High Court. If this Court is to give the "final word" on the matter, as the applicants ask, it could not do so in the context of either an appeal or a cross-appeal. It would have to decide the matter directly. Hence my conditional counter-application for direct access.

81 The reality is that there have been significant factual developments while my original review application, the appeal to the SCA and the remittal have been pending. These include the following:

81.1 When I began the application there were three possible contenders for the crown, the first applicant, my uncle Charles and I. Charles' appointment was sought in the alternative to mine. (My elder brother, Elvis Mphephu, born of another mother who did not marry King Dimbanyika, has indicated on affidavit that he has no interest in contending for the throne.)

81.2 Charles withdrew his alternative claim, as explained above. It is now a contest between me and the first applicant.

81.3 An intolerable situation has arisen, as explained earlier, where the SCA's unilateral order staying the withdrawal of the first applicant's certificate of recognition has created a perverse incentive for the first applicant to spin the legal proceedings out for as long as possible. Opportunities for doing this abound. As pointed out above, the first applicant has delayed the pre-trial processes in the remittal proceedings. There will also be the opportunity to apply for leave to appeal once again to the SCA and this Court when the High Court decides the matter on remittal. This could take years. All the while, the first applicant will continue to reap the benefits of a kingship that has been declared to be unconstitutional and which he is not entitled to hold.

81.4 As pointed out earlier, it has been revealed in the VBS Mutual Bank Report that the first applicant and his attorney received millions of rands of stolen money from the savings of, predominantly, poor and low income citizens of the Vhavenda nation. I speak subject to correction, but, whilst there may have been protestations of innocent receipt, the actual receipt of these funds has never been denied by the first applicant or his attorney. At the very least, however, it cannot be said that the first applicant and his attorney are above suspicion. Yet he remains in the position of king, with consequential further harm to the institution while he remains protected by a court order in that position.

82 Against that background, it is important to consider what the remaining issues are in dispute that are to be decided upon remittal. In essence, there are only two factual disputes that remain for determination upon remittal that are relevant to the choice between me and the first applicant (accepting that my gender should not count against me):

82.1 Whether the first applicant's position as *ndumi* to my late father precludes him from being appointed king; and

82.2 Whether my mother was the *dzekiso* wife.

83 The second of these disputes is, in truth, a non-issue because it is common cause that the first applicant was himself not the son of King Patrick's *dzekiso* wife. My father's mother had that status and that is why my father was the king, not the first applicant. That is also why the first applicant could only hold the position of *ndumi* to my late father.

84 Assuming for the moment that my mother was not the *dzekiso* wife (which I strongly dispute), it would be profoundly unequal and irrational (and unconstitutional) if that were to operate as a disqualifying criterion for me and not for the first applicant. Even in circumstances where neither of us were the issue of a *dzekiso* wife, under a system of primogeniture, the oldest contending child of the deceased monarch should be the incumbent. The heir thus comes from the heir's offspring, not his siblings. It is not in dispute in these proceedings that the rule of primogeniture should apply. The only question is whether it is a rule that operates in favour of men only. Since the rule of male primogeniture is unconstitutional and I am available to succeed as my father's oldest contending child, there is no reason to follow the exceptional route of reverting to a sibling of the king from the previous generation to favour the first applicant as the successor to my late father.

85 The question of the implication of the first applicant's status as *ndumi* need not even arise, since even if an *ndumi* could be king (which he cannot), my uncle's claim must surely be trumped by my being the issue of the late king.

86 In any event, there can be no doubt that it is a cardinal rule of Vhavenda customary law (and a rule that is shared by many communities) that an *ndumi* cannot be king.

86.1 On the papers, the first applicant's denial of this is bald and unconvincing;

86.2 The first applicant's denial of the rule is not confirmed on the papers by any expert, whereas the existence of the rule was confirmed in my papers by an expert, being the acting Head of the Centre for

Indigenous Knowledge at the University of Venda, Dr Pfarelo Matshidze;

86.3 The National and Provincial Houses of Traditional Leaders' report on the customary law at issue, supports my claim. That report confirms, inter alia, that it is a common customary law rule that an *ndumi* cannot succeed to the throne.

87 Accordingly –

87.1 on the basis of the common cause facts; alternatively,

87.2 on the application of the rule in *Plascon-Evans* that bare and/or implausible denials will not suffice to prevent final relief in opposed motion proceedings,

and with due regard to section 9 of the Constitution, there is in fact only one possible outcome in this matter, which is the recognition of my superior claim to title. The remitted proceedings before the High Court are in truth no longer necessary.

88 In these exceptional circumstances (as amplified in the papers), and having regard to the extraordinary delays already experienced in the finalisation of my review application, if the court is inclined to afford the applicants an oral hearing on the application for leave to appeal or to grant them leave to appeal, I ask the Court to –

88.1 dismiss the applicants' application for leave to appeal, alternatively, its appeal;

88.2 grant leave to apply directly to this Court; and

88.3 substitute for the decisions of the second applicant (purporting to act as the royal family) and the President, an order recognising my title as successor to the Vhavenda throne.

89 This would bring about the certainty and stability that the Vhavenda Nation craves, and which has been absent since my father's untimely death in 1997, some 23 years ago.

90 Alternatively, but for the same reasons, should this Court not be inclined to grant the substitution order, I ask this Court to direct the High Court to make a substitution order upon referral back to it (and not to remit the matter to the Commission, the second applicant or the royal family and the President for redetermination).

Relief sought in relation to the SCA's stay order

91 As pointed out above, if this court dismisses the applicants' application for leave to appeal without an oral hearing, I nonetheless apply directly and unconditionally to this court, without seeking an oral hearing, to discharge the SCA's stay of the withdrawal of the first applicant's certificate of recognition as King of Vhavenda pending the final determination of the proceedings (paragraph 3(f) of the SCA order). I do so because of the intolerable situation caused by the stay. This Court has the power in terms of sections 172 and 173 of the Constitution to grant interlocutory relief. An interlocutory order may always be varied if circumstances change. This includes the discharge of an order granting interlocutory relief.

92 Such a discharge is appropriate in the current circumstances. The stay order is causing me prejudice in the ongoing review proceedings through the incentive for delay that it has created. The stay also prejudices the Vhavenda nation, who are now subject to the indefinite rule of an unlawfully appointed and publicly compromised king.

93 In the alternative, I seek leave to cross-appeal against the SCA's stay of the withdrawal of the first applicant's certificate of recognition as King of Vhavenda pending the final determination of the proceedings (paragraph 3(f) of the SCA order). I do so on the following grounds:

93.1 Such an order was not sought by any of the parties, nor was it canvassed at the hearing before the SCA or thereafter before judgment was given.

93.2 It has unduly prejudiced me in the litigation, and will continue to do so as long as it stands, as it serves to incentivise the delay-tactics that the first applicant is employing to frustrate the finalisation of my review. It also means that the first applicant continues to have at his disposal all the financial resources attendant on holding the office of *khosikhulu,* to finance spurious litigation and appeals to frustrate the finalisation of the proceedings.

93.3 The order was unfairly granted by the SCA, having not afforded me a hearing before the order was granted, and it is highly prejudicial to me and to the administration and interests of justice. That prejudice is evidenced by the first applicant's spurious and belated application in this Court and his threatened review of the Houses' reports.

93.4 The order is not reconcilable with the SCA's finding that the identification and recognition of the first applicant as king, by the 'Mphephu-Ramabulana Royal Family Council' and the President respectively, was unconstitutional and invalid.

93.5 What is more, as pointed out already, the first respondent is implicated in corruption exposed in the VBS Mutual Bank report. It is all the more intolerable that he remains in the position. His continued tenure on this basis is damaging to the integrity of the traditional leadership of the Vhavenda community and, more broadly, to the institution of traditional leadership in this country.

94 Even if this Court is disinclined to grant me leave to cross-appeal against the SCA's stay, I am advised that it is open to this Court, having regard to the interlocutory nature of the order granting the stay, to vary that order so as to remove the stay.

95 The result of removing the stay would be an interregnum during which there would be no recognised king or queen of the Vhavenda. That would undoubtedly better serve the public interest and the interests of justice than the continued operation of the stay order, for the reasons I have stated. It would incentivize the expeditious and efficient conclusion of the legal proceedings.

Cross-appeal on the constitutional challenge to the rule of male primogeniture and sections of the TLGFA

96 In the application I challenged the constitutionality of the rule of male primogeniture. I also challenged the constitutionality of the word

"progressively" in the Preamble and in section 2(3)(c), 2A(4)(c) and 2B(4)(c) of the TLGFA. The SCA dismissed both these components of my application. In general terms this appears to be on the basis that in the context of traditional leadership, and unlike other aspects of human and social relations, gender equality is something that African women are only entitled to on an incremental basis, as and when the communities to which they belong choose to develop their customs to recognise gender equality. Given that traditional leaders would ordinarily reign until death, this is a process that may take generations. Accordingly, I also conditionally seek leave to cross-appeal against this component of the SCA's order.

97 I dispute that the right of African women to equal treatment and protection from unfair discrimination in the context of succession to positions of traditional leadership, is something that is only available on a progressive or incremental and organic basis. In this regard I make the following submissions:

97.1 South African women are subject daily not only to pervasive ongoing discrimination on the grounds of their gender, but also to profound levels of endemic violence at the hands of men. Femicide is so common that it often struggles to attract the front page headlines of newspapers. No amount of public condemnation or hand-wringing by the authorities seems to have any impact on this phenomenon.

97.2 In this context, constitutional questions need to be asked about institutions and norms within society that protect and preserve male domination. The rule of male primogeniture is a norm in the context of traditional leadership that is incompatible with the rights of African

women in section 9(1) and 9(3) of the Constitution. The incremental or progressive realisation of those rights in the context of traditional leadership could only be justified on the basis that such a limitation would be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Manifestly, that cannot be so.

97.3 Section 211(1) of the Constitution makes it clear that *"[t]he institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution." (my emphasis).* To limit the right to equality and not to be discriminated against unfairly on the basis of section 212 is an inversion of the hierarchy especially provided for in section 211(1).

97.4 Where the Constitution dictates progressive realisation of a right, it says so – hence the reference to "progressive realisation" in section 26(2) and 27(2) of the Bill of Rights.

97.5 Both the High Court and the SCA essentially ignored this challenge, despite it having been an issue which they were required to decide in terms of paragraph 15 of the separation order. In this regard, section 172(1)(a) of the Constitution obliged the High Court and the SCA, when deciding a constitutional matter within their power, to declare the rule of male primogeniture constitutionally invalid to the extent of its inconsistency with the Constitution.

98 I am advised and submit that the inclusion of the qualification of "progressively" in the Preamble and in section 2(3)(c), 2A(4)(c) and 2B(4)(c) of the TLGFA

does not accord with the 'relevant principles in the Bill of Rights', as the wording of the sections suggest. The inclusion of the word:

98.1 qualifies the nature of the obligation imposed by the right to equality in the context of succession to traditional leadership positions, as one subject to progressive realisation, not immediate realisation;

98.2 renders the protection and promotion of the right to equality in the context of succession to traditional leadership positions subject to the existing institutions of traditional leadership, and not vice versa as required by s 211(1) of the Constitution; and

98.3 renders the protection and promotion of the right to equality in the context of succession to traditional leadership positions subject to the incremental development of the customary law, in conflict with sections 39(3) and 211(3) of the Constitution.

99 To this extent, the provisions are unlawful and invalid for non-compliance with the Constitution. No justification for the limitation of the right to equality under these provisions has been advanced by the Minister responsible for administering the TLGFA, or by any of the respondents a quo. In the absence of any justification or evidence of any legitimate government purpose served by the inclusion of the qualifier "progressively", the limitation of the right to equality under sections 2(3)(c), 2A(4)(c) and 2B(4)(c) is not justifiable and should have been declared invalid.

100 The SCA reasoned that the constitutional challenge to these provisions was unfounded for "want of evidence" that the Vhavenda community had failed to

advance gender equality.[22] This finding is difficult to comprehend, since the minutes of the very meeting at which I was excluded as an heir to the throne (of 14 August 2010) reflect that my uncle, Mr David Mphephu who chaired the meeting, advised all present that "*the purpose of the meeting was to identify the King of the Vhavenda*", and that "*In the Mphephu-Ramabulana family in particular, only males succeed to the throne*". He also advised all those present that *"In our family/ nation, a woman does not reign"*.

101 The SCA also sought to infer from this Court's decision in *Shilubana* that communities should be allowed to develop customary law incrementally even if this means that the right to equality is infringed as a result. But this Court's judgment in *Shilubana* has no such meaning and effect. In that case, this Court was concerned with a community that had developed their customary law to promote gender equality – not, as in my case, a community that had resisted doing so.

102 Further, even if the SCA was correct that the community of which I am a member practices equality and does not unfairly discriminate against women, it did not deprive me of my right to challenge these discriminatory legislative provisions.

103 It is important to note that since the hearing in the SCA, the Traditional and Khoisan Leadership Act 3 of 2019 has been assented to and published in the Government Gazette (GG 42865 of 28 November 2019), but its date of operation is yet to be proclaimed. When it comes into operation, the Traditional

[22] SCA judgment para 34.

and Khoisan Leadership Act will repeal the whole of the TLGFA (as appears in schedule 4). But the provisions of the Traditional and Khoisan Leadership Act contain the same language, requiring only the 'progressive' advancement of gender representation in the succession to Khoisan and traditional leadership positions, in section 2(1)(c) and section 36(1)(a)(viii)(*cc*).

104 Should the Court grant me leave to cross-appeal I accordingly ask that the relief I seek in respect of the offending provisions of the TLGFA be extended to these new provisions of the Traditional and Khoisan Leadership Act.

Cross-appeal on substitution

105 As pointed out above, the applicants and I are *ad idem* that the effect of the SCA's remittal to the High Court for *"adjudication on the merits"* amounted to an order requiring substitution by the High Court upon remittal of its decision for that of the second applicant and the President. That said, the SCA was not as clear as it could have been in its order in this regard.

106 Accordingly, if this Court decides to afford an oral hearing, and if I am not granted the substitution order I seek on direct access, then I seek leave to cross-appeal to the extent only that the SCA's order is open to the interpretation that it declined to order substitution by the High Court upon remittal.

107 As pointed out earlier –

107.1 remittal to the Commission is no longer possible as the Commission no longer exists;

107.2 remittal to the second applicant and the second respondent (the President) would be unlawful and unfair because the second applicant is unlawfully constituted and is hopelessly biased against me and in favour of the first applicant;

107.3 even if the second applicant were to be trimmed down to comply with the definition of "royal family", being the close relatives that constitute the royal family as defined in section 1 of the TLGFA, they have cast their lot with the applicants and I would have no prospect whatsoever of a fair procedure in their hands.

108 In these circumstances, it would be appropriate to frame an order replacing that of the SCA so as to make it clear that the High Court upon remittal is to act in terms of section 8(1)(c)(ii)(aa) of PAJA.

Cross-appeal on prescription and costs

109 As pointed out earlier in this affidavit, the SCA (upholding the High Court's findings) wrongly held, first, that my claim had "prescribed" with reference to my alleged failure to comply with procedures in sections 9, 21 and 25 of the TLGFA which I was duty-bound to do; second, that the High Court was correct in dismissing my reliance on a legitimate expectation that the question of the incumbent of the Vhavenda queenship/kingship was under investigation by the Commission; and third, that the President was not estopped from denying the

legality of the public statement that the question of the incumbent of the Vhavenda queenship/kingship was under investigation by the Commission.[23]

110 These findings did not find expression in the SCA's order. However, on the basis of these findings, the SCA declined to award me the costs of the appeal and ruled that the costs of the original proceedings in the High Court would be costs in the cause.

111 I am advised that because the findings of the SCA in relation to prescription did not find their way into the order, no appeal is necessary in relation to them and it is open to my counsel to argue to the contrary in any hearing before this Court. I therefore seek leave to appeal in this regard only to the extent that this Court may view the matter differently. However I do seek leave to cross appeal against both –

111.1 the order that no costs be awarded in relation to the appeal; and

111.2 the order that the costs in the original proceedings before the High Court be costs in the cause.

112 The outcome of the appeal to the SCA, if regard is had to the content of its order, is that I was successful. The relief granted (save for the stay) was final. Moreover I was successful in a constitutional matter that involved state parties and institutions.

[23] These findings are summed up in paragraph 27 of the SCA's judgment.

113 In those circumstances, I was, on the basis of the law pertaining to costs generally and on the basis of *Biowatch*, entitled to my costs in the High Court, including the separation application, in the applications for leave to appeal and in the appeal itself. The state respondents sided entirely with the applicants and strenuously opposed the application for review, the separation application (until the doors of the court), the applications for leave to appeal and the appeal. All the respondents ought therefore to have been held liable for the costs, jointly and severally.

114 The SCA did not even make reference to *Biowatch*, despite having been referred to it in argument. This point does not require elaboration. The SCA was quite wrong in its costs orders.

CONCLUSION AND CONDONATION

115 I pray that the applicants' application for leave to appeal be dismissed with punitive costs.

116 In the event that the applicants are granted an oral hearing or are granted leave to appeal, I ask the Court –

116.1 to grant my application for direct access and to grant the substitution order recognising me as queen of the Vhavenda people; and

116.2 to grant my application for leave to cross-appeal and to uphold that appeal with an order in terms of the accompanying notice of motion.

117 Regardless of whether the application for leave to appeal or my applications to cross-appeal or for direct access are heard or granted by this Court, I ask that

this Court exercise its remedial powers and inherent procedural power to discharge the SCA's stay of the withdrawal of the first applicant's certificate of recognition.

118 In the event that condonation for the late institution of my application is required, I pray for condonation on the following grounds:

118.1 My application has been prompted by the applicants' delay and obstruction of the finalisation of my review application, of which their application to this Court is a clear instance.

118.2 When the time period for appealing the SCA's order had come and gone, I trusted that the parties would proceed to finalise my review application in good faith and as expeditiously as possible, in the interests of the Vhavenda people and in the interests of justice. While I was aware of certain errors in the SCA's judgment, these did not all reflect on the SCA's order and I considered that, in any event, I should use my limited resources to finalise the review application as expeditiously as possible.

118.3 However, as is clear from the above, that has not come to pass, and I am being prejudiced by further obstructive litigation and other delay tactics that, it is now apparent, are incentivised by the SCA's stay order. I have accordingly now sought to have the SCA's stay order discharged to level the playing field and incentivise all parties to finalise my review application.

118.4 Should this court hear the applicants' application for leave to appeal, then I believe and submit that it would be in the interests of justice and convenient also, for the errors in the SCA's judgment and order to be corrected, particularly as they have broader constitutional import beyond my case. I also seek direct access for a substitution order in that event, because it is in fact beyond dispute that I am entitled to be recognised as queen and this can and should be decided without any further delay and unnecessary legal costs being incurred. For these reasons, I have instituted a cross-appeal and application for direct access, but have done so conditionally upon the court deciding to hear or grant the applicants' application for leave to appeal.

118.5 I have acted at all times in this litigation in a manner aimed at expediting my review application and to avoid protracted and costly litigation. My application to this Court is made with the same concern, and would cause no prejudice to the other parties.

MC

MASINDI CLEMENTINE MPHEPHU

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of her knowledge both true and correct. This affidavit was signed and sworn to before me at Sandton on this the 17 day of July 2020, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended, have been complied with.

COMMISSIONER OF OATHS

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