

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 8541/2021

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED: YES/NO

25/03/2025
DATE..... SIGNATURE.....

In the matter between:

VHO-MAKHADZI MASINDI LUVHENGU LIGEGE

FIRST APPLICANT

THE NETSHIMBUPFE ROYAL FAMILY

SECOND APPLICANT

FUNZANI ERNEST NETSHIMBUPFE

THIRD APPLICANT

And

THE PREMIER OF THE PROVINCE OF LIMPOPO
THE CHAIRPERSON OF THE LIMPOPO HOUSE
OF TRADITIONAL LEADERS

FIRST RESPONDENT
SECOND RESPONDENT

THE MEC OF GOGHSTA, LIMPOPO PROVINCE

THIRD RESPONDENT

MULATEDZI NETSHIMBUPFE

FOURTH RESPONDENT

THE NETSHIMBUPFE ROYAL COUNCIL

FIFTH RESPONDENT

THE PREMIER OF THE PROVINCE OF LIMPOPO
IN HIS CAPACITY AS HEAD OF THE EXECUTIVE
COUNCIL OF THE LIMPOPO GOVERNMENT

SIXTH RESPONDENT

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date for hand-down is deemed to be on 25 March 2025 at 10h00AM.

JUDGMENT

PILLAY AJ:

Introduction:

[1] The application before court in its amended form is to seek an order in terms of the Promotion of Administrative Justice Act¹ (PAJA) to set aside and or review the following:

[1.1] The Premier of the Province of Limpopo in his capacity as Head of the Executive Council of the Limpopo Government is joined as sixth respondent

[1.2] The decision of the sixth respondent of 29 September 2021 to approve the recognition of the fourth respondent as Senior Traditional Leader of the Tshimbupfe Traditional Community is reviewed and set aside.

¹ Act 3 of 2000

[1.3] Alternatively, the decision of the first respondent of 29 September 2021 to recognise the fourth respondent as Senior Traditional Leader of the Tshimbupfe Traditional Community is reviewed and set aside.

[1.4] The decision to appoint a Senior Traditional Leader for the Tshimbupfe Community is referred(back) to the first respondent to recognise either the third applicant or the fourth respondent as Senior Traditional Leaders of the Tshimbupfe Traditional Community.

[2] The Premier is required to act in the following manner:

[2.1] The Premier is to take into account the full text of the judgement of the Supreme Court of Appeal annexed to the founding affidavit as Annexure "FA2".

[2.2] The Premier is to afford both the first second and third applicants on the one hand and the fourth and fifth respondents on the other hand, ample opportunity to submit documents directly to the Premier and an opportunity to address the Premier thereon.

[2.3] The Premier is not to take into account any input from the Limpopo Provincial Government Executive Council.

[2.4] The Premier is to take into account every Review ground raised by the applicants in this application.

[2.5] The Premier is to establish definitively the composition of the Netshimbupfe Royal Family (second applicant) and the Netshimbupfe Royal Council (fifth respondent) so as to establish which of the two bodies is the Royal Family within the ambit of such term in Section 1 of the Traditional and Khoi-San Leadership Act, 3 of 2019.

[2.6] The Premier is to take into account that the identification of the successor by the Khadzi and Ndumi is an indispensable part of the identification process to be valid.

[2.7] The Premier is to take into account that the composition of each is at the centre of this dispute. The question was which persons the second applicant and the fifth respondent should have populated each such structure and who of those were entitled to be present when a traditional leader was identified.

[2.8] The Premier is to take into account the criticism which the first second and third applicants raised, particularly the fact that a person by the name of Phopi was never married to Khosi Tshisevhe 1.

[3] **The Order of Court under case number 480/2021 is rescinded in terms of rule 42(1)(a).**

[4] The first and second respondents are ordered to pay the cost of this Review application.

[5] In addition to the first and second respondents, any respondents who or which opposes this application is to pay the cost of this application in *solidum* with the first and second respondents.

[6] Further and/ or alternative relief.

[7] The application was opposed by all the respondents.

Brief Background:

[8] The parties before court have been grappling with the identification of the Senior Traditional Leader of the Tshimbupfe Traditional Community, which has persisted for several years. This has led to various litigations and Court Orders. Without delving into the merits of the dispute, having read the documents before court and listened to

the arguments by the parties, it was apparent that there was a specific prayer sought in the application, which could not be entertained by this forum, in the manner in which it was sort. The applicants sought that the order of court under case number 480/2021 is rescinded in terms of Rule 42(1)(a) of the Uniform Rules of Court. For completeness of record, it is important to note that there are two Court Orders, the first is Case Number 480/2021 dated 18 May 2021 and the second is Case Number 6410/2021 dated 4 November 2021.

- [9] With specific reference to the rescission of the Court Orders, the applicants indicated that it was not necessary for the purposes of this application to first set aside the order of the 18 May 2021, as it was not competent for a Court to compel a Premier to decide upon a specific person. That Court could only have granted a *mandamus*, to compel the Premier to make a recognition, but not of a specific person. This Order was granted in the absence of the applicants, who were not served with the application. A Court file was to be placed before the Honourable Court at the hearing, indicating that such application was not served by the Sheriff. In consequence, the Order must be set aside in terms of Rule 42(1)(a) of the Uniform Rules of Court.
- [10] The applicants indicated that in the case number 480/2021, it was unclear whether the applicants (in that matter) used the term “Royal Council” and “Royal Family” interchangeably. Moreover, the applicants (in these proceedings), were not cited. This Court Order conflicted with the Judgment of the Supreme Court of Appeal², as relied upon in the founding affidavit, but also section 59 of the Khoisan Act. In respect of the second Court Order under case number 6410/2021 dated 4 November 2021, the

² *Netshimbupfe and another v Mulaudzi and Others* (563/17)[2018]ZASCA 98(4 June 2018)

applicants indicated that it was not necessary to rescind this Order as it was granted only after the appointment on 29 September 2021.

- [11] The respondents opposed the application in *toto* but with specific reference to the Court Orders, indicated that there were instructive, specifically to the First Respondent, to recognise the fourth respondent as the Senior Traditional Leader of the Tshimbupfe Traditional Community, which was complied with by the first respondent. That the applicants had not made out a case for an order rescinding the Court Order under case number 480/2021.

The Issue to be adjudicated:

- [12] The following issues were identified by this court which needed to be ventilated first prior to considering the merits of the Review application:

[12.1] Whether the prayer sought for the rescission of the Court Order under case number 480/2021 in terms of Rule 42(1)(a) of the Uniform Rules of Court, was capable of being granted in this court?

[12.2] Whether this application was ripe for the hearing considering the two Court Orders?

[12.3] What would be the appropriate consequence, in these circumstances?

The Legal Principles and Applicability:

- [13] An order or judgment may be rescinded or varied under Rule 42(1)(a)³, which reads:

³ Rule 42 of the Uniform Rules of Court

"The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:

- (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;*

[14] To succeed in a rescission under Rule 42(1)(a), an applicant must show that the judgment was "erroneously sought or erroneously granted in the absence of any party affected thereby". An order will be erroneously granted "if there existed at the time of its issue a fact which the court was unaware of, which would have precluded the granting of the judgment and which would have induced the court, if aware of it, not to grant the judgment."⁴

[15] The applicants rely on Rule 42(1) (a) as a prayer sought in this Review proceedings to motivate why the Court Order in case number 480/2021 should not have been granted. In the case of **Matseke v Maine**⁵ the court noted,

"It is trite that an applicant who places reliance on rule 42 (1) (a) for rescission, must show and prove firstly that the order sought to be rescinded, was granted in their absence, and secondly, that same was erroneously sought or granted. Once the two requirements are met, that is not the end of the enquiry. The court will then be entitled to exercise its discretion, and in doing so take into account considerations of fairness and justice. In other words, therefore, a court is not compelled to rescind an

⁴ See *Rossitter & Others v Nedbank Ltd* [2015] ZASCA 196 at para 15.

⁵ (M198/2020) [2024] ZANWHC 13 (26 January 2024)

order or judgment, but has a discretion, which discretion must be exercised judicially.”

- [16] In the case of **Zuma v Secretary of Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others**⁶, the Constitutional Court summarised the position concerning whether the applicant had met and satisfied the requirements for rescission of judgment either in terms of rule 42 (1) (a) or the common law as follows:

“It should be pointed out that once an applicant has met the requirements for rescission, a court is merely endowed with a discretion to rescind its order. The precise wording of rule 42, after all, postulates that the court “may”, not “must”, rescind or vary its order – the rule is merely an “empowering section and does not compel the court” to set aside or rescind anything. This discretion must be exercised judicially.”

- [17] The parties all accept that there are two Court Orders that have been granted in favour of the fourth and fifth respondents. On account of the Court Orders, the fourth respondent was identified as the Senior Traditional Leader of the Tshimbupfe Traditional Community. It is uncertain in case number 480/2021, the contents of the application, that resulted in the Court Order on which this rescission of judgement is being sought. An application for rescission of judgement can only be sought in the case where the judgement by default was granted. It is only in those circumstances

⁶ 2021 (11) BCLR 1263 (CC)

where the merits peculiar to the matter, in which the default judgement was granted, could be considered, in so far as the merits relating to the rescission of judgement is concerned. This court is ill-equipped to ventilate the requirements of rule 42(1)(a) judicially in circumstances where this court is not seized with the main proceedings on which the default judgement was granted and the order which followed was made. Review proceedings is not capable of being used for the purpose of rescission of a High Court order.

[18] In as much as it could be argued that the applicants were aware of the circumstances, and the order granted with specific reference to case number 480/2021, it would not be appropriate to penalise the applicants for not seeking the rescission in the correct forum, and for praying this court to grant the rescission, in this Review proceedings.

[19] Regard was had to the prayer of further and or alternative relief and considered it appropriate to afford the applicants an opportunity to ventilate the rescission of judgement in terms of rule 42(1)(a) of the Uniform Rules of Court, in the correct forum where the judgement and Court Order was granted in respect of the aforementioned matter, prior to ventilating the merits of this application.

Costs:

[20] In light of the fact that the matter is not ripe for consideration on the merits, which will be ventilated at a later stage, it would be prudent for costs to be reserved to be argued at a later stage.

Ruling:


[31] It is for the above reasons that the application for review sought by the Applicant in terms of PAJA stands to be postponed sine die pending the outcome of the relevant rescission application before the relevant Court wherein the Judgment by Default and subsequent Court Order was granted.

Order:

[32] In the result the following order is made:-

[32.1] The Review application is postponed *sine die*.

[32.2] The costs are reserved.



 PILLAY KL
 ACTING JUDGE OF THE HIGH COURT,
 LIMPOPO DIVISION, POLOKWANE

APPEARANCES

FOR THE APPLICANT	:	Advocate Q Pelser SC
INSTRUCTED BY	:	Tambani Matumba Inc
FOR THE 1 st , 2 nd , 3 rd & 6 th RESPONDENTS	:	Advocate Steven Mbhalati
INSTRUCTED BY	:	Office of the State Attorney Polokwane
FOR THE 4 th and 5 th RESPONDENTS	:	Advocate MM Monene
INSTRUCTED BY	:	Ligege & Associates INC
DATE OF HEARING	:	11 November 2024
DATE OF JUDGEMENT	:	25 March 2025