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Long live the king: The problematic nature of Davis J's judgment in the case of *Prince Mbonisi Bekithemba kaBhekuzulu v the President of the Republic of South Africa*

ANOPA TAMUKA MURAMBIWA

LLM Candidate, Faculty of Law, University of Cape Town, Rondebosch, South Africa

https://orcid.org/0009-0009-8827-915X

Abstract

Shaka kaSenzangakhona and Dingane kaSenzangakhona would never have imagined that today their descendants would engage in judicial warfare over the throne. This article analyses the cases Zulu v Mathe *and* Prince Mbonisi Bekithemba kaBhekuzulu v the President of the Republic of South Africa*. I take the view that Prince Misuzulu (as he then was) is the rightful King of the AmaZulu. It would be unjust to change that position based on some procedural irregularity when even in the presence of the so-called correct procedure contemplated in section 8(4) and (5) of the Traditional Leadership and Khoi-San Act, he would still be king. The role played by the court in* Zulu v Mathe *was that of an investigative committee contemplated in the Leadership Act. As such, this is the exception to such a process being mandatory. In a hypothetical situation in which Prince Simakade is a contender to the throne, he falls short due to his mother's*

being a spinster. The equality argument is not sufficient to change his position. As such, the prospects of invalidating King Misuzulu's claim to the throne seem quite scant.

Keywords: kingship; heir; constitution; Zulu customary law; judicial warfare; the doctrine of finality; Traditional Leadership and Khoi-San Act; claim to the throne; investigative committee

1 INTRODUCTION

In this article, I challenge Davis J's reasoning in *Prince Mbonisi Bekithemba kaBhekuzulu v President of the Republic of South Africa*.[1] I maintain the view that the President did err in his failure to appoint an investigative committee to investigate the allegations of a dispute regarding then Prince Misuzulu's identification as *Isilo,* King of the AmaZulu. However, such an error of law was not material enough to have the President's action set aside in terms of section 6(2)(d) of the Promotion of Administrative Justice Act (PAJA).[2]

To demonstrate my position, I examine the dates leading to the recognition of Prince Misuzulu as *Isilo*, King of the AmaZulu on 16 March 2022.[3] I argue that there was no legal impediment hindering the recognition. The only attempt to interdict the recognition had been dismissed by the KwaZulu-Natal High Court in *Zulu v Mathe*.[4] I also present the case that once the court in *Zulu v Mathe* found no basis for the allegations that customary law had not been followed in Prince Misuzulu's nomination, there was no need for an investigative committee. The court had acted *sui generis* of the committee; hence its function was fulfilled. As a result, Prince Misuzulu's recognition was lawful.

I go on, furthermore, to present a hypothetical constitutional argument in favour of Prince Simakade. This argument is that even if an investigative committee were to be appointed and it found in favour of Prince Simakade, such a finding would not hold. This is because his mother was a spinster and was never married to the late King Goodwill Zwelithini kaBhekuzulu.[5] An examination into Zulu customary law will indicate that kingship flows from the mother, in that it

[1] *Prince Mbonisi Bekithemba Ka Bhekuzulu and Others v President of the Republic of South Africa and Others* [2023] ZAGPPHC 1982 (hereafter "*Prince Mbonisi v President")*.
[2] Act 3 of 2000.
[3] *Prince Mbonisi v President* para 46.
[4] [2022] ZAKZNPHC 6.
[5] *Zulu v Mathe* para 99.

is the Great Queen or Queen Regent's eldest son who becomes heir. This again favours Prince Misuzulu whose mother was Queen Regent.

Although section 9(3) of the Constitution read with 2(1) of the Traditional Leadership and Khoi-San Act ("the Leadership Act") provides that no one shall be discriminated against based on marital status,[6] there are sound reasons in favour of this discrimination. In line with section 36(1) of the Constitution, I argue that the Great Queen or Queen Regent plays a role in handling the affairs of the kingdom. As such, her son's being heir can be interpreted as a reward or privilege flowing from her duties to the kingdom. This solidifies Prince Misuzulu's claim to the throne. Ultimately, I argue that there is no definitive reason for disqualifying Misuzulu from the Zulu throne.

2. THE DYNAMICS OF *ZULU v MATHE AND PRINCE MBONISI v PRESIDENT*

2.1 Factual background

Adv Puckrin SC in argument submitted that the pronouncement by Madondo AJP was binding on everyone including the President.[7] It is from this point that this article begins. First, I consider the timeframes key to these two cases. The late Queen Regent Shiyiwe Mantfombi Dlamini Zulu ("Queen Mantfombi") died on 29 April 2021, shortly after the Zulu royal family assembled for a meeting at which Prince Mangosuthu Buthelezi nominated Prince Misuzulu as the successor.[8] The latter accepted the nomination.[9] There was no dissension recorded at this meeting.[10] Shortly thereafter, another meeting was held by an opposing faction within the royal family; here, Prince Simakade Jackson kaZwelithini was nominated, a nomination which he rejected.[11]

Prince Mbonisi instituted legal proceedings on 19 November 2021 to stay the coronation of Prince Misuzulu.[12] On 10 March 2022, Madondo AJP held that the application by Prince Mbonisi was unfounded, dismissed it, and pronounced Prince Misuzulu as the rightful King of the AmaZulu.[13] After the President recognised Prince Misuzulu as *Isilo*, King of the AmaZulu, Prince Mbonisi

[6] Constitution of the Republic of South Africa, 1996 (hereafter "Constitution"). See Act 3 of 2019.
[7] *Prince Mbonisi v President* para 61.
[8] *Zulu v Mathe* paras 71–77.
[9] *Zulu v Mathe* paras 71–77.
[10] *Zulu v Mathe* paras 71–77.
[11] *Zulu v Mathe* paras 71–77.
[12] *Zulu v Mathe* paras 71–77.
[13] *Prince Mbonisi v President* para 18.

launched another court application, in the Gauteng High Court, on the basis that the President erred in recognising Prince Misuzulu as King of the AmaZulu without an investigative committee having been appointed in terms of section 8(4) and (5) of the Leadership Act.[14] This time, Prince Mbonisi's application challenged the President's recognition of Prince Misuzulu as procedurally flawed in terms of the Leadership and Khoi-San Act and PAJA.[15] The judgment to this effect was delivered on 11 December 2023.[16]

2.2 An analysis of the dates

My line of reasoning aligns with that of Adv Puckrin SC.[17] The applicant argued that an investigative committee was not appointed to investigate "evidence and allegations" of a dispute about the legitimacy of Prince Misuzulu's identification and recognition as King of the AmaZulu as contemplated by the Act.[18] I submit that when the President exercised his powers in recognising Prince Misuzulu as such on 16 March 2022, the dispute did not exist. This is because the matter of whether Prince Misuzulu was the rightful *Isilo* had been finalised in the KwaZulu-Natal High Court by Madondo AJP on 2 March 2022.[19] Subsequently, the recognition took place on 16 March 2022.[20] It is important to point out that an application for leave to appeal the decision of Madondo AJP was made only 18 March 2022, after the coronation had already happened.[21]

I am aware of the argument surrounding the legal standing of the letter sent to the President on 9 March 2022 by Prince Mbonisi's attorneys informing the President of their intention to appeal,[22] an issue I address later in this article. However, as far as the dates are concerned, the President recognised Prince Misuzulu rightfully as the King of the AmaZulu. I would have reached a different conclusion had there not been the Madondo AJP judgment.

[14] *Prince Mbonisi v President* para 8.
[15] Act 3 of 2000.
[16] *Prince Mbonisi v President* paras 8–9.
[17] *Prince Mbonisi v President* para 61.
[18] *Prince Mbonisi v President* para 8. See also section 8(4) and (5) of Act 3 of 2019.
[19] *Zulu v Mathe* [2022] ZAKZPHC 6 paras 102–103.
[20] *Prince Mbonisi v President* para 46.
[21] *Prince Mbonisi v President* para 46.
[22] *Prince Mbonisi v President* para 46.

2.3 Characterisation of the Zulu v Mathe judgment

In *Zulu v Mathe* regarding the matter between Prince Mbonisi and Misuzulu, Prince Mbonisi sought to (a) interdict the coronation of Prince Misuzulu, (b) interdict the President from recognising Prince Misuzulu as the King of the AmaZulu, and (c) interdict the premier of KwaZulu-Natal from issuing a certificate of recognition to Prince Misuzulu.[23] The requirements for an interdict are that there must be a *prima facie* right facing a reasonable threat or prospect of irreparable and imminent harm and with no other means of preventing it than the order.[24] The court in *Zulu v Mathe* held that there "was no basis for interdicting the recognition and coronation of Prince Misuzulu as King of the AmaZulu".[25] Such a conclusion rested on the following: there was no indication of the existence of any *prima facie* right of the applicants or any other person, or indication that it would be adversely affected should the coronation take place.[26]The court found that the applicants could not win a stay of those proceedings because they failed to show enough evidence that they would be affected by the appointment and coronation.[27]

Regarding the identification and nomination itself, the court held that there was no indication that Prince Misuzulu's identification did not satisfy the requirements of Zulu customary law.[28] Prince Mbonisi argued for a more developed approach to the identification process in line with section 2(1) of the Leadership Act, which provides that such a process must (a) prevent unfair discrimination (b) promote equality (c) seek to progressively advance gender representation in positions of traditional leadership.[29] I speculate that this was to lay a foundation for Prince Simakade to be nominated and appointed as King of the AmaZulu. The grounds for Prince Simakade's disqualification rested on the fact that his mother was not married to the late King Goodwill kaBhekuzulu.[30] He, however, never stated that he had the intention of becoming king, but maintained that he would abide by whatever the royal family decided.[31] The invocation of

[23] *Zulu v Mathe* para 67.
[24] *Economic Freedom Fighters v Gordhan; Public Protector v Gordhan* 2020 (6) SA 325 (CC) para 21. See also *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) para 41; *Setlogelo v Setlogelo* 1914 AD 221.
[25] *Zulu v Mathe* para 102.
[26] Zulu v *Mathe* para 83.
[27] *Zulu v Mathe* para 83.
[28] *Zulu v Mathe* paras 82–104.
[29] *Zulu v Mathe* para 96. See also Act 3 of 2019.
[30] *Zulu v Mathe* para 99.
[31] *Zulu v Mathe* para 98.

section 2(1) of the Leadership Act was thus a possible attempt to lay the grounds by which the current Zulu custom of kingship tracing from the mother could be developed to accommodate sons of the king born of spinsters.[32]

The court in turn held that Zulu kingship was dependent on the status of the mother,[33] and that the development of customary law, in this case the Zulu customary law of succession, must take this into account. The court also held that Zulu succession traces from the mother,[34] with precedence going from the great queen to the other queens. Prince Simakade would only be identified as king in their absence.[35] An argument could be made on the grounds of equality in line with section 2(1) of the Leadership Act or section 9(3) of the Constitution. However, in this article, I engage with it separately. Regardless of the equality argument, the court held that no grounds for an interdict had been demonstrated.[36] The applicants could not identify any contender to the throne who would reasonably be affected by Prince Misuzulu's appointment as king.

I am of the view that the interdict sought by Prince Mbonisi ought to have been framed in terms of section 8(4) and (5) of the Leadership Act. It would have been a better approach to the argument to base it on this process rather than diving into the merits regarding the existence of a dispute. This is because section 8(4) and (5) of the Leadership Act contemplates "evidence and allegations", not a "dispute". As Davis J noted, had there been some disagreement in the Zulu royal family, this would have been sufficient to trigger section 8(4) and (5) of the Leadership Act.[37] The sheer fact that a mediation panel had been appointed by the President is evidence enough to suggest that there was indeed disagreement about the throne.[38] However, by diving into the merits of the dispute, the court in *Zulu v Mathe* was forced to step into the shoes of an investigative committee and assess whether or not Zulu customary law had been followed in identification of Prince Misuzulu as king.

As I demonstrate later in this article, section 8(4) and (5) of the Leadership Act is a compulsory process albeit subject to exceptions. This means that once there is an allegation or evidence of a

[32] *Zulu v Mathe* para 99.
[33] *Zulu v Mathe* para 99.
[34] *Zulu v Mathe* para 99.
[35] *Zulu v Mathe* para 99.
[36] *Zulu v Mathe* para 101.
[37] Act 3 of 2019. See also *Prince Mbonisi v President* paras 53–61.
[38] *Prince Mbonisi v President* para 54.

possible dispute concerning the secession to the throne, section 8(4) and (5) will be triggered, irrespective of whether the allegations or evidence have any basis to them. Section 8(4) and (5) of the Leadership Act provides for an investigative procedure in which an independent committee investigates the basis of the evidence and/or allegations. The implication is that should Prince Mbonisi have sought the interdict in terms of section 8(4) and (5), it would not have been up to the court to determine whether the evidence or allegations had any basis. Such a decision would be made only by the investigative committee. Here, Prince Mbonisi would be required only to show that there was some dispute within the royal family, be it unfounded or not.

It is important to note that the interdict in *Zulu v Mathe* was sought on grounds that required the court to delve into the merits of whether a genuine dispute existed. The application to stay proceedings of the identification and nomination of Prince Misuzulu rested on section 8(1) and (3) of the Leadership Act read with section 17(3) of the KwaZulu-Natal Traditional Leadership and Governance Act (KZN Act).[39] These sections speak to the validity of the proceedings that were applied in the process of identification and nomination of Prince Misuzulu as King of the AmaZulu in terms of Zulu customary law. The onus on Prince Mbonisi was weightier than it would have been should he have sought the interdict in terms of section 8(4) and (5) of the Leadership Act. Here, the applicant had to prove that the procedure in terms of section 8(1) and (3) of the Leadership Act read with section 17(3) of the KZN Act was materially flawed.[40]

In this regard, Madondo AJP held that the identification and nomination of Prince Misuzulu was in line with Zulu law and custom.[41] As per Zulu law and custom, a meeting was held on 14 May 2021 at which Prince Misuzulu was identified and nominated; no one disputed Prince Misuzulu's entitlement to the throne at the meeting or thereafter.[42] As such, there was no basis on which to allege the existence of a dispute regarding Prince Misuzulu's ascension to the throne; what was "evidence or allegations" became a dispute settled in court. As a consequence of the dismissal of the application by Prince Mbonisi, there was nothing to stop the identification, nomination, and recognition of Prince Misuzulu as King of the AmaZulu.

[39] *Zulu v Mathe* para 85. See also Act 3 of 2019.
[40] *Zulu v Mathe* paras 92–97.
[41] *Zulu v Mathe* para 96.
[42] *Zulu v Mathe* para 96.

2.4 To what extent is section 8(4) and (5) of the Traditional Leadership Act compulsory?

Davis J held that the procedure under section 8(4) and (5) of the Leadership Act is compulsory.[43] As such, the President was obliged to follow that procedure before recognising Prince Misuzulu as King of the AmaZulu.[44] I agree with this point but only partially: the compulsory nature of section 8(4) and (5) of the Leadership Act is with exceptions. I engage in legal interpretation to determine the meaning and parameters of section 8(4) and (5) of the Leadership Act. When interpreting legal texts, attention must be paid to the words, context, and purpose.[45] Such an exercise must be done unitarily and not in stages. Accordingly, the words, context, and purpose of the provision being interpreted must all feed into each other to yield meaning.

The wording of section 8(4) and (5) of the Traditional Leaders Act mandates the President or the relevant premier to appoint an investigative committee to investigate "evidence or allegations" concerning "the identification of a person as King or Queen". The operative words in this provision are "evidence or allegations". For an investigative committee to be enacted, the threshold that must be met is that there has been some disagreement or potential dispute concerning the identification of the next king or queen.[46] It is not required that the allegations or evidence be substantial. As per section 8(4)(a) of the Leadership Act, the investigative committee must "investigate" and provide a "report on whether the identification or election of the relevant person was done following customary law and customs", and if not, the committee must indicate who "should be identified or whether a new election should be held". Procedurally, the President's ad hoc mediation panel should not have been employed; instead, in terms of section 8(4) and (5) of the Traditional Leadership Act, it ought to have been an investigative committee.

In addition to the fact that the wording indicates that the President is obliged to appoint an investigative committee to report on who must be identified as king, the wording in question must be placed within its context and purpose. The procedure entails a "reasoned assessment of the

[43] *Prince Mbonisi v President* para 61.
[44] *Prince Mbonisi v President* para 61.
[45] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18. See also *Capitec Bank Holdings Ltd v Coral Lagoon Investments* 194 (Pty) Ltd 2022 (1) SA 100 (SCA) para 10.
[46] *Prince Mbonisi v President* paras 59–62.

broad purpose underlying its enactment".[47] This considers both external and internal aids.[48] Sections 8(4) and (5) of the Leadership Act fall under Chapter 2 of the Act under the heading of "Recognition of king or queen". Davis J points out that this must be distinguished from section 59 of the Leadership Act, which falls under Chapter 5 of the Act under the heading of "Disputes". Section 8(4) and (5) of the Leadership Act exclusively deals with the process of identification and recognition of a king or queen. It contemplates a situation in which it is not certain that a dispute exists but is potentially the case. As such, the investigative committee's obligation is twofold: to identify whether the "evidence or allegations" amount to a dispute, and then to provide a solution to the said dispute.[49] This stands in contrast to section 59 of the Leadership Act, which presupposes that a dispute exists.

Another factor essential to determining the context and purpose of section 8(4) and (5) of the Leadership Act is placing it within the confines of the Constitution.[50] It is here that I show that section 8(4) and (5) of the Leadership Act has exceptions. In terms of section 34 of the Constitution of the Republic of South Africa, "Everyone has the right to have any dispute … resolved … in a fair … court or, where appropriate … another independent and impartial tribunal."[51] Section 34 provides for dispute resolution either by way of litigation or alternative dispute resolution (ADR). It is important to note that the option for ADR is under the condition that it must be appropriate to do so. Correctly, section 8(4) and (5) of the Leadership Act can thus be construed as providing an ADR mechanism by which a person can be identified as king or queen. It therefore follows that in an instance where a court of law steps into the shoes of the investigative committee and decides as to the validity of the identification process of a king or queen the ADR objective of the investigative committee is to be considered fulfilled. This is the basis for the exception applicable to section 8(4) and (5) of the Leadership Act.

I contend that the judgment by Madondo AJP suggests a waiver of the procedure contemplated under section 8(4) and (5).[52] Taking into account my previous characterisation of *Zulu v Mathe*,

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[47] Wallis M "Interpretation before and after Natal Joint Municipality Pension Fund v Endumeni Municipality 2012 4 SA 593 (SCA)" (2019) 22 *PELJ* 1 at 17.
[48] Willis (2019) at 17–19. This assessment seeks to establish what the legislature intended to resolve, the so-called mischief rule. See also *Hoban v Absa Bank Ltd t/a United Bank* 1999 (2) SA 1036 (SCA) para 20.
[49] Section 8(4)(a) and (b) of Act 3 of 2019.
[50] Section 34 of the Constitution.
[51] Section 34 of the Constitution.
[52] *Zulu v Mathe* para 101.

the grounds by which the court denied the interdict rested on a failure by the applicant to prove that (a) there were procedural irregularities in the identification and nomination process; (b) that there was a person with an interest in the identification and nomination process; and (c) that such a person would be unjustly prejudiced should Prince Misuzulu be appointed as king.[53]

As contemplated in my characterisation of *Zulu v Mathe*, the interdict was based on an audit of the process of identification and nomination of a king in terms of section 8(1) and (3) of the Leadership Act. No fault was found. In so doing, the court acted *sui generis* of the function of the investigative committee contemplated in section 8(4) and (5) of the Leadership Act. One should be mindful, as demonstrated in my interpretation of section 8(4) and (5), that when the latter is read with section 34 of the Constitution, nothing bars a court from fulfilling the said function. In any event, should a dispute arise from the conclusion reached by an investigative committee, it would still have been settled in court. It is this aspect of the court's acting as a *sui generis* investigative committee that, I submit, is the exception to section 8(4) and (5) of the Leadership Act.

2.5 Legal relevance of the letter to the President of 9 March 2022

As previously indicated, an alternative argument that could be made is that the letter sent to the President on 9 March 2022 informing him of Prince Mbonisi's intention to appeal fell within the ambit of section 8(4) of (5) of the Leadership Act's "evidence and allegation".[54] I find this point problematic. It raises the question: What does it mean to finalise a matter in a court of law? As I have maintained in my argument, once the "allegations and evidence" had been put in front of a court of law, they became a "dispute". Even the learned judge, Davis J, acknowledged that the court order could be suspended only by way of an appeal.[55] Such an appeal application was made only on 18 March 2022 after the coronation. To assert that the President was bound by the letter sent on 9 March 2022 is to invalidate the standing of the court's order.

The doctrine of finality rests on the presumption that a court's decision is final save for an appeal.[56] As held in *TWK Agricultural Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd*,[57] the

[53] *Zulu v Mathe* para 101.
[54] *Zulu v Mathe* para 42. See also Act 3 of 2019.
[55] *Zulu v Mathe* para 46.
[56] *TKW Agricultural Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd* 2023 (5) SA 163 (SCA) paras 20–27.
[57] 2023 (5) SA 163 (SCA) paras 20–27.

"rule of law requires that the law is ascertainable and meets reasonable standards of certainty".[58] Ordinarily, people do not go to court intending to appeal the decision should it not go their way. The interdict's purpose was to stop the identification, nomination, and recognition of Prince Misuzulu as *Isilo*, King of the AmaZulu. That application was dismissed.[59] It would appear misleading to maintain that, absent a suspension of the court order by an application for appeal, there existed any barrier to the President's action at the time he recognised Prince Misuzulu as king.[60] Prince Mbonisi's attorneys seem to be suggesting that the process of identification, nomination, and recognition process was stayed during the 15 days granted by Madondo AJP to apply for leave to appeal.[61]

However, one should bear in mind that there was no application to appeal, save for after the recognition, and that there was a court order to the effect that Prince Misuzulu is the rightful heir. Accepting that the President should not have recognised Prince Misuzulu as king based on the letter assumes that legal proceedings had not settled the matter. It risks giving the said letter the capacity of an interdict, which was denied at the time, in turn potentially violating the doctrine of finality. The onus lay on Prince Mbonisi to apply for leave for an appeal to stop Prince Misuzulu's recognition.

2.6 Did the President err?

From a procedural standpoint, it would seem that the President did err. However, such an error was made not at the point of the recognition itself on 17 March 2022.[62] The error was made *before* the recognition, by not having an investigative committee appointed as per section 8(4) and (5) of the Leadership Act.[63] As indicated above, the moment Prince Mbonisi filed for an interdict based on section 8(1) and (3) of the Leadership Act, the court acted in the capacity of the investigative committee.[64] I am not suggesting that the President's actions are not subject to review – section 6(2)(c) and (d) of PAJA makes it clear that where there is an error in law or procedural unfairness in an administrative decision, such decision is subject to judicial review. What I have attempted to

[58] *TKW Agricultural Holdings (Pty) Ltd v Hoogveld Boerderybeleggings* para 20.
[59] *Zulu v Mathe* para 104.
[60] *Prince Mbonisi v President* para 46.
[61] *Prince Mbonisi v President* para 46.
[62] *Prince Mbonisi v President* paras 60–64.
[63] *Prince Mbonisi v President* paras 60–64.
[64] *Zulu v Mathe* para 101. See also *Prince Mbonisi v President* paras 49–61.

do is draw on the cases both of *Zulu v Mathe* and *Prince Mbonisi* and suggest that although there was an error on the President's part, such an error might not hold enough weight to sway Prince Mbonisi's recognition as *Isilo*, King of the AmaZulu. I disagree with the conclusion of the learned judge, Davis J. Any review of the President's action should also consider the points above.

3. *PRINCE MBONISI* AND THE EQUALITY ARGUMENT

As noted above, it is possible, for a constitutional argument to be made in favour of Prince Simakade as a candidate for the throne. The possibility of Prince Simakade contending for the throne was hinted at in *Zulu v Mathe*.[65] Prince Mbonisi argued that the process by which Prince Misuzulu was identified as King was flawed in its failure to develop a selection criteria required under section 2(1) of the Leadership Act.[66] Section 2(1) of the Leadership Act provides that customary law governing the recognition of a king and queen must (a) prevent unfair discrimination; (b) promote equality; and (c) seek to progressively advance gender representation in the succession to positions of traditional leadership.[67] It is against these requirements under section 2(1) of the Leadership Act that the discussion surrounding Prince Simakade's mother's status as a spinster arose.[68] The argument that appears to be pushed is that should an investigative committee be appointed pursuant to the President's action of recognising Prince Misuzulu as King be invalidated, Prince Simakade might be identified as a candidate for the throne. The questions to be answered are as follows: Could a constitutional argument in terms of section 2(1) of the Leadership Act read with section 9(3) of the Constitution pass, and if yes, could the investigative committee identify Prince Simakade as king despite his mother's being a spinster?

The starting-point would be *Mthembu v Letsela*, wherein it was held that the development of an institution of customary law by the court rests on a proper investigation of such institution within the confines of the Constitution.[69] Such an investigation accounts for both past and present practices.[70] Madondo AJP correctly stated that customary law should not be developed "willy-

[65] *Zulu v Mathe* paras 96–99.
[66] Zulu v Mathe para 96.
[67] *Zulu v Mathe* para 96.
[68] *Zulu v Mathe* para 96.
[69] *Mthembu v Letsela* [2000] ZASCA 181 para 47. See also *Bhe v Khayelitsha Magistrate* 2005 (1) SA 580 (CC) para 7; *Zulu v Mathe* para 96.
[70] *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC) 44–49.

nilly".[71] On the other hand, the *Shilubana v Nwamitwa* precedent provides that communities that observe customary law (inclusive of traditional authorities) have a right to develop their living customary law in line with the Constitution.[72] Where a rule of customary law appears to be in potential conflict with the Constitution, as a remedy it may be developed to be made more consistent with the latter.[73] Should such development prove impossible, the rule will be struck off.[74] This entails a constitutional analysis involving a balancing exercise between the customary law itself and the need to develop it in line with the Constitution.[75] A *prima facie* violation must first be established and then evaluated against any possible justification for its existence (akin to the *Harksen v Lane* test for unfair discrimination).[76]

The court noted that kingship under Zulu customary law stems from the status of the mother.[77] A king is chosen from amongst the sons of the queens, wives of the late king.[78] Prince Simakade's mother does not meet this criterion being a spinster and never actually married to the late king.[79] Even if she was a queen, precedent goes to the son of the Queen Reagent or Great Queen who would have been selected by the king prior to his death.[80] This suggests differences in statuses of the queens by virtue of seniority.[81] A case of *prima facie* discrimination on the basis of marital status can therefore be made in favour of Prince Simakade. If all the women in question had sons for the king, why should they be treated differently? Hence, the first leg of the inquiry is satisfied.

In relation to the second leg of the inquiry, I submit, that there are sound justifications that can be made for the existence of this differentiation. Shamase indicates that, historically, Zulu queens had more privileges than responsibilities but did have responsibilities nonetheless.[82] Shamase refers to

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[71] *Zulu v Mathe* para 96.
[72] *Shilubana v Nwamitwa* paras 43–45. See also section 211(2) of the Constitution.
[73] *Shilubana v Nwamitwa* paras 43–49.
[74] *Bhe v Khayelitsha Magistrate* paras 218–222.
[75] Section 39(2) of the Constitution.
[76] 1998 (1) SA 300 (CC) paras 50–60.
[77] *Zulu v Mathe* para 99. See also Madondo MI *The role of traditional courts in the justice system* (2017) at 26.
[78] *Zulu v Mathe* para 99.
[79] *Zulu v Mathe* para 99.
[80] *Zulu v Mathe* para 99.
[81] *Zulu v Mathe* para 99. A hierarchy exists amongst Zulu queens with the Great Queen being the most senior.
[82] Shamase MZ "The royal women of the Zulu monarchy through the keyhole of oral history: Queen Nandi (c. 1764 – c. 1827) and Monase (c. 1797 – c. 1880)" (2014) 6(1) *Inkanyiso Jnl Hum & Soc Sci* 1. See also Ntuli HS "The role of women in shaping the Zulu kingdom in the late 18th and 19th century" (2020) 18(1) *Gender & Behaviour* 14885 at 14887.

Zulu queens as "[w]omen kingmakers".[83] An example is Queen Regent Mkabayi, who ruled as a regent after the passing of Jama until her brother Senzangakhona came of age.[84] One should be mindful that the role of queen regent at the time was largely political. She had previously been a military leader for the regiment ebaQulusini.[85] Queen Mkabayi was also instrumental in Dingane's rise to power in that she plotted Shaka kaSenzangakhona's assassination.[86] As queen regent, she was politically influential, playing both an administrative and political role. In this regard, she made a king. Although Shamase takes the stance that the role played by the queens such as Mkabayi was unheard of at the time, it became commonplace after. It marked the starting point of a Zulu custom of queen regents such as Mkabayi being instrumental in the making of kings.[87]

At present, the responsibilities may be different, but they do exist. When King Goodwill died, his wife Queen Mantfombi Dlamini became regent and "made" Prince Misuzulu, her son, heir to the Zulu throne, as Madondo AJP points out.[88] Where historically such a role had political significance, at present she takes care of affairs in the Zulu kingdom in her capacity as queen regent.[89] It would seem unjust to deny her contributions and substitute them for that of someone else who might not have contributed to the same extent. It is on this basis that I find it justifiable that Prince Misuzulu be made king instead of Prince Simakade.[90]

In line with section 36(1) of the Constitution, I contend that Prince Simakade's right to the throne has been limited justifiably. There is a reason why the mother's status is treated differently given that mother was a spinster. It is the status of the mother that makes a king. This is justifiable because queens, particularly queen regents, contribute to governing the Zulu kingdom. Notably, Queen Mantfombi became queen regent after the passing of King Goodwill – hence Prince Misuzulu's claim to the throne. At any rate, Prince Simakade still has a claim to the throne should all the other heirs be absent.[91] This serves as a reasonable minimum limitation to his right to the

[83] Shamase MZ "Women kingmakers: The case of Zulu Princess Mkabayi kaJama (c. 1750 – 1843)" (2017) 15(4) *Gender & Behaviour* 10390. See Ntuli (2020) at 14888.
[84] Shamase (2017) at 10392.
[85] Shamase (2017) at 10391.
[86] Shamase (2017) at 10393.
[87] Shamase (2017) at 10391–10393. See Weir J "I shall use her to rule: The power of 'royal' Zulu women in the pre-colonial Zulu kingdom" (2000) 43 *South African Historical Journal* 3 at 4.
[88] *Zulu v Mathe* para 99.
[89] Shamase (2017) at 10391–10393.
[90] I acknowledge that my presentation of Zulu history might be limited, but believe it is still sufficient for the purposes of the argument.
[91] *Zulu v Mathe* para 99.

throne.[92] As such, I am of the view that a constitutional argument by Prince Mbonisi on behalf of Prince Simakade along the lines of equality would probably not pass.

4. CONCLUSION

The President erred in not appointing an investigative committee – this step ought to have been taken from the moment there were signs of a potential dispute over the Zulu throne within the royal family. However, I maintain the stance that such action does not invalidate the position of Prince Misuzulu as King of the AmaZulu. The nature of the interdict sought by Prince Mbonisi called for an audit of the procedure by which Prince Misuzulu was identified as king, as contemplated in section 8(1) and (3) of the Leadership Act. As such, the court acted *sui generis* the functions of the investigative committee. Also, at the time of the recognition, there was a court order dismissing an application to interdict the identification and recognition of the king. It had not been appealed and hence was final. There was no contender for the Zulu throne apart from Prince Misuzulu. Even if there were and Prince Simakade posed as a contender, his mother's status as a spinster is likely to have rendered him ineligible for the throne in Prince Misuzulu's stead. An application of the equality test would be insufficient, as there are reasons justifying his not being a candidate for the throne. I thus find it unlikely that on appeal the position of Prince Misuzulu as *Isilo*, King of the AmaZulu, would change.

BIBLIOGRAPHY

Books

Madondo MI *The role of traditional courts in the justice system: Acting within the provisions of the Constitution* (2017)

Rautenbach C *Introduction to legal pluralism in South Africa* 5th ed Durban: LexisNexis (2018)

Journals

Ntuli HS "The role of women in shaping the Zulu kingdom in the late 18th and 19th century" (2020) 18(1) *Gender & Behaviour* 14885-14896

[92] Section 36(1) of the Constitution.

Shamase MZ "The royal women of the Zulu monarchy through the keyhole of oral history: Queens Nandi (c. 1764 – c. 1827) and Monase (c. 1797 – c. 1880)" (2014) 6(1) *Inkanyiso Journal of Humanities & Social Sciences* 1-14

Shamase MZ "Women kingmakers: The case of Zulu Princess Mkabayi kaJama (c. 1750–1843)" (2017) 15(4) *Gender & Behaviour* 10390-10401

Wallis M "Interpretation before and after Natal Joint Municipality Pension Fund v Endumeni Municipality 2012 4 SA 593 (SCA)" (2019) 22 *PELJ/PER* 1-29

Weir J "I shall use her to rule: The power of 'royal' Zulu women in the pre-colonial Zulu kingdom" (2000) 43 *South African Historical Journal* 3-23

Cases

Bhe v Khayelitsha Magistrate 2005 (1) SA 580 (CC)

Bhekuzulu and Others v President of the Republic of South Africa and Others [2023] ZAGPPHC 1982

Capitec Bank Holdings Ltd v Coral Lagoon Investments 194 (Pty) Ltd 2022 (1) SA 100 (SCA)

Economic Freedom Fighters v Gordhan; Public Protector v Gordhan 2020 (6) SA 325 (CC)

Harksen v Lane 1998 (1) SA 300 (CC)

Hoban v Absa Bank Ltd t/a United Bank 1999 (2) SA 1036 (SCA)

Mthembu v Letsela 2000 ZASCA 181

Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)

National Treasury v Opposition to Urban Tolling Alliance 2012 (6) SA 223 (CC)

Prince Mbonisi Bekithemba Ka Bhekuzulu and Others v President of the Republic of South Africa and Others [2023] ZAGPPHC 1982

Setlogelo v Setlogelo 1914 AD 221

Shilubana v Nwamitwa 2009 (2) SA 66 (CC)

TKW Agricultural Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd 2023 (5) SA 163 (SCA)

Zulu v Mathe [2022] ZAKZPHC 6

Legislation

Constitution of the Republic of South Africa, 1996

KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005

Promotion of Administrative Justice Act 3 of 2000

Traditional Leadership and Khoisan Act 3 of 2019