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Abstract

Traditional leadership is constitutionally entrenched in section 212 of the South African *Constitution*, 1996. As it is the oldest form of government in the country, there is always curiosity pertaining to matters of traditional leadership. The place of traditional leadership in a democracy, where leaders are elected, is also debatable. However, the recent events in traditional communities, including the death of certain notable traditional leaders and the legal tussles that engulfed their nations following their deaths, have sparked an interest in the law regarding the recognition of traditional leaders. This article, therefore, critically discusses the law regarding the appointment of traditional leaders. It discusses the statutory law and the customary law of hereditary succession, as well as the role of royal families in governance. It also considers some contentious issues, such as the succession of people born out of wedlock and of women into positions of traditional leadership.

Keywords

Traditional leadership; hereditary succession; royal family.

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1 Introduction

Traditional leadership is the oldest form of government in South Africa. Even before colonialism, traditional leaders held a lot of power and had authority over a number of things, including social welfare, judicial functions, land and the economy.[1] Traditional leaders were recognised as legitimate leaders and they possessed authority. Arguably, this is the case to this day – especially in the rural areas and semi-rural areas. In their nature, regal traditional leadership positions are hereditary. However, non-regal traditional leadership positions, such as the membership of traditional councils and the positions of headmen or headwomen, are not hereditary. In a hereditary system a leader is born and not elected.[2] While this may be seen as controversial in a constitutional democracy, what should be borne in mind is that traditional leadership has the support of the *Constitution of the Republic of South Africa*, 1996. The fact that it has such support does mean that the institution must comply with the broader framework of the *Constitution*.[3]

Recent events in various traditional communities in South Africa have among other things provoked curiosity about the law regarding the recognition of traditional leaders. These events include the prosecution, conviction,[4] release[5] and re-installation of the AbaThembu King Buyelekhaya Dalindyebo (King Dalindyebo),[6] and the bowing[7] of various notable traditional leaders including Gcaleka/AmaXhosa King Zwelonke Sigcawu,[8] AmaRharhabe Queen Noloyiso Sandile (born Her Royal Highness Princess Nomusa Zulu kaBhekuzulu),[9] Bapedi King Victor

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1 Lutabingwa, Sabela and Mbatha 2016 *Politeia* 74.

2 George and Binza 2011 *Journal of Public Administration* 950.

3 Ntlama 2020 *PELJ* 3.

4 Evans 2013 https://mg.co.za/article/2013-07-17-dalindyebo-the-tyrant-the-case-against-the-king/.

5 Tandwa 2019 https://www.news24.com/news24/just-in-king-dalindyebo-released-from-prison-20191223.

6 Feni 2020 https://www.timeslive.co.za/news/south-africa/2020-06-23-premier-restores-dalindyebos-throne-demands-azenathi-vacate-great-place/.

7 Traditionally, a traditional leader (king or *inkosi*) does not "die". A king or *inkosi*'s death is referred to as *ukukhothama* or to bow.

8 Feni 2019 https://www.timeslive.co.za/news/south-africa/2019-11-14-amaxhosa-king-sigcawu-has-died/.

9 Feni 2020 https://www.timeslive.co.za/news/south-africa/2020-07-09-amarharhabe-queen-noloyiso-sandile-dies-after-short-illness/.

Thulare,[10] Inkosi Thandisizwe Diko of Amabhaca[11] and AmaZulu King Zwelithini KaBhekuzulu,[12] to name a few.

Following the bowing of the above-mentioned traditional leaders, succession issues engulfed their respective nations. Chief among these issues were who would succeed them, how the successor would be chosen and who was entitled to participate in the selection of the successor. Without fail the matters ended in court, and they often resulted in protracted litigation. This endless litigation raises an interesting question regarding the law on the recognition of traditional leaders in South Africa and the role of a royal family in the identification of a successor. This article is a critical discussion of two issues, namely the law relating to the recognition of traditional leaders in South Africa and the role of a royal family in the identification of a successor.

The article starts with an exposition of the law on the recognition of traditional leaders. It shows that the recognition is done in accordance with statutory law and customary law. It sets out the salient statutory provisions and then follows this up with a critical discussion thereof. Applicable customary law is also discussed. Since there are various traditional communities following different customary laws and customs of hereditary succession in South Africa, the article discusses only the law of a few traditional communities. The role of the royal family is then set out and critically considered. As shown below, statutes provide that the royal family must identify a successor in terms of the applicable customary law and custom. This raises a number of questions. The first is who forms part of the royal family. This question is important because, as will be shown below through case law, it has an impact on the validity of decisions taken at meetings. Another question regards the extent of the role of the royal family. Is the royal family expected to rubberstamp customary law by simply applying existing rules? To what extent may the royal family depart from the pre-existing rules of customary law? Some of these questions have received the attention of the courts, and these will be referred to.

2 The legislative framework for the recognition of traditional leaders

In line with section 211(2) of the *Constitution*, the recognition of traditional leaders is regulated by national legislation and the provincial legislation. It must be noted that it is not all of the nine provinces of South Africa that have

10 Singh 2021 https://www.timeslive.co.za/news/south-africa/2021-01-06-bapedi-king-victor-thulare-iii-dead-at-40/.

11 Pheto 2021 https://www.timeslive.co.za/news/south-africa/2021-02-22-bhaca-chief-thandisizwe-diko-dies-in-east-london-hospital/.

12 Eyewitness News 2021 https://ewn.co.za/2021/03/12/zulu-king-goodwill-zwelithini-dies-aged-72.

traditional leaders. For instance, the Western Cape does not have any recognised traditional leader. It therefore does not have any provincial legislation on traditional leadership. Also, the Western Cape does not have a House of Traditional Leaders. Gauteng is a unique province. Although there may be a number of traditional leaders that either reside or carry out work in Gauteng, these traditional leaders are linked to provinces such as KwaZulu-Natal, the Eastern Cape or any other neighbouring province.[13] Gauteng has only six recognised traditional leaders, comprising two senior traditional leaders[14] and four headmen and headwomen.[15] The senior traditional leaders are those of AmaNdebele A Lebelo and AmaNdebele A Ndzundza.[16]

The provincial legislation must be read with the national legislation. Although there is nothing in the national legislation to suggest this, in the event of any clash between national and provincial legislation presumably the provisions of the national legislation would prevail.

2.1 National legislation

The *Traditional Khoi-San Leadership Act*[17] (hereafter the *TKLA*) is the national legislation that regulates the recognition of traditional leaders in South Africa. This Act commenced on 1 April 2021[18] and it followed on the failure of its predecessor, the *Traditional Leadership and Governance Framework Act*[19] (hereafter *TLGFA*), to expressly recognise the Khoi-San communities and their traditional leaders as traditional communities. The *TLGFA* also failed because of the concerns that it denied people living under traditional authorities several constitutional rights and thus distinguished them from the rest of the country that enjoyed the benefits of post-apartheid citizenship.[20] The *TKLA* recently met a similar fate when in *Mogale v*

13 Staff Writer 2018 https://businesstech.co.za/news/government/263191/south-africa-has-a-huge-number-of-traditional-leaders-heres-how-much-they-get-paid/. The data serves to illustrate that there are few traditional leaders in Gauteng.

14 Department of Cooperative Governance and Traditional Affairs 2017 https://www.cogta.gov.za/index.php/2017/10/20/provincial-houses-traditional-leaders-constituted-successfully/.

15 Gauteng Cooperative Governance, Traditional Affairs and Human Settlement Portfolio Committee 2022 https://www.gpl.gov.za/wpcontent/uploads/2022/03/CoGTA-FIS-Oversight-Report-on-the-Department-of-CoGTA-Sitting-22-March-2022.pdf.

16 Gauteng Cooperative Governance, Traditional Affairs and Human Settlement Portfolio Committee 2022 https://www.gpl.gov.za/wpcontent/uploads/2022/03/CoGTA-FIS-Oversight-Report-on-the-Department-of-CoGTA-Sitting-22-March-2022.pdf 8.

17 *Traditional Khoi-San Leadership Act* 3 of 2019 (*TKLA*).

18 See Proc 38 in GG 43981 of 11 December 2020.

19 *Traditional Leadership and Governance Framework Act* 41 of 2003 (TLGFA). This Act commenced on 19 December 2003 and was repealed on 1 April 2021, when its successor, the *TKLA*, came into force.

20 *Mogale v Speaker of the National Assembly* 2023 6 SA 58 (CC) para 8.

Speaker of the National Assembly[21] the Constitutional Court declared it invalid for lack of public participation. However, the declaration of invalidity was suspended for 24 months to allow Parliament to re-enact the *Act* in a manner that is consistent with the *Constitution,* or to pass a new Act.[22] Nevertheless, the Constitutional Court held that the *TKLA* will remain in force in the interim because of its unique feature in recognising Khoi-San communities and leadership and the work that had already been done in implementing it. The court observed that to restore the *TLGFA* would have a disruptive impact as the latter Act did not recognise the Khoi-San communities and Khoi-San leadership.[23]

It is important to point out that for several years into democracy there was no new legislation dealing with the recognition of traditional leaders until the enactment of the *TLGFA*. This delay was despite the explicit constitutional recognition of traditional leadership in section 212 of the *Constitution* and the same provision explicitly calling for an enactment on traditional leadership. Prior to the *Constitution* the only notable piece of legislation that partially dealt with traditional leadership was the notoriously controversial *Black Administration Act.*[24] One may argue that an enactment regarding traditional leadership was not as pressing as some of the legislation that was enacted soon after the attainment of democracy. Granted! However, what should have been considered is that traditional leaders and their communities were among the first victims of colonialism and apartheid. Ignoring them simply made them restless. Some of this restlessness continues to this day. Whether this restlessness is justified or not is another matter, but it is not in the interest of nation building to have restless leaders. Traditional leaders have a great role to play in building their communities and they cannot just be pushed back or ignored for too long.

2.2 The Traditional and Khoi-San Leadership Act

2.2.1 General purpose of the Act

Since the *TKLA* is still in force, it is worthwhile discussing its provisions. Even when new legislation is enacted in line with the judgment in *Mogale v Speaker of the National Assembly*, one strongly doubts that the forms of the provisions discussed below will be any different from their current form. The main objectives of the *TKLA* are to provide for the recognition (and the withdrawal thereof) of traditional and Khoi-San communities,[25] the recognition of Khoi-San and traditional leadership positions, the recognition

21 *Mogale v Speaker of the National Assembly* 2023 6 SA 58 (CC).
22 *Mogale v Speaker of the National Assembly* 2023 6 SA 58 (CC) para 87.3.
23 *Mogale v Speaker of the National Assembly* 2023 6 SA 58 (CC) para 84.
24 *Black Administration Act* 38 of 1927.
25 See ch 2, part 1 of the *TKLA*.

(and withdrawal thereof) of traditional and Khoi-San leaders,[26] the establishment and recognition of traditional councils and Khoi-San councils, the establishment and composition of the National House of Traditional and Khoi-San Leaders and the establishment and composition of the Provincial Houses of Traditional and Khoi-San Leaders.[27] The *TKLA* also provides for the establishment, composition and functions of the commission on Khoi-San matters.[28]

2.2.2 Traditional leadership positions under the TKLA

This part of the article will focus primarily on the provisions relating to the recognition of traditional leaders. The *TKLA* recognises the following traditional leadership positions: kings/queens, principal traditional leaders, senior traditional leaders, headmen, and headwomen.[29] The *TKLA* is also innovative in recognising the Khoi-San communities, a senior Khoi-San leader and a branch head.[30] A king is referred to by various names in the different ethnic groups. A Zulu king is referred to as *isilo*,[31] In isiXhosa, Mpondo, Thembu, Gcaleka and Rharhabe it is *ikumkani* or *ikumkanikazi* (or queen)[32] and in Sepedi it is *kgosi*.[33] In most African kingdoms a queen is the consort of a king. However, in the Balobedu kingdom the rain queen reigns in her own right.[34] The translation of other traditional leadership positions will appear below as the context dictates.

A principal traditional leader was defined in the *TLGFA* as a traditional leader "under whose authority, or within whose area of jurisdiction, senior traditional leaders exercise authority in accordance with customary law".[35] The *TLGFA* defined a king/queen regnant in the same terms as a principal traditional leader. However, it is clear that a principal traditional leader is not a king or a queen regnant. Instead, a principal traditional leader exercises authority over a limited number of senior traditional leaders, whereas a king or queen exercises authority over the whole nation.[36] For example, the Zulu king exercises authority over the whole of the Zulu nation and not just selected senior traditional leaders.

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26 See ch 2, part 2 of the *TKLA*.
27 The Preamble of the *TKLA*.
28 See ch 4 of the *TKLA,* which deals specifically with the work of the commission on Khoi-San matters.
29 Generally, see s 7(1)*(a)* of the *TKLA*.
30 Generally, see s 7(1)*(b)* of the *TKLA*.
31 Bekker 2011 *PELJ* 31.
32 Diko 2023 *Southern African Linguistics and Applied Languages Studies* 7.
33 Otlogetswe 2018 *Nomina Africana* 57.
34 Motasa and Nortje-Meyer 2021 *Pharos Journal of Theology* 1.
35 Section 1 of the *TLGFA*.
36 Section 63(8)(*c*) of the *TKLA*.

A senior traditional leader is *"inkosi*" or "*kgosi*". The difference between a king and a senior traditional leader is that a king has authority over the whole nation, while a senior traditional leader has authority over a defined jurisdictional area or traditional community within the nation. Therefore, a senior traditional leader exercises authority under the principality of a king, or in limited circumstances, under the principality of a principal traditional leader. It is interesting to pause and question if a principal traditional leader is a position that exists under customary law, or whether it is simply a fiction of the *TLGFA* and its successor, the *TKLA*. On a reading of section 10A of the *TLGFA* and section 63 of the *TKLA*, it appears that a principal traditional leader is one who does not qualify as a king but possesses more authority than a senior traditional leader.

Finally, headmen and headwomen, "*izinduna*", are traditional leaders who serve under a king, queen, principal traditional leader and senior traditional leader, but over a smaller jurisdictional area.[37] However, unlike kings, queens, principal traditional leaders and senior traditional leaders, the positions of headmen and headwomen are not hereditary.[38] They serve at the behest of the hereditary leader and may, therefore, be disposed of by the hereditary leader under whom they serve.

2.2.3 The recognition of traditional leaders

Section 8 of the *TKLA* is titled "recognition of kings or queens, principal traditional leaders, senior traditional leaders, headmen or headwomen". However, this section really deals with the process to be followed leading to the recognition of a traditional leader. As will be shown below, the process is three-pronged. The first process is the identification, the second is the application for recognition and the final process is the recognition process itself.[39] Each of these processes has a designated functionary. Should anyone else act in the place of the functionary, the process will become invalid. It appears that in each process, the functionary cannot delegate its authority.

In terms of section 8(1), whenever there is a traditional leadership vacancy, the royal family must, within 90 days of the occurrence of the vacancy, and with due regard to customary law, identify a successor who qualifies in terms of customary law and custom. The use of the word "must" in section 8(1) raises an interesting dynamic, especially in the African context. It is

37 Section 1(1)(viii)(*a*) of the *TKLA*.

38 Section 8(2)(*b*) of the *TKLA*.

39 *Netshimbupfe v Mulaudzi* 2018 3 All SA 397 (SCA) (hereafter *Netshimbupfe v Mulaudzi*) para 8. In this decision, the Supreme Court of Appeal (SCA) referred only to the recognition and the identification stages. But in between these two stages is the application for recognition, which is equally important. Without it, the process would not progress to the recognition phase.

widely known that after the passing of a person, a mourning period is observed varying from three months to a year, depending on who passed away.[40] The 90-day rule certainly coincides with the mourning period. A question arises regarding the consequences if the royal family fails to identify a successor within the 90 days. The Act is silent on this. It is hereby suggested that the legislature ought to have used a word that makes it clear that the royal family is not compelled to identify a successor within the 90 days. The royal family may identify a regent for the time being.[41]

Nonetheless, a distinction is drawn between the process for the identification of a king or queen and the identification of a principal traditional leader, senior traditional leader and headman or headwoman.

If the vacancy is for a kingship or queenship position, the royal family must apply to the president for the recognition of the person who has been identified to succeed in terms of customary law.[42] The application must be accompanied by the particulars of the person who has been identified to succeed[43] as well as the reasons for the identification of the person as king or queen.[44] The president may, after consultation with the minister of the Department of Cooperative Governance and Traditional Affairs and the premier of the province concerned, recognise the person so identified as king or queen.[45] In the case of a principal traditional leader, the recognition is carried out by the premier of the province concerned.[46]

In the case of vacancies for senior traditional leaders, headmen and headwomen, the *TKLA* further draws a distinction between hereditary and non-hereditary positions.[47] The position of a senior traditional leader is hereditary; whereas the positions of headmen and headwomen are not.[48] The royal family must, within 90 days of the occurrence of a vacancy for a senior traditional leader, identify a person who qualifies to succeed in terms of customary law or custom.[49] The royal family must then, through relevant customary structure, apply to the premier for the recognition of the person so identified. The application must be accompanied by the particulars of the person.[50] The *TKLA* does not require the premier to be furnished with reasons for the identification of the person in question. Nevertheless, one does foresee that in practice the reasons will naturally be required. Not

40 Kotze, Els and Rajuili-Masilo 2012 *Death Studies* 754.
41 Section 12 of the *TKLA*.
42 Section 8(1)*(a)*(ii) of the *TKLA*.
43 Section 8(1)*(a)*(ii)*(aa)* of the *TKLA*.
44 Section 8(1)*(a)*(ii)*(bb)* of the *TKLA*.
45 Section 8(1)*(b)* of the *TKLA*.
46 Section 8(1)*(c)* of the *TKLA*.
47 See generally s 8(2) of the *TKLA*.
48 Section 8(2)*(b)* of the *TKLA*.
49 Section 8(2)*(a)* of the *TKLA*.
50 Section 8(2)*(c)* of the *TKLA*.

requiring any reasons would simply open the process to abuse and would sanction ignorance of the rules of customary law in the identification process.

According to the *TKLA*, headmen and headwomen are elected by the community concerned.[51] It is the local traditional council that applies to the premier for the recognition of the headmen and headwomen.[52]

The recognition is effected through the publication of a notice of recognition in the *Gazette*. In the case of the recognition of a king or queen, the president publishes a notice in the national *Gazette.* In the case of the recognition of a principal traditional leader, senior traditional leader, headman or headwoman, the premier of the province concerned publishes the notice of recognition in the *Provincial Gazette*.[53] The president or premier then issues a certificate of recognition to the person concerned,[54] and informs the national and provisional houses of traditional leaders of the recognition.[55]

If it happens that the identification was not done in accordance with customary law, the president or premier, depending on the nature of the identification being disputed, may cause an investigation to be carried out by a designated committee. The committee must report on whether the identification was done in accordance with customary law, and if it was not, the committee must state who should have been identified. The report must be referred to the royal family for their comments; and thereafter, the president or premier must identify a person by notice in the *Gazette* or provincial *Gazette*.[56]

It is important also to indicate that the recognition of a person will be withdrawn should the person be convicted of an offence with a sentence of more than 12 months imprisonment without the option of a fine, is declared mentally unfit or mentally disordered by a court, or no longer permanently resides in the area of the kingship or queenship council, principal traditional council or traditional council, whichever is applicable.[57] There are other grounds for which recognition may be withdrawn. These are removal from office in terms of the code of conduct or transgression of a rule of customary

51 Section 8(2)*(b)* of the *TKLA*. The Eastern Cape is a good example where communities elect headmen and headwomen. See *Premier, Eastern Cape v Ntamo* 2015 6 SA 400 (ECB).
52 Section 8(2)*(c)* of the *TKLA*.
53 Section 8(3)*(a)* of the *TKLA*.
54 Section 8(3)*(b)* of the *TKLA*.
55 Section 8(3)*(c)* of the *TKLA*.
56 Section 8(4) generally of the *TKLA*.
57 Section 9(1)*(a)* of the *TKLA*.

law or custom.[58] The recognition will also be withdrawn if ordered by a court.[59]

3 Provincial legislation

As pointed out above, eight of the nine provinces in South African each have local legislation dealing with the recognition of traditional leaders. With the recognition of the Khoi-San traditional communities, who mostly reside in the Western Cape and the Northern Cape, the Western Cape may have to enact local legislation to address matters that may not be addressed in the national legislation. It is beyond the scope of this article to discuss all provincial pieces of legislation. As a result, only two provinces' legislation will be briefly discussed because of their unique features, namely, the Eastern Cape and KwaZulu-Natal.

The Eastern Cape has a number of traditional leaders at the level of kings, namely the AbaThembu king, AmaRharhabe king, AmaMpondo aseNyandeni king, AmaMpondo aseQaukeni queen[60] and AmaXhosa king. In this province traditional leadership is governed by the *Eastern Cape Traditional Leadership and Governance Act* of 2017[61] (hereafter the *ECTLGA* 2017). The notable feature of this Act is that while it recognises the position of kings and queens (*ikumkani* and *ikumkanikazi*), it does not make specific provision for the recognition of kings and queens.[62] Instead the *ECTLGA* 2017 has a blanket provision on the recognition of all traditional leaders.[63] The only plausible explanation for this omission is that the *ECTLGA* 2017 defers to the national legislation on this specific issue.

Another notable feature regarding the *ECTLGA* 2017 is that, unlike the national legislature, which allows the royal family up to 90 days to identify a successor, the *ECTLGA* 2017 provides for a blanket allowance of only 14 days.[64] The *ECTLGA* 2017 also requires the premier to invite public comments on the intended recognition of the person who has been identified by the royal family.[65] The premier is enjoined to consider the comments before making the recognition.[66]

58 Section 9(1)*(b)* of the TKLA.
59 Section 9(1)*(c)* of the TKLA.
60 The queenship of Amampondwe aseQaukeni is currently being contested in a string of *Sigcau* cases, some of which are referred to in this article.
61 *Eastern Cape Traditional Leadership and Governance Act* 1 of 2017 (*ECTLGA* 2017).
62 See s 21 of the *ECTLGA* 2017.
63 See generally s 23 of the *ECTLGA* 2017.
64 Section 23(1)*(a)* of the *ECTLGA* 2017.
65 Section 23(1)*(b)* of the *ECTLGA* 2017.
66 Section 23(2) of the *ECTLGA* 2017.

KwaZulu-Natal (hereafter KZN) is a unique province in that it has only one king (*isilo*). In KZN the institution of traditional leadership is governed by the *KwaZulu-Natal Traditional Leadership and Governance Act*[67] (hereafter the *KZNTLGA*). The *KZNTLGA* is aligned with national legislation and must be read closely with it. The purposes of the *KZNTLGA* are to provide for the recognition of traditional leaders and to provide for the recognition of *Isilo* as the monarch of KwaZulu-Natal.[68] It recognises three traditional leadership positions, namely *isilo*, *inkosi* and *induna* – these being kingship/queenship, senior traditional leadership and headmanship/headwomanship respectively.[69] The *KZNTLGA* also recognises *isiphakanyiswa*.[70] *Isiphakanyiswa* is an elected senior traditional leader whose position is not hereditary.[71]

In general, whenever a vacancy arises, be it for *isilo*, *inkosi* or *induna*, the royal families play a vital role. However, with respect to the recognition of *isilo*, what distinguishes KZN from other provinces is that the royal family must inform the premier and the member of the provincial executive council responsible for traditional affairs of the identification of the monarchy. The premier must forward the matter to the president for recognition.[72]

An interesting feature of the *KZNTLGA* is that it allows a royal family "a reasonable time" to identify a successor, as opposed to the 90-day rule of the national legislation. Another interesting feature is that while it provides for the recognition and removal of all other traditional leaders that are recognised in KZN, it does not provide for the removal of *isilo*. Of course, this does not mean that *isilo* cannot be removed. Just like the recognition, the removal will have to be carried out in terms of national legislation.

4 Customary law of hereditary succession

The statutes discussed above make it clear that it is the role of the royal family to identify a successor in terms of customary law or custom. This part of the article discusses the customary law of hereditary succession. The immediate challenge that one also faces with this part of the discussion is that there are various traditional communities following different customs. It is beyond the scope of this article to deal with all of them at great length.

Before embarking on a discussion of the customary law of hereditary succession, it is vital to point out that the legal positions discussed below are not cast in stone. The practices and customs may change gradually

67 *KwaZulu-Natal Traditional Leadership and Governance Act* 5 of 2005 (*KZNTLGA*).
68 The Preamble of the *KZNTLGA*.
69 Section 16 of the *KZNTLGA*.
70 Section 29(1) of the *KZNTLGA*.
71 Section 29(2) of the *KZNTLGA*.
72 Section 17 of the *KZNTLGA*.

along with time. In *Yende v Premier of Mpumalanga Province* the court indicated that customary law by its nature is a constantly evolving system[73] and that where there is a dispute about the present form of any practice, tradition or custom, the parties must place evidence regarding the present form of the practice, tradition or custom before the court.[74] It is then the duty of the court to examine and acknowledge any developments, if they have occurred.[75] The court emphasised that it is the prerogative of a traditional community to develop its customary law in order for the customary law "to be compatible with the dynamic circumstances of the community."[76]

What follows below is a summarised discussion of the customs of selected traditional communities.

4.1 AbaThembu customary law of hereditary succession

AbaThembu of the Eastern Cape are part of a larger group of Xhosa-speaking people. Xhosa-speaking people comprise various people including amaMpondo, amBhaca, amaGcaleka and amaRharhabe. Their customary law is in many respects almost identical. Originally, the king (*ikumkani*) would marry several wives.[77] Among these were the great wife (*undlunkulu*),[78] the right-hand wife or first wife (*ikunene*)[79] and the consort (*iqadi*).[80] The son of the great wife would be the preferred successor. If the great wife did not have a son at the time the vacancy occurred, the son of the consort would step in and succeed his father. The son of the right-hand wife could not succeed; instead, he could establish a semi-independent community and rule over it.[81]

It is important to point out that in *Sigcau v The President of the Republic of South Africa*,[82] an impression was created that in exceptional circumstances

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73 *Yende v Premier of Mpumalanga Province* (80576/2014, A602/2017) [2019] ZAGPPHC 237 (26 June 2019) (hereafter *Yende v Premier*) para 23.

74 *Yende v Premier* para 23.

75 *Yende v Premier* para 23.

76 *Yende v Premier* para 24.

77 To be exact, the king would marry no less than seven wives: the great wives (*undlunkulu*), the right-hand wife, *iqadi* of the great wive, *iqadi* of the right-hand wife, the seed bearer wife, *umsengi* of the great wife and *umtshayelo* of the great house. See summary of a report by the Commission on Traditional Leadership Disputes and Claims 2014 https://www.gov.za/sites/default/files/gcis_document/201409/determination-matanzima-and-dalindyebo-paramountcies.pdf 15.

78 *Sigcau v Minister of Cooperative Governance and Traditional Affairs* 2017 3 All SA 608 (SCA) para 7 (hereafter *Sigcau 1*).

79 *Sigcau 1* para 7.

80 *Sigcau 1* para 7.

81 Commission on Traditional Leadership Disputes and Claims 2014 https://www.gov.za/sites/default/files/gcis_document/201409/determination-matanzima-and-dalindyebo-paramountcies.pdf 16.

82 *Sigcau v President of the Republic of South Africa* 2022 All SA 315 (SCA) (hereafter *Sigcau 4*).

the throne could go to the right-hand house. In this case a submission was made that if the great wife did not have any sons, the throne would go to the right-hand house.[83] It is not clear whether this submission was a general rule in contrast to the above, or an exception that applied only in cases where a king had fewer than three wives. In this case the king in question only had two wives. There was no consort to begin with. Perhaps the correct preposition is that the submission was an exception that applied only if the king had fewer than three wives.

Whatever the correct position is, the rules above remain in place. However, these rules are effective only if a king has several wives. The rules become redundant, obsolete or unclear if the king has only one wife or fewer than three wives. If a king has only one wife, logic would dictate that the first son of the first wife, who would automatically be the great wife, would succeed.

4.2 AmaZulu customary law of hereditary succession

In terms of Zulu customary law, the position regarding hereditary succession was stated as follows in *Umndeni (Clan) of Amantungwa v MEC for Housing and Traditional Affairs KwaZulu-Natal*:[84]

> the [successor to] the chieftainships is the heir of a deceased chief. In this way succession is retained within the Royal House. In essence the successor to a deceased chief will be the eldest son from the *indlunkulu.* (This means the first or the great house.) If the eldest son is dead or cannot take up the position, then that eldest son's senior male descendant: failing which the second son of the *indlunkulu*, failing which the senior male and so on through the sons of the *indlunkulu* and their descendants… [85]

The author observes that the word *indlunkulu* has a number of meanings. Generally, it refers to the wider royal family/house that includes various generations and their descendants. The word comprises two parts. The first part is "*indlu*", meaning house. The second part is "*nkulu*", which means big or great. The word is also used to refer to the first wife of *isilo* or *inkosi* and it is also used to refer to any woman who is married to the wider royal house. However, the term is never used to refer to the wife of *induna*. Neither is it ever used to refer to a wife belonging to the family of *induna*. As pointed out above, the position of *induna* is not hereditary and his or her family is not a royal family.

Another factor that is considered in identifying a successor in terms of Zulu law is the status of the mother of the candidate [or of the maternal

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83 *Sigcau 4* para 9.

84 *Umndeni (Clan) of Amantungwa v MEC for Housing and Traditional Affairs KwaZulu-Natal* 2011 2 All SA 548 (SCA).

85 *Umndeni (Clan) of Amantungwa v MEC for Housing and Traditional Affairs KwaZulu-Natal* 2011 2 All SA 548 (SCA) para 21. Also see *Yende v Premier* para 6. Although this case was against the premier of Mpumalanga Province, the applicable law was the Zulu law of hereditary succession.

grandfather of the candidate]. If the candidate's mother is a princess, her descendants will take preference, even if their mother is not the first wife.[86] By virtue of being a royal, the princess will be the great wife.

The position above provokes further thoughts regarding what would happen if a king has various royal wives. Will all of them be great wives? What happens if all or some of them bear sons for the king? Which among the sons will succeed his father? In *Zulu v Mathe*[87] it was pointed out that under Zulu customary law of hereditary succession, it was common for Zulu kings to name their successors before their death.[88] Indeed, King Shaka's father, Inkosi Senzangakhona, preferred and named Prince Sigujana as his successor.[89] Shaka cut Sigujana's reign short by orchestrating his assassination.[90] Among his sons, King Mpande preferred Prince Mbuyazi over Prince Cetshwayo.[91] However, the *TKLA* and the *KZNTLGA* do not recognise the nomination and identification through the will of the predecessor.[92]

Perhaps common sense will dictate that where a king has a number of royal wives, the first of the royal wives will be the great wife and her eldest son shall succeed. Since the *TKLA* and the *KZNTLGA* do not make provisions for the wishes of the predecessor to be considered, perhaps the wishes of the predecessor may influence the decision of the royal family and arguably, this may be in line with customary law and custom.

4.3 Tshivenda customary law of hereditary succession

Venda customary law of hereditary succession determines that the first-born son of the *dzekiso* wife usually succeeds.[93] *Dzekiso* wife means a royal wife and by implication, the *dzekiso* wife must come from a royal family.[94] If a traditional leader dies without having married a *dzekiso* wife, the family will marry one posthumously to bear an heir.[95] A male member of the royal family will be appointed to sow the seed. The first-born son born of the

86 *Zulu v Mathe* (2751/2021P 2752/2021P) [2022] ZAKZPHC 6 (2 February 2022) (hereafter *Zulu v Mathe*) para 97.
87 *Zulu v Mathe* para 97.
88 *Zulu v Mathe* para 88.
89 Khoza *Discussion of R.R.R. Dhlomo's Historical Novels* 73; Morrissey *Fugitive Queens* 40.
90 Bazza 2023 *VUNA JHIR* 3.
91 Khoza *Discussion of R.R.R. Dhlomo's Historical Novels* 66.
92 *Zulu v Mathe* para 89.
93 *Mphephu v Mphephu-Ramabulana* 2019 3 All SA 51 (SCA) (hereafter *Mphephu v Mphephu-Ramabulana*) para 28.
94 *Tshivhulana Royal Family v Netshivhulana* 2017 6 BCLR 800 (CC) para 3.
95 In *Tshivhulana Royal Family v Netshivhulana* 2017 6 BCLR 800 (CC) 4 a firstborn son could not succeed his father because he was not born of the *dzekiso* wife.

dzekiso wife will succeed the deceased/ However, until such time, a regent will be appointed.

In addition to the requirements above, a successor must be identified by the royal family in the presence of the *khadzi* and *ndumi*.[96]

4.4 Valoyi customary law of hereditary succession

Before *Shilubana v Nwamitwa*[97] the Valoyi customary law of hereditary succession followed the male line of descendants. The eldest son of a *hosi* (senior traditional leader) succeeded. As will be seen below, in the *Shilubana* case the constitutional court developed the Valoyi customary law of hereditary succession in so far as traditional authorities did not have the power to make changes that are in line with the *Constitution*, such as the identification of a woman as a *hosi*. Whether the flexible nature of customary law has accepted such changes remains open until such time as a similar situation arises. In the same vein, whether all the tribes of South Africa will voluntarily follow *Shilubana* without any judicial intervention remains to be seen.

4.5 Bapedi customary law of hereditary succession

According to Bapedi customary law of hereditary succession, there are two ways of ascending to a traditional leadership position, particularly a kingship. The first is that the first son of a *timamollo* wife (the great wife) is the heir presumptive. The *timamollo* wife was nominated by the royal family and the community. If the *timamollo* wife did not have a son to succeed, ancillary rules were applied. The second way of ascending to the throne was acquisition through might and bloodshed (the usurpation rule).[98] According to the usurpation rule, on the death of a king the heir presumptive would succeed. However, his succession was not final as anyone could lay a claim to the throne by challenging him through might and bloodshed. The victor would become king.

The case in *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims*[99] illustrates the usurpation rule in action. Some time in the 1800s Mampuru II, a son of a *timamollo* wife, was due to succeed Kgosi Sekwati on the latter's death. Unfortunately, Mampuru II was challenged by Kgosi Sekhukhune. Mampuru II fled and Kgosi Sekhukhune

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96 *Netshimbupfe v Mulaudzi* para 6; *Mphephu v Mphephu-Ramabulana* para 22, where it is stated that the *khadzi* (the sister of the incumbent ruler) would announce her choice of successor.

97 *Shilubana v Nwamitwa* 2002 9 SA 66 (CC) (herafter *Shilubana v Nwamitwa*).

98 *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims* 2015 3 BCLR 268 (CC) (hereafter *Bapedi Marota Mamone v Commission*) para 71.

99 *Bapedi Marota Mamone v Commission* para 71.

usurped the Bapedi kingship. Some time later Mampuru II returned and killed Kgosi Sekhukhune. After killing Kgosi Sekhukhune, Mampuru II immediately fled. For decades to come, the Bapedi community was seized with the question of the legitimate lineage of the Bapedi kingship between the descendants of Kgosi Sekhukhune and that of Mampuru II. This question would go unresolved until the decision under the present discussion.

In *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims* the Constitutional Court found that on the death of Kgosi Sekwati, Kgosi Sekhukhune became king through usurpation. Although Mampuru II later returned to lay claim to the throne, he did not become king as he immediately fled after killing Kgosi Sekhukhune. According to the majority of the court this was not consistent with successfully laying a claim to the throne in terms of the Bapedi hereditary law of succession as Mampuru II "did not exert his authority over the Bapedi nation".[100] In finding that the kingship resorted under the lineage of Kgosi Sekhukhune, the Constitutional Court stated that there was nothing in terms of the Bapedi hereditary law of succession to suggest that a usurping king could not pass kingship to his descendants.[101]

It is submitted that in the light of the Constitution that upholds the sanctity of life, the usurpation rule cannot be sustained. In this light the first son of a *timamollo* wife may succeed as king.

5 The royal family

5.1 The composition of the royal family

Although it is clear that it is the royal family that is entrusted with the identification of a successor, there are a few preliminary issues that are not as clear. The question of who forms part of the royal family is contentious. In terms of section 1 of the *TKLA*, the royal family is defined as "the core customary institution or structure consisting of immediate relatives of the ruling family within a traditional or Khoi-San community, who have been identified in terms of customary law or custom, and includes, where applicable, other family members who are close relatives of the ruling family."

The above definition would have been more helpful had it specified the persons who form part of the immediate family, immediate relatives and close relatives. For instance, it may have specified that the immediate family is the spouse(s), descendants and siblings of the reigning traditional leader. But the *TKLA* does not do this; even its predecessor, the *TLGFA*, did not

100 *Bapedi Marota Mamone v Commission* paras 88-90.
101 *Bapedi Marota Mamone v Commission* paras 99-108.

specify who formed part of the royal family. It is well known that African families tend to be big and that those who may otherwise be regarded as "relatives" may easily be close family members. For example, the siblings of a person's parents are close family members in the African context. Further, in the African context a close relative may not be as genealogically close.

The composition of the royal family is very important as it determines the validity of decisions taken at meetings of the royal family. A decision taken by an improperly constituted royal family will be invalid. In *Yende v The Premier of Mpumalanga*, decisions taken at a meeting convened by the Commission on Traditional Leadership Disputes and Claims were declared invalid because the key members of the royal family, being the surviving descendants of the deceased senior traditional leader, had not been provided with an opportunity to be present and to make contributions.[102] In *Yende v Yende*[103] (an appeal of *Yende v The Premier of Mpumalanga*), the SCA stated that "the biological children [of the late senior traditional leader] constituted the core members of the royal family".[104] The SCA further stated that "denying a party who has an interest in a matter the right to meaningful participation in a hearing renders the proceedings in question procedurally unfair."[105]

Further, one must carefully distinguish between the royal family and the royal council. The latter is a smaller body that normally oversees the work of the traditional leader.[106] It may comprise people who are not members of the royal family.[107] Even if the royal council were to comprise only members of the royal family, it cannot validly make decisions that are within the powers of the royal family. A meeting called by the royal council cannot entertain matters that are reserved for the royal family, such as the identification of a successor.

In *Netshimbupfe v Mulaudzi* the first appellant was identified by the royal family for the position of senior traditional leader of the Tshimbupfe traditional community, whereas the fifth respondent was identified by the royal council for the same position.[108] The first appellant approached the court for, among other things, an order setting aside the identification of the fifth respondent in favour of his identification. The High Court dismissed the application on the ground that the identification of the first appellant was not in accordance with the Venda law of hereditary succession in that the latter

102 *Yende v Premier* para 46.
103 *Yende v Yende* (1128/19) [2020] ZASCA 179 (18 December 2020).
104 *Yende v Yende* (1128/19) [2020] ZASCA 179 (18 December 2020) para 14.
105 *Yende v Yende* (1128/19) [2020] ZASCA 179 (18 December 2020) paras 17 and 22.
106 Section 19 of the *TKLA.*
107 See ss 16, 17 and 18 of the *TKLA* on the composition of royal councils.
108 *Netshimbupfe v Mulaudzi* para 2.

was not the first son.[109] On appeal before a full bench, the identification of the fifth respondent by the royal council was set aside on the ground that it had not been carried out in the presence of *khadzi* and *ndumi.*[110] On further appeal the SCA was critical of the decision of the full-bench as it implied that the presence of *khadzi* and *ndumi* at a royal council meeting would clothe the royal council with the powers of the royal family.[111]

5.2 The role of the royal family

Perhaps a great starting point in regard to the role of the royal family is the repealed *TLGFA*. Arguably this *Act*, though repealed, remains an important piece of legislation as the first enactment of its kind. Briefly, section 9(1)*(a)* of the *TLGFA*, which dealt with the recognition of kings and queens, made it a duty of the royal family to identify a person who qualified to succeed in terms of customary law. Under the *TLGFA* the royal family was (and still is) the traditional authority that was entrusted with the responsibility to identify the successor in terms of customary law, and to cause the details of the person so identified to be forwarded by the relevant structure to the relevant authority for recognition (the president or premier, depending on the level of recognition).

The fact that such a responsibility was conferred upon the royal family created the impression that the role of the royal family was more than simply rubberstamping the customary law of hereditary succession and endorsing male primogeniture. However, section 9(1)*(a)* and similar provisions made it clear that the royal family could not go beyond the prescripts of the customary law of hereditary succession. According to section 9(3), if there was evidence that the identification of a person was not in accordance with the customary law and custom, the president or the relevant premier, depending on the level of traditional leadership, could refer the matter to the House of Traditional Leaders for its recommendation,[112] or refuse to recognise the person so identified. The president[113] or the relevant premier was mandated to refer the matter back to the royal family for reconsideration.[114]

The provisions referred to above inhibited the powers of the royal family to be creative in the identification of a successor. In accordance with the customary law of hereditary succession of an overwhelming number (if not all) of traditional communities, the eldest son of the great house will succeed. If anyone other than the eldest son of the great house were to be

109 *Netshimbupfe v Mulaudzi* para 6.
110 *Netshimbupfe v Mulaudzi* para 6.
111 *Netshimbupfe v Mulaudzi* para 15.
112 Section 9(3)*(a)* of the *TLGFA*.
113 Section 9(3)*(b)* of the *TLGFA*.
114 Section 9(3)*(c)* of the *TLGFA*.

identified, the powers of the president or the relevant premier to refer the matter to investigations or even refuse to recognise the person identified, as pointed out above, were triggered.[115]

Although a handful of decisions on the customary law of hereditary succession have acknowledged that customary law is flexible enough to change along with the changing values of society, one does foresee difficulty in proving that customary law has evolved so as to recognise that the eldest son who is born out of wedlock may succeed his father. Indeed, this difficulty is evident in the *Umndeni (Clan)* of *Amantungwa*. A similar case is currently pending before the High Court where the eldest son of the late AmaZulu King Goodwill Zwelithini, Prince Simakade Zulu, who was born out of wedlock, is laying a claim to the Zulu throne on the ground that he is the eldest son of the late king.[116] Women who wish to succeed their fathers or re-claim the throne after it has passed to another house in the absence of a surviving male heir in the great house, also face a similar difficulty. Surely the royal family should be able to align their customary law of hereditary succession with the *Constitution* so that nobody is discriminated against directly or indirectly.

In *Shilubana v Nwamitwa* – a trailblazer on women and traditional leadership – the appellant's father, Hosi Fofoza Nwamitwa (a senior traditional leader) of the Valoyi clan, passed away in 1968 without any male heir. Because the appellant was a woman, her father was instead succeeded by his brother, Hosi Richard Nwamitwa.[117] Shortly after the enactment of the *Constitution* in 1996, the royal family met and decided that although the appellant was not eligible to succeed as a female, the constitutional right to equality permitted a female to succeed. Accordingly, the royal family identified the appellant as *hosi*. However, Hosi Richard would continue in office indefinitely while the appellant served as a member of Parliament.[118]

When Hosi Richard passed away in 2001, the Limpopo provincial government issued the appellant with a letter of recognition as *hosi* of the Valoyi clan in 2002.[119] Hosi Richard's son, the respondent, challenged the appellant's recognition and argued that as the male heir, and in terms of the Valoyi customary law of hereditary succession, he was entitled to succeed his father as *hosi* of the Valoyi clan.[120] The respondent's contention succeeded before the High Court and before the SCA (albeit on slightly

115 Section 8(4) of the *TLGFA*.
116 Matiwane 2022 https://www.timeslive.co.za/news/south-africa/2022-09-16-prince-simakade-kazwelithini-takes-claim-to-the-throne-to-the-high-court/.
117 *Shilubana v Nwamitwa* para 3.
118 *Shilubana v Nwamitwa* para 5.
119 *Shilubana v Nwamitwa* para 6.
120 *Shilubana v Nwamitwa* para 7.

different grounds). The appellant then petitioned the Constitutional Court. The main issue before the Constitutional Court was whether the royal family had the authority to develop the customs and traditions of the Valoyi and thus recognise the succession of a woman as *hosi*. The respondent argued that the royal family did not have this authority and that its role was confined only to the identification of a successor in terms of custom. He also argued that the royal family did not have the authority to restore a traditional leadership position to a house where it had earlier been removed through custom.[121]

In summary, the court held that if the royal family or traditional authorities did not have the power to develop its customs, it would mean that nobody in the community had the power to make constitutionally-driven changes.[122] The court also emphasised that communities should have the power to bring their customs and practices in line with the *Constitution*. It then invoked its powers in terms of section 39 of the *Constitution* and proceeded to develop customary law in so far as traditional authorities did not have the power in question.[123] It is important to point out that this power of traditional authorities is not without limits. It cannot, for instance, be used to dethrone a reigning traditional leader whose ascension had been lawful at the relevant time.[124]

The decision of the Constitutional Court has been lauded for being a breakthrough for women in traditional leadership and promoting gender-equality.[125] Moreover, Mmusinyane welcomes the emphasis on a community-driven development as opposed to a court-driven development. He points out that "customs and traditions that have been developed directly by the traditional authorities can be seen to have a sense of belonging to the communities."[126] He also points out that the judgment is sensitive to the needs of the community to respect the decisions of traditional authorities – especially those that are in line with the Bill of Rights.[127] Mireku lauded the decision to promote gender equality.

After the decision in *Shilubana*, the SCA had the opportunity to explain the role of the royal family in *Ludidi v Ludidi*.[128] It stated that the royal family:

> Remains the custodian of the customs…and the royal family's lineage and is the sole repository of the rights to identify the chief…And it is significant that when it exercises this right, it does not consider only that the candidate is the

121 *Shilubana v Nwamitwa* para 32.
122 *Shilubana v Nwamitwa* para 72.
123 *Shilubana v Nwamitwa* para 75.
124 *Shilubana v Nwamitwa* para 78.
125 Mireku 2010 *AHRLJ* 515
126 Mmusinyane 2009 *PELJ* 153.
127 Mmusinyane 2009 *PELJ* 155.
128 *Ludidi v Ludidi* 2018 4 All SA 1 (SCA).

> eldest child in the great house. It vets the potential candidate against the relevant customary law.[129]

Despite the decisions above, there are still hanging questions regarding the role of the royal family in the light of the provisions of the *TKLA*. The *TKLA* still has provisions which inhibit the royal family. For example, section 8(1)*(a)*, which deals with the identification of traditional leaders, enjoins the royal family to identify a person who qualifies to succeed in terms of customary law and customs. It is worth pointing out that the *TKLA* was enacted after the landmark decisions referred to above. The legislature already knew that the courts had held that the role of the royal family goes beyond simply rubberstamping customary law of hereditary succession.

Like its predecessor, section 8(4) of the *TKLA* empowers the president or the relevant premier to cause an investigation to be conducted by an investigative committee if there is evidence that the identification of a person was not conducted in terms of customary law or custom. It is submitted that the continued insistence on the royal family's identifying a person who qualifies to succeed in terms of customary law indirectly undermines the powers of the royal family and promotes endless litigation in the guise that the identification did not accord with the principle of male primogeniture.

An ideal role of the royal family is one which does not confine the royal family to any rule of customary law of hereditary succession. It is one where the royal family has the discretion to make decisions that are in the best interest of the traditional community. These may or may not be in line with any bygone rule of customary law of hereditary succession. If a predecessor had a few sons, the royal family should be able to identify any son amongst them, regardless of whether the identified person was born in or out of wedlock. It should also be able to identify a daughter if there are no male heirs within the descendants of the departed traditional leader. The royal family should be able to develop a practice of identifying any eldest child of a predecessor, regardless of gender or the marital status of the mother. These acts should be possible without risking any investigation on the ground that the identification is not supported by customary law.

6 Conclusion

This article has critically discussed the applicable law in the process leading to the recognition of traditional leaders. It has shown that the recognition of traditional leaders is done in accordance with both statutory law and customary law of hereditary succession. The statutory law comprises national legislation and the various provincial legislations on traditional leadership. Some of the salient statutory provisions of the national legislation have been carefully set out and analysed. Selected provincial

129 *Ludidi v Ludidi* 2018 4 All SA 1 (SCA) para 23.

statutes were chosen for their unique features. It has been shown that the Eastern Cape province is unique in that it has several monarchs. While the *ECTLGA* 2017 deals with the recognition of traditional leaders, it does not deal with the recognition of kings and queens. It has also been shown that the *KZNTLGA* recognises *isilo* as the only monarch in KZN and that the recognition process goes through the office of the premier.

The customary law of hereditary succession in a number of South African traditional communities has also been set out with particular reference to case law. The benefit of case law is that it also reflects on the law that is actually observed. This article has also shown that courts have stepped in to align the living customary law of hereditary succession with the *Constitution*. In addition, it has been shown that male primogeniture is commonly observed by an overwhelming majority of traditional communities.

The composition and the role of the royal family have been scrutinised. The article has asserted the importance of the correct composition of the royal family as this has a bearing on the validity of decisions taken at meetings of the royal family. A distinction has also been drawn between a royal family and a royal council. Both of these are traditional authorities. However, each may not usurp the powers of the other. The royal family is the only role player in the identification of traditional leaders. However, the law is different with headmen, headwomen and *iziphakanyiswa*. These positions are not hereditary and the communities may play a role in the election process.

Finally, the extent to which the family may exercise its discretion in the identification of a traditional leader has been considered. It has been argued that certain statutory provisions of the *TKLA* and the repealed *TLGFA* inhibit the role of the royal family and confine it to merely rubberstamping rules of customary law of hereditary succession. This is contrary to the decision in *Shilubana,* wherein the customary law was developed so that traditional authorities have the power to make changes that are aligned with the *Constitution*. The irony is that the *TKLA* was enacted after *Shilubana*, and despite that, it still contains provisions that limit the powers of the royal family to infuse constitutional norms in the identification process.

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List of Abbreviations

AHRLJ	African Human Rights Law Journal
ECTLGA	Eastern Cape Traditional Leadership and Governance Act
KZN	KwaZulu-Natal
KZNTLGA	KwaZulu-Natal Traditional Leadership and Governance Act
PELJ	Potchefstroom Electronic Law Journal
SCA	Supreme Court of Appeal
TKLA	Traditional and Khoi-San Leadership Act
TLGFA	Traditional Leadership and Governance Framework Act
VUNA JHIR	VUNA Journal of History and International Relations