REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA;
LIMPOPO DIVISION; POLOKWANE

CASE NO:2885/2016

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

DATE: 01 NOVEMBER 2023 **AJP SEMENYA M.V**

SIGNATURE: [redacted]

In the matter between:

INGWANA JOHN MOHLABA	**: FIRST APPLICANT**
MARHAMBU BENNET CHAUKE	**: SECOND APPLICANT**
MAMILA ROSE BALOYI	**: THIRD APPLICANT**
MAHASHA MMALEKUTU	**: FOURTH APPLICANT**
ERNEST MOTSILU BOIMA	**: FIFTH APPLICANT**
PATRICK MDUDUZI MPHAMELA MASHEGO	**: SIXTH APPLICANT**
MAGATE SAMUEL MAPHOTO	**: SEVENTH APPLICANT**
ALFRED CHWENE MAFIKENG	**: EIGHTH APPLICANT**
MASEKELA FRANS MATHEKGA	**: NINTH APPLICANT**
AARON MOGOBOYA	**: TENTH APPLICANT**

THOMAS MBANYELA	**: ELEVENTH APPLICANT**
NKUZI DEVELOPMENT TRUST	**: TWELFTH APPLICANT**

And

MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	**: FIRST RESPONDENT**
PREMIER. LIMPOPO PROVINCE	**: SECOND RESPONDENT**
MEMBER OF THE EXECUTIVE COMMITTEE FOR TRADITIONAL AFFAIRS, LOMPOPO PROVINCE	**: THIRD RESPONDENT**
MUKHOMI TRADITIONAL AUTHORITY	**: FOURTH RESPONDENT**
MAVEMBE TRADITIONAL AUTHORITY	**: FIFTH RESPONDENT**
MODJADJI TRADITIONAL AUTHORITY	**: SIXTH RESPONDENT**
MATLALA TRADITIONAL AUTHORITY	**: SEVENTH RESPONDENT**
MOLETJI TRADITIONAL AUTHORITY	**: EIGHTH RESPONDENT**
MOGOBOYA TRADITIONAL AUTHORITY	**: NINTH RESPONDENT**
MACHAKA TRADITIONAL AUTHORITY	**: TENTH RESPONDENT**
LIMPOPO PROVINCIAL HOUSE OF TRADITIONAL LEADERS	**: ELEVENTH RESPONDENT**

JUDGMENT

Heard on: 26 JUNE 2023

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be **01 NOVEMBER 2023**.

SEMENYA AJP:

[1] Sections 211(1) (2) and (3) of the Constitution of the Republic of South Africa, 1996 (the Constitution) provides for the recognition, status, role of traditional leadership according to customary law. It further provides for the application of customary law in certain instances by the courts. In addition, section 212 provides for the enactment of National legislation to provide for a role of traditional leadership as an institution at local level on matters affecting local communities.

[2] In line with the principle of the Supremacy of the Constitution as envisaged in section 2, the application of customary law by the traditional authorities, its application by our court and the promulgation of any legislation related thereto, should not be inconsistent with the Constitution.

[3] The Limpopo Traditional Leadership and Institutions Act, 6 of 2005 (the Limpopo Act) and the Traditional Leadership and Governance Framework Act 41 of 2003 (the Governance Act), which has since been repealed by the Traditional and KoiSan Leadership Act 3 of 2019 are some of the Acts which have been enacted pursuant to section 212 of the Constitution. In view of the repeal of the Governance Act, counsel for the applicants has

indicated during oral submissions that the applicants will not proceed with their claims which are sought in reliance with the Governance Act.

[4] The applicants in these proceedings are members of various communities/villages led by traditional leaders within the Limpopo Province. In this application, the applicants approached this court for an order in the following terms:

The Limpopo Act

1.1 Section 25 of the Limpopo Traditional Leadership and Institutions Act 6 of 2005 (the Limpopo Act) is inconsistent with the Constitution and invalid;

1.2 The order of invalidity in paragraph 1.1 will operate from the date of the order and shall have no retrospective effect.

a). **Customary law**

aa) It is declared that customary law only permits traditional leadership structures to impose only voluntary levies, and only after meaningful consultation with the community about the need for, amounts and purpose of the levy.

ab). In the alternative to paragraph 2, customary law is developed to permit traditional leadership structures to impose only voluntary levies, and only after meaningful consultation with the community about the need for, amounts and purpose of the levy.

Status of traditional authorities

b). It is declared that the fourth to tenth respondents have not been established in terms of the Limpopo Act.

Publication

c). The second and/or third respondents are directed to:

ca). Publicise the court's order in a manner that ensures that all traditional leaders, traditional authorities and members of the traditional communities become aware of the content and effect of the order; and

cb) Within one month of the order, submit a plan to the Court outlining how it will perform the task in paragraph ca.

d) The applicants shall have ten days to comment on the Publication Plan

e) The court shall either approve the Publication Plan, or amend it.

f) The second and/or third respondents shall implement the plan as approved or amended by the court.

g) The respondents shall pay the applicants' costs, including the costs of two counsel.

[5] A summary of the allegations made by the applicants, some of whom were already deceased at the time of the hearing of the application, is as follows:

5.1. **Ingwana John Mohlaba** (first applicant) (now deceased)

He was a pensioner who, in his life, resided at Phaphazela village which falls within the traditional leadership of the fourth respondent. He is unhappy with the levies that people within the village are required to pay to traditional authorities in terms of section 25 of the Limpopo Act. He states that he and his wife together with six additional family members, two children and four grandchildren, are pensioners who depend on Government old age and child grants. He states that at some stage he required to pay One Hundred and Fifty Rand (R150.00) in tribal tax or R50.00 before he could be provided with a letter of proof of address. He

states that such tax has an impact on their livelihood as they all depend on social grant.

Mohlaba states further that in the nineteen fifties up to the seventies, he used to pay what he refers to as Government tax for the National Government, Gazankulu Government and Mzila tax. In 2011, the chief of Mukhomi village called a meeting of the Phaphazela villagers. The meeting was attended by many people who were told to pay tribal levies. He was personally told that his household is in arrears of an amount of R150.00 which he owed from 2009-2011. He was told to pay the money on the spot. He paid it because, firstly, he was of the impression that it was compulsory for him to pay. Secondly, because he knew that if he does not, he will be denied any services that he would require from the traditional authority. Thirdly, because he was accustomed to the olden days principle that prohibits members of the traditional communities from questioning the authority of the Government or of a chief.

Mohlaba further states that it was written on the receipt that payment was for tribal tax. The community was told that they are required to pay fifty rand (R50.00) per annum. As far as he knows, he, as a pensioner, is supposed to be exempted from paying taxes to the municipality and Mukhomi Traditional Authority. He again paid an amount of One Hundred Rand (R100.00) in 2013.

Apart from annual tax, Mohlala states that villagers are required to pay for services such as letters to be used as proof of residence which people who reside outside the villages get them for free.

5.2. Marhambu Bennet Chauke (second applicant).

He lives in the same village as Mohlaba. He confirms the meeting called by the traditional authority as well as what transpired in that meeting. Unlike Mohlaba, he was ordered to pay R120.00 for tax, which he refused to pay because the previous regime had already excluded from paying tax due to his disability. He does not know why they were ordered to pay different amounts. He believes that his refusal to pay has caused him to lose certain services such as installation of a toilet.

5.3 **Mamaila Rose Baloyi (**third applicant)

She resides at Mahonisi village and regards headman Mahonisi and not Mavembe as her chief. She paid R60.00 at Mahonisi when she required proof of residence letter. Home Affairs Department rejected it and told her to obtain one from Mavembe. She had to pay R300.00 at Mavembe. She was not told why she had to pay that amount but heard from other people that it was for the installation of a chief. She was further told that the money she was required to pay was gazetted in terms of the Limpopo Act.

5.4 **Mahasha Mmalekutu** (fourth applicant).

He lives in Thako village under the traditional leadership of Modjadji. He states that the people who live under Modjadji Traditional Authority are paying annual levy. He further states that no one was ever told what the levies are used for. He further states that members of the community are denied assistance with the burial of their loved ones if they refuse to pay the levy. They will be allowed to bury their loved ones only after making an upfront payment of R600. 00. It is then that a graveside would be allocated.

5.5 **Ernest Motsila Boima** (fifth applicant)

He resides in Mopye village under the same traditional leadership as Mmalekutu. He states that the villagers in his area are required to pay annual levy of R20.00. He further states that a corpse of a villager was kept in the morgue for six months because the family was unable to pay arrear levies.

5.6. **Patrick Mduduzi Mphamela Mashego** (sixth applicant)

He resides at Lebejane village in Sekhukhune. According to him, the villagers are required to pay levies for reporting death in the family, for the purchase of a new car for the chief and for the chief to consult a traditional healer, annual levy, cultural ritual levy *etc.* Mashego states that the villagers are not told anything about what the money has been used for.

Although the levies are announced at community meetings, no discussion about them is allowed.

5.7. **Magate Samuel Maphoto** (seventh applicant).

He resides at Makgodu village under Moletji traditional authority. Makgodu villagers are required to pay a levy of R2000.00 for relocation to another village, R565.00 to the chief, R400.00 for the headman to allocate a residential stand, R30.00 to R50.00 to lodge a dispute to the headman and R350.00 to be allowed to transfer property from one person to the other in case of death of the owner.

2.8. **Alfred Chwene Mafikeng** (eighth applicant).

He also resides at Makgodu. He states that he was once required to pay an amount of R400.00 when he wanted to acquire a residential stand for her disabled daughter. He states that he was charged that amount because he did not pay levies. The stand was eventually allocated by elders of the community, including Mr Maphoto. He was reported to the tribal court for disrespecting the chief. He won the case on appeal to the magistrate court. In addition to the amount which are to be paid as stated by Maphoto, he said that an amount of R50.00 is to be paid in order to be given a letter as proof of residence.

5.9. **Masekela Frans Mathekga** (ninth applicant).

He resides at Makgodu village. In addition to the levies stated by his co-villagers, he states that one has to pay R300.00 if you want to establish a church, R1500.00 for allocation of a business site and R215.00 for transfer of ownership of property.

5.10. **Aaron Mogoboya** (tenth applicant).

He stays at Mosorone village near Tzaneen. He states that community members are required to pay certain amounts for collection of clay, cutting of grass or herbs, for the chief and headman/woman and for allocation of stands. He further states that there were various protest marches against the payment of these levies in the past. According to Mogoboya, it is difficult to state how much one is required to pay because they are enforced when one requires services from the traditional authority.

5.11. **Thomas Mbanyela** (eleventh applicant).

He resides at Botlokwa village under Machaka Traditional Leadership. He states that villagers are charge an annual levy of R35.00 and an amount of R550.00 for allocation of stands and R20.00 for proof of address letter, which is enforced by withholding services such as access to grazing fields.

5.12. **Motlanalo Lebepe** (twelfth applicant)

She is the Director of the twelfth applicant. She states that the field workers of the trust are always required to pay levies in at least ten of the

twenty-six municipalities that they are servicing within the Limpopo Province. She further states that fines are imposed on unmarried women and payment is required in lieu of burial and annual levies.

[6] What is common in the summary of the allegations made by each of the people mentioned in Mohlaba's affidavit, who in turn deposed to their own affidavits, is that the levies are demanded without any consultation with residents. Further that there is no accountability from the traditional authorities, in other words, the communities are not informed about how and for what was the money collected used.

The Constitutionality of section 25 of the Limpopo Act:

[7] Section 25 of the Limpopo Act provides as follows:

> **"Levy of traditional council rate**
>
> (1) A traditional council may, with the approval of the Premier, levy a traditional council rate upon every taxpayer of the traditional area concerned.
>
> (2) The levy of a traditional council rate under subsection (1) shall be made known by the Premier by notice in the Gazette and shall be of force from the date mentioned in such notice.

> (3) Any taxpayer referred to in subsection (1), who fails to pay the traditional council levy may be dealt with in accordance with the customary laws of the traditional community concerned."

[8] Two issues arise out of the provisions of the above section namely, whether section 25 is inconsistent with the Constitution on the basis that it authorises traditional councils to tax or to levy members of their communities contrary to the dictates of the Constitution. Should the answer to this question be in the affirmative, whether it is premature to declare the section unlawful and invalid in circumstances where the Premier has not yet done what he is required to do as envisaged in subsection (2).

[9] The parties in this matter disagree concerning the interpretation of the words traditional council levy as it appears in section 25 of the Limpopo Act. The Government respondents contend that the applicants require this court to apply the outdated method of interpretation by reading the provisions of a statute in isolation from its context within which the words exist. Counsel submits that in as much as the word 'levy' is not defined in the Limpopo Act, this courts should find its meaning in the context in which it is used in the statute. It is counsel's further submission that this court

should not equate 'levy' with 'tax', as the applicants would want it court to do.

[10] Counsel for the second, third and eleventh respondents contend that there is no need for the declaration sought by the applicants in that section 25 of the Limpopo Act because it is not yet in operation. Counsel contends that any payment to the traditional council, by members of the communities, is not a 'rate' levied in terms of section 25. According to counsel, the said payment is a voluntary contribution to the traditional leaders.

[11] Counsel for the applicants contends that it is not necessary to wait until the section 25(2) Gazette before the constitutionality of the section can be challenged in court. He further contends that the only meaning that can be ascribed to the word 'levy', as it appears in the Limpopo Act, is that the legislature intended to cause members of traditional communities to pay tax. It is counsels' contention that this court will have to arrive at that conclusion, whether the words are given their ordinary dictionary meaning, or are interpreted in the context of the Limpopo Act, as submitted by the respondents. It is further submitted that this court should find that section 25 is unlawful as it authorises traditional councils to

impose tax on members of their communities, despite the fact that the Constitution is clear with regard to the entities which are empowered to impose taxes and that traditional councils are not one of those entities.

[12] Whether or not this court is entitled to declare section 25 unconstitutional despite the current status of subsection (2) (that the Premier has yet made the levy of a traditional council rate known by notice in the Gazette) has been answered already by the Constitutional court in **Ferreira v Levin *NO* and Others; Vryenhoek and Others v Powell *NO* and Others**[1] (Ferreira v Levin) where the Court said the following:

> "[25] ...There are four parts to the above line of reasoning. The first relates to the question whether the invalidity (being of "no force and effect") of a statute (as a species of "law") is determined by an objective or a subjective enquiry...
>
> [26] The answer to the first question is that the enquiry is an objective one. A statute is either valid or "of no force and effect to the extent of its inconsistency". The subjective positions in which parties to a dispute may find themselves cannot have a bearing on the status of the provisions of a statute under attack. The Constitutional Court, or any other competent Court for that matter, ought not to restrict its enquiry to the position of one of the parties to a dispute in order to determine the validity of a law. The consequence of such a

[1] [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at par 26.

(subjective) approach would be to recognise the validity of a statute in respect of one litigant, only to deny it to another. Besides resulting in a denial of equal protection of the law, considerations of legal certainty, being a central consideration in a constitutional state, militate against the adoption of the subjective approach."

[13] My understanding of Ferreira v Levin whether the levies are been charged in terms of section 25 is of no moment with regard to the determination of its constitutional validity. The Limpopo Act came into effect on the 1 April 2006. In essence, section 25 is already of force and effect. This section bestows the power on traditional councils to levy taxpayers within their traditional communities. Submissions made by counsel for the applicants that the council levy will affect the interests of the applicants in this matter is correct. As such, there is no need for the applicants to wait until publication of the rate before they can approach a court of law to determine whether the section of the Act is valid or not. All that the court has to do is to objectively make such a determination[2].

[14] I agree with counsel for the parties that it is necessary to determine the meaning of the word levy as used in section 25. I also agree with counsel for the Government respondents that the provisions of an Act of

[2] See Ferreira v Levin at paragraph 168

Parliament must be interpreted within the context of the Act concerned. However, the nature of the issues before this court dictates that section 25 should not be considered in the context of the Limpopo Act only, it must also be read together with the Constitution in order to determine its validity.

[15] Counsel for the applicants argue that in terms of the Constitution, only democratically elected institutions are authorised to enforce levies or to tax the citizens of this country. In support of this argument, counsel referred this court to section 77 (the money bill) of the Constitution. This section provides as follows:

> "**Money Bills**
>
> 77. (1) A Bill is a money Bill if it—
>
> (a) appropriates money;
>
> (b) imposes national taxes, levies, duties or surcharges;
>
> (c) abolishes or reduces, or grants exemptions from, any national taxes, levies, duties or surcharges; or
>
> (d) authorises direct charges against the National Revenue Fund, except a Bill envisaged in section 214 authorising direct charges.
>
> (2) A money Bill may not deal with any other matter except—

(a) a subordinate matter incidental to the appropriation of money;

(b) the imposition, abolition or reduction of national taxes, levies, duties or surcharges;

(c) the granting of exemption from national taxes, levies, duties or surcharges; or

(d) the authorisation of direct charges against the National Revenue Fund.

(3) All money Bills must be considered in accordance with the procedure established by section 75. An Act of Parliament must provide for a procedure to amend money Bills before Parliament."

[16] Section 77 must be read together with sections 228 and 229 of the Constitution, which are applicable to Provinces or municipalities respectively. In terms of these sections it is the Provinces and the municipalities which have the power to impose taxes, levies and duties other than income tax, value added tax, general sales tax, rates on property or custom duties. The sections provide that the provinces and municipalities' power should be exercised in such a way that it does not materially and unreasonably prejudice national economic policies, economic activities across provincial boundaries, or the national mobility of goods, services, capital or labour.

[17] The Constitutional Court in **South African Reserve Bank v Shuttleworth**[3], deemed it necessary to assign a meaning to the undefined words taxes, levies, and surcharges as used in section 77 of the Constitution. It was said that their scope is limited to charges that are at the national level. It was however stated that a search of our national legislative instruments using the terms tax, levy duty or surcharge suggest that the terms ore of wide import and are often used synonymously or interchangeably. The court went further to state that according the terms their literal meaning will not be useful and that courts should rather resort to the context within which the terms is used and the purpose for which the tax, levy, duty or surcharge has been imposed. This reasoning is in line with the submissions made by counsel for the Government respondents.

[18] One of the purposes of the Limpopo Act as stated in its preamble is to provide for the funding of traditional councils. As Moseneke DCJ has stated in the Shuttleworth matter at paragraph [48], one way of determining the meaning of the terms is tax or levy is to look at the dominant objective of the statute. He went further to state that the court must decide whether the primary purpose of the statute is to regulate the

---

[3] 2015 (5) SA 146 at [43]

revenue collected under the statute or to raise revenue. The court concluded that if the dominant purpose is to raise revenue, then the fee or charge is ordinarily a tax. It can be concluded, based on the preamble to the Limpopo Act that section 25 was meant to raise revenue for the traditional councils, therefore, the amount to be paid by the members of the community within those traditional authority amounts to tax. It is for this reason that the section specifically requires the money to be paid by taxpayers.

[19] Counsel for the applicants contend that, in spite of the fact that the Constitution recognises the institution of traditional leadership, its drafters did not deem it necessary to grant traditional councils the power to impose taxes on their members. Reliance is placed on **Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others**[4] in support of this argument. In this case it was stated that:

> "[45] It seems plain that when a legislature, whether national, provincial or local, exercises the power to raise taxes or rates, or determines appropriations to be made out of public funds, it is exercising a power that under our Constitution is

[4] [1998] ZACC- 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (CC) at [44] and [45]

a power peculiar to elected legislative bodies. It is a power that that is exercised by democratically elected representatives after due deliberations...."

[20] Traditional councils are not democratically elected. Therefore, in accordance with the decision in Fedsure, above, and the money Bill, they do not possess the power to impose taxes, levies, duties and surcharges. I agree with counsel for the applicants that I should find that section 25 is authorising traditional councils to impose tax on taxpayers inconsistently with the Constitution. There is no other interpretation that can be attributed to the words used in that section. In as much as the provincial legislature is not empowered to enact law that is inconsistent with the Constitution, so too is the Limpopo Legislature not empowered to authorise traditional councils to do what the Constitution has not sanctioned. Section 25 of the Limpopo Act is found to be unlawful and invalid on that basis.

[21] **Aninka Claasen** in her article "**Resurgence of tribal levies: Double taxation for the rural poor"** states on page 13 that Limpopo is the only province in South Africa that provides for payment of council levies. She sates that the Kwa-Zulu Natal, Mpumalanga and Free State traditional legislations are silent on tribal levies. However, the Eastern Cape, Norther cape and North West legislation expressly provide that members of their

communities would not be required to pay such levies. According to Claassen, Limpopo tribal community members, unlike other citizens of the Republic of South Africa, are taxed twice. That other provinces have no similar provisions in their statutes to a certain extent lends support to the applicants' case.

Customary law.

[22] The traditional authority respondents argue that the contributions made by members of their communities are made, not in terms of section 25, but in accordance with custom. The parties agree that contributions to traditional leaders are supposed to be made voluntarily and subject to consultation and agreement with community members. Counsel for the applicant correctly submitted that this is the content of customary law. Furthermore, all parties agree that annual levies were introduced by the apartheid government and imposed on traditional communities. It is further agreed that traditional authorities were used by the previous government to collect these taxes on its behalf.

[23] The applicants contend that traditional leaders are continuing to collect compulsory levies such as annual levy, levy for the purchase of a

new motor vehicle, for a traditional leader to consult with a traditional healer contrary to the dictates of customary law. The parties disagree on whether levies charged by present day traditional leaders are compulsory or whether they are service charges which are meant to run the affairs of the community.

[24] There are conflicting versions before this court which attract the application of the well-known **Plascon-Evans** principle. Counsel for the applicants contends that the applicants have attached proof in the form of receipts to show that they are obligated to make contributions to the coffers of the traditional authorities. It is further argued that this court should reject the documents attached to some of the respondents' affidavits as proof that the communities are consulted and that they have agreed to pay the amounts required by traditional authorities.

[25] My understanding of the traditional authorities' case is that levies collected from members of their communities are meant to assist these institutions in the running of their affairs. The eighth respondent and others explain that the traditional authority has employed other people to add to those who have been deployed by the Provincial Government due to a large scope of work at that institution. The respondents further state

that the system employed by banks, which require those who wants to, for instance, open bank accounts, to have letters of proof of residence has resulted in the need to have people who will assist in that regard. In short, respondents' case is that, without money, we will see the demise of the institution of traditional leaders, in spite of its constitutional recognition. It is not guaranteed that the majority of the community members would voluntarily contribute money towards the running of traditional communities.

[26] The respondents deny that they use the withholding of certain services as a tool to force community members to pay levies, which, if correct, will go against the common cause principle that, in terms of custom, contributions are made voluntarily. The respondents further deny that contributions are collected without prior consultation with community members and are agreed to. Furthermore, traditional leaders state that they account not only to their members, but to the Provincial Government as well.

[27] **Thandabantu Nhlapo, Chuma Homonga, IP Maithufi, Sindiso Mnisi Weeks, Lesala Mofokeng and Dial Ndima in their book African Customary Law in South Africa Post-Apartheid and Living Law**

Perspectives[5] seem to confirm the allegations that those who do not pay tribal levies are subject to sanctions such as denial of access to traditional courts to have their disputes resolved in terms of customary law, denial of permission to bury loved ones and denial of letter of proof of address.

[28] Counsel for the applicants argue that the resolution of the disputed facts can best be arrived at by the application of the Plascon-Evans rule. The following was said in **Wightman t/a J W Construction v Headfour (Pty) Ltd and Another**[6]

> "[13] A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied."

---

[5] Page 403 paragraph 13.5
[6] 2008(3) SA 371 (SCA at paragraph [13]

[29] Counsel argues that the applicants have attached receipts to prove that they have been forced to pay annual levies. It appears from some of the receipts that payment was for annual levy and that the person who made that payment must continue to do so. Counsel argues that the annexure to the eighth respondent's affidavit that was attached as proof that there was a meeting in which members of the community agreed on the amount which are to be paid for certain services, falls short of providing such proof. Counsel argues that there is no signature of those who are said to have attended the meeting. Only the signatures of those who represented the traditional authority appear on the document. Furthermore, eighth respondent confirms that community members are expected to pay at outstanding monies accumulated over the years before they can be given certain services.

[30] On the facts as alleged by the applicants which are admitted by the respondents, together with the facts alleged by the respondents, this court finds that there is sufficient proof that traditional authorities enforce payment by withholding services. I agree that the good intentions of the traditional authorities have no bearing on the issues at hand. In terms of section 211(3) of the Constitution, courts are enjoined to apply customary law when that law is applicable, subject to the Constitution and legislation

that specifically deals with customary law. As stated earlier, customary law and the Constitution do not support imposition of compulsory levy or tax by traditional authorities. This court cannot, on this basis, make an order that permits traditional authorities to act inconsistently with the Constitution and customary law.

[31] As stated earlier, it is not necessary to determine whether traditional leadership respondents have been duly constituted in that the case of the applicants on that issue depends on the Governance Act which has since been repealed.

[32] On the issue of costs, counsel for the government respondents argue that this court should not apply the Biowatch principle in that the Premier had to come and defend the matter and to show the court that contributions to the traditional councils are not made in terms of section 25. Furthermore, counsel argues that the applicants have caused confusion in that they have decided to abandon some of their claims at a very late stage. Counsel contends that the applicants should have withdrawn the case against the Premier as soon as they realised that the levies are not charged in terms of section 25 of the Limpopo Act.

[33] The applicants allege that the apartheid government introduced a system of payment of taxes by members of traditional communities. They further allege that the current authorities are simply continuing with it even during this constitutional era. With regard to the traditional authorities, I am of the view that it will be inappropriate to order the traditional authorities to pay the costs. The applicants seek an order in terms of which traditional authorities are ordered not to impose compulsory levies on community members. The traditional authorities have stated in their affidavits that without such contributions, the institution will be brought to their knees. It follows that the respondents will not, in view of the order, be in a position to pay costs. I agree with counsel for government respondents that this is a case where each party should be ordered to pay its own costs.

[34] In the result I make the following order:

1. Section 25 of the Limpopo Traditional Leadership and Institutions Act, 6 of 2005 is inconsistent with the Constitution and invalid;

2. The order of invalidity in paragraph 1 will operate from the date of the order and shall have no retrospective effect;

3. It is declared that customary law only permits traditional leadership structures to impose only voluntary levies, and only after consultation with the community about the need for, amounts and purpose of the levy;

4. The second and/third respondents are directed to:

4.1 Publicise the court's orders in order to ensure that all traditional authorities, traditional leaders and members of traditional communities become aware of the content and effect of the order; and

4.2. Within one month of the date of the order, submit a plan to the court outlining how it will perform the task 4.1;

5. The applicants shall have 10 days to comment on the Publication Plan;

6. The court shall either approve the Publication Plan, or amend it;

7. Each party is to pay own costs.

[redacted]

M V Semenya
Acting Judge President
Limpopo Division

APPEARANCES:

Counsel for the Applicant	**: Adv. G Budlender Sc; M Bishop & N Muvangua**
Instructed by	**: Legal Resources Centre**
Counsel for the 1st to the 3rd and the 11th Respondents	
	: Adv. T.F Mathibidi SC & N. Choeu
Instructed by	**: State Attorneys**
Counsel for 4th to 10th Respondents	
	: Adv. R. Mudau
Instructed by	**: SM Mpati Attorneys**
Date of Hearing	**: 26 JUNE 2023**
Date of Judgment	**: 01 NOVEMBER 2023**