CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 07/24

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 COOPERATIVE GOVERNANCE, HUMAN	

SETTLEMENTS AND TRADITIONAL AFFAIRS, LIMPOPO PROVINCE	Third Respondent
MUHOMI TRADITIONAL AUTHORITY	Fourth Respondent
MAVEMBE TRADITIONAL AUTHORITY	Fifth Respondent
MODJADJI TRADITIONAL AUTHORITY	Sixth Respondent
MATLALA TRADITIONAL AUTHORITY	Seventh Respondent
MOLETJIE TRADITIONAL AUTHORITY	Eighth Respondent
MOGOBOYA TRADITIONAL AUTHORITY	Ninth Respondent
MACHAKA TRADITIONAL AUTHORITY	Tenth Respondent
LIMPOPO PROVINCIAL HOUSE OF TRADIONAL LEADERS	Eleventh Respondent

Neutral citation:	*Mohlaba and Others v Minister of Cooperative Governance and Traditional Affairs and Others* [2024] ZACC 32
Coram:	Madlanga ADCJ, Kollapen J, Majiedt J, Mathopo J, Rogers J, Seegobin AJ, Theron J, Tolmay AJ and Tshiqi J
Judgments:	Theron J (unanimous)
Heard on:	17 September 2024
Decided on:	20 December 2024
Summary:	Limpopo Traditional Leadership and Institutions Act 6 of 2005 — constitutionality of section 25 — section is unconstitutional — only legislative bodies may impose taxes Traditional leaders have no power to impose a tax — Traditional levies and rates are taxes — Direct leave — costs

ORDER

On application for confirmation of the order of the High Court of South Africa, Limpopo Division, Polokwane:

1. Condonation for the late filing of the application for confirmation and the application for leave to appeal directly to this Court is granted.
2. The High Court's order of invalidity is confirmed.
3. Section 25 of the Limpopo Traditional Leadership and Institutions Act 6 of 2005 is declared inconsistent with the Constitution and invalid.
4. Leave to appeal directly to this Court is granted.
5. The High Court's costs order is set aside and replaced with the following: "The first, second, third and eleventh respondents shall pay the applicants' costs, including the costs of two counsel."
6. The first, second, third and eleventh respondents shall pay the applicants' costs in this Court, including the costs of two counsel.
7. The State Attorney shall not be entitled to recover from its clients the fees and expenses of more than two junior counsel in this Court.
8. Counsel for the first, second, third and eleventh respondents are not entitled to fees for the preparation of the submissions in response to the post-hearing directions issued by this Court.

JUDGMENT

THERON J (Madlanga ADCJ, Kollapen J, Majiedt J, Mathopo J, Rogers J, Seegobin AJ, Theron J, Tolmay AJ and Tshiqi J concurring):

Introduction

[1] This is an application for confirmation of an order of constitutional invalidity granted by the High Court, Limpopo Division, Polokwane in terms of section 172(2)(a) of the Constitution.[1] The High Court declared section 25 of the Limpopo Traditional Leadership and Institutions Act[2] (the Limpopo Act) unconstitutional. Section 25 provides for traditional councils to "levy a traditional council rate upon every taxpayer of the traditional area concerned". That rate must be approved by the Premier and gazetted in the Provincial Gazette, and if the rate is not paid, a taxpayer can be "dealt with in accordance with the customary laws of the traditional community concerned". That declaration of invalidity only becomes effective when confirmed by this Court. The respondents do not oppose confirmation of the order of constitutional invalidity.

[2] The applicants also seek leave to appeal directly to this Court against that part of the High Court's order which directed each party to pay their own costs. The respondents oppose only the costs order.

Background

[3] The first to eleventh applicants[3] are members of traditional communities falling under seven traditional authorities within the Limpopo Province. The twelfth applicant is a non-profit company, which provides a range of support services to historically disadvantaged communities in Limpopo and Mpumalanga, with its focus mainly on land rights.

[4] The first, second and third respondents are the Minister of Co-operative Governance and Traditional Affairs, the Premier, Limpopo Province, and the Member

[1] Section 172(2)(a) of the Constitution provides that the Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

[2] 6 of 2005.

[3] The first applicant, Mr Mohlaba passed away on 4 February 2021, while the matter was still pending in the High Court. The fourth applicant, Mr Ernest Boima, passed away in March 2017.

of the Executive Council, Co-operative Governance, Human Settlements and Traditional Affairs respectively. The fourth to tenth respondents are traditional authorities within Limpopo. The eleventh respondent is the Limpopo Provincial House of Traditional Leaders. The first, second, third and eleventh respondents shall be referred to as the State respondents.

[5] Before colonialism, communities in Limpopo paid tributes to their traditional leaders, often in the form of goods or labour. With the advent of colonialism and apartheid, these practices were corrupted as traditional leaders were co-opted to act as servants of the State, and to collect taxes both for themselves and for the colonialists. As the applicants' expert, Professor Delius, explained, "[p]re-colonial customary law recognised the use of levies based on consent and reciprocity". The levies which were imposed in the 1980s "were not accepted as an expression of custom, but were instead viewed to be creations of the [a]partheid regime, which contributed to wide-scale oppression".

[6] The evidence in this matter has demonstrated that the practice of traditional leaders imposing taxes rather than receiving voluntary tributes has survived to this day. Across Limpopo, communities are forced to pay levies to traditional leaders. Communities are required to pay a wide range of levies imposed, and collected by, traditional authorities. The most common is the annual levy. The amount of the levy varies widely from about R20 to R150. Levies are imposed to raise money for a specific purpose, including in one instance for a new car for a chief. Some levies are imposed in order to access a common resource. These include levies to allocate a stand, allow the running of a business or bury a family member. Levies are imposed for an act that should be free of charge, like providing a proof of address letter. Fines are often imposed for the non-payment of levies.

[7] The levies are not discussed or adopted by communities. They are adopted by chiefs, or traditional authorities, and then announced to villagers who are given no choice but to pay them. The levies are enforced by denying access to services or

resources until outstanding levies have been paid.[4] The evidence reveals that another common method of extracting payment is refusing to provide a proof of address letter, or other letters required by the State. These are important for members of traditional communities to access government services – such as social grants – and basic commercial services such as bank accounts. Refusal to pay levies has real consequences for community members.[5]

Order of the High Court

[8] The High Court made 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."

[4] The fourth applicant, explains the practice in the Modjadji Traditional Authority:

> "If a household does not pay the levy, that household will have a problem when any family member passes away. Customarily families are expected to notify the traditional authority of the death of a member before they can be allocated a burial place. But such a place will not be allocated if the family is in arrears with their levies. Before a household is allocated a place for burial, the relatives have to first produce proof that levies were paid and that there are no arrears. If the household had never paid levies, the relatives have to pay a fine of R600.00."

[5] When the fourth applicant passed away, the Modjadji Traditional Authority refused to assist the family with the burial because the fourth applicant was in arrears with his levies. The family paid R500 to bury the fourth applicant and his son was required to pay a further R600, in order to continue occupying his family's home.

Issues

[9] The following issues arise in this matter:

(a) whether condonation should be granted;

(b) whether section 25 of the Limpopo Act is unconstitutional; and

(c) whether leave to appeal directly to this Court against the High Court's costs order should be granted.

Condonation

[10] In terms of rule 16(4) and rule 19(2) of the Rules of the Constitutional Court, this application had to be brought within fifteen days of delivery of the judgment of the High Court. The judgment was delivered on 1 November 2023. This application should, therefore, have been filed by 22 November 2023. It was instead, filed in the last week of December 2023. The applicants therefore seek an order from this Court condoning the late filing.

[11] The delay is not extensive – just over a month. The explanation for the delay is both full and reasonable. The applicants have been involved in this litigation since 2011. They have used the same junior counsel throughout. When the High Court delivered judgment, their counsel was acting as a High Court Judge and was unable to assist. The applicants reasonably did not want to approach this Court without the benefit of his advice and assistance. The delay causes no prejudice to the any party and the respondents do not oppose the application for condonation. On the other hand, the applicants have strong prospects of success both on confirmation and on costs. Refusing condonation would cause them serious prejudice. This Court must hear the confirmation proceedings. That is why the Registrar of the High Court is required to refer declarations of invalidity to this Court for confirmation.[6]

[12] In these circumstances, condonation is justified.

[6] Section 15(1)(a) of the Superior Courts Act 10 of 2013.

Constitutionality of section 25

[13] Section 25 of the Limpopo Act is headed "Levy of traditional council rate" and reads:

> "(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."

[14] Despite the fact that the respondents do not oppose confirmation of the order of invalidity, this Court must still satisfy itself that section 25 is unconstitutional. This question will be considered under three components, namely; (i) only legislative bodies may impose taxes; (ii) traditional levies and rates are taxes; and (iii) traditional leaders have no power to impose taxes.

Only legislative bodies may impose taxes

[15] Because of the democratic centrality of the taxing power, the Constitution carefully regulates who can impose taxes, and how they must exercise that power. It expressly confers and circumscribes taxation powers on provincial legislatures[7] and municipal councils.[8] Parliament has inherent legislative power and so there is no express conferral of taxing power.

[16] The Constitution imposes special procedures for adopting taxes. Section 77(1)(b) recognises that a law that "imposes national taxes, levies, duties or

[7] Section 228 of the Constitution.

[8] Section 229 of the Constitution.

surcharges" is a "money bill" that must follow a specific procedure. The same is true for bills that impose taxes in provincial legislatures.[9] The Constitution specifically prohibits a municipal council from delegating its taxation power.[10] The Constitution also contains restrictions on the powers of provinces and municipalities to impose taxes – neither can impose a tax that "materially and unreasonably prejudices national economic policies, economic activities across provincial boundaries, or the national mobility of goods, services, capital or labour".[11]

[17] In accordance with these provisions, this Court has repeatedly held that there must be a direct constitutional source for the power to impose a tax;[12] the Constitution only affords a taxing power to the three elected spheres;[13] and the power to tax cannot be delegated to the Executive.[14]

[18] In *Fedsure*, this Court first stated that "the power of taxation and appropriation of government funds is reserved for legislatures".[15] That power could not be delegated because "when a legislature, whether national, provincial or local, exercises the power to raise taxes or rates . . . it is exercising a power that under our Constitution is a power peculiar to elected legislative bodies."[16] This Court re-affirmed this proposition in *Shuttleworth*[17] where it held that "[i]t is the people, through their duly elected representatives, who decide on the taxes that residents must bear".[18] The authority to

[9] Section 120(1)(b) of the Constitution. See *Casino Association of South Africa v Member of the Executive Council for Economic Development Environment Conservation and Tourism* [2023] ZACC 39; 2023 JDR 4520 (CC); 2024 (5) BCLR 611 (CC) (*Casino Association*) at paras 36-41.

[10] Section 160(2)(c) of the Constitution.

[11] Sections 228(2)(a) and 229(2)(a) of the Constitution.

[12] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17; 1998 (12) BCLR 1458 (CC); 1999 (1) SA 374 (CC) at paras 44-5.

[13] Id at para 44 and *South African Reserve Bank v Shuttleworth* [2015] ZACC 17; 2015 (5) SA 146 (CC); 2015 (8) BCLR 959 (CC) (*Shuttleworth*) at para 42.

[14] *Casino Association* above n 9 at para 42.

[15] *Fedsure* above n 12 at para 44.

[16] Id at para 45.

[17] *Shuttleworth* above n 13.

[18] Id at para 42.

impose a tax "is solely within the remit of the Legislature".[19] The purpose of limiting the taxing power to legislative bodies "is to ensure that there is 'no taxation without representation'".[20] Permitting unelected bodies to impose taxes would violate that basic principle.

[19] More recently, in *Casino Association*,[21] this Court confirmed the invalidity of a North West Provincial Act that conferred a power on a Member of the Executive Council to impose gambling taxes by regulation. This was unconstitutional because "the Executive has no power to raise taxes itself".[22]

[20] These cases confirm that the Constitution reserves the taxing power for legislative bodies and that, when it permits the imposition of tax, it does so expressly and regulates how the power must be exercised. Legislative bodies can delegate the power to regulate, but not the power to tax.

Traditional leaders have no power to impose a tax

[21] *Shuttleworth* and *Casino Association* concerned the delegation of taxing powers to the Executive. That is plainly impermissible. To the extent that section 25 delegates a taxing power to the Premier, it falls foul of the Constitution. Just like the Constitution does not permit the Executive to tax, the Constitution does not confer such a power on traditional leaders, and does not allow that power to be delegated to them.

[22] Traditional leadership and customary law have a special place in the constitutional framework. The Constitution recognises the "institution, status and role of traditional leadership, according to customary law . . . subject to the Constitution".[23] It requires courts to "apply customary law when that law is applicable, subject to the

[19] Id.

[20] *Casino Association* above n9 at para 42.

[21] Above n 16.

[22] Id.

[23] Section 211(1) of the Constitution.

Constitution and any legislation that specifically deals with customary law".[24] The Constitution also permits a traditional authority to "function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs".[25] Finally, the Constitution permits national legislation to "provide for a role for traditional leadership as an institution at local level on matters affecting local communities".[26]

[23] None of these provisions authorise traditional leaders to impose taxes. It bears repetition that the Constitution limits taxing powers to elected legislative bodies. It would be inconsistent with the Constitution to permit unelected, non-legislative bodies to impose taxes. It is, in addition, common cause between the parties that customary law does not permit the imposition of compulsory taxes, only voluntary contributions. This was confirmed by both experts, and it is the unchallenged finding of the High Court.[27]

[24] In sum, under the Constitution, traditional leaders are not democratically elected legislative bodies, and therefore cannot impose taxes in terms of legislation. Neither can they impose taxes under customary law. The Provincial Legislature cannot delegate its power to impose taxes to either traditional leaders or the Premier.

Traditional levies and rates are taxes

[25] The final question under this heading is whether the levies and rates authorised by section 25 are "taxes, rates and levies" within the meaning of the Constitution. The question is about what section 25 permits traditional councils, together with the Premier, to do. Whether that power has in fact been exercised is immaterial to

[24] Section 211(3) of the Constitution.

[25] Section 211(2) of the Constitution.

[26] Section 212(1) of the Constitution.

[27] High Court judgment at para 34.

determining the constitutionality of section 25.[28] The confirmation of invalidity before this Court relates only to the law.

[26] To answer this question, this Court must consider and determine the meaning of a "tax, levy, rate, duty or surcharge" and whether the levies authorised by section 25 fit that definition. Courts have generally defined "tax" according to the ordinary dictionary definition: "compulsory contribution to the support of government, levied on persons, property, income, commodities, transactions etc".[29] However, there is no precise definition.

[27] In *Shuttleworth*, this Court noted that most decisions "shy away from defining the word 'tax' because it defies precise description outside the context of a specific statute and its purpose".[30] In *Casino Association*[31] this Court evaluated the instances where a charge is considered a tax. Emphasis was placed on the need to determine whether the dominant purpose of a provision was to raise revenue or regulate conduct. If it was the former, then it would usually be a tax. The Court explained that our jurisprudence demonstrates that there are "open-ended but helpful guidelines"[32] on determining the dominant purpose of a particular piece of legislation. Those guidelines must be weighed carefully on a case-by-case basis to arrive at a correct decision".[33] This Court referred to the following cases to support this reasoning:

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[28] *Ferreira v Levin N.O.*; *Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 26.

[29] See, for example, *Alberts v Roodepoort-Maraisburg Municipality* 1921 TPD 133 at 136; *Port Edward Health Committee v SA Polisie Rusoord* 1975 (2) SA 720 (D) (holding that "tax" generally has a wide meaning that includes "rates"); *City Treasurer and Rates Collector, Newcastle Town Council v Shaikjee and Others* 1983 (1) SA 506 (N) at 507F-508B (in determining whether property rates were a "tax" for the purposes of the Prescription Act 68 of 1969, Kumleben J held: "I have no doubt that they are. To furnish reasons for this conclusion is about as difficult as attempting to prove the truth of an axiom." He endorsed this definition of "tax": "compulsory contribution to the support of government, levied on persons, property, income, commodities, transactions, etc."); and *The Master v I L Back & Co Ltd* 1983 (1) SA 986 (A) at 1000H (endorsing these definitions).

[30] *Shuttleworth* above n 13 at para 49.

[31] Above n 9.

[32] *Shuttleworth* above n 13 at para 52.

[33] *Casino Association* above n 9 at para 46.

> "In *Permanent Estate*, a tax was said to be identifiable by the fact that money is paid into a general revenue fund for general purposes and no specific service is given in return for payment. In *Israelsohn*, the Appellate Division held that the charge in question was a tax because it was subject to the general machineries of tax assessment and collection. In *I L Back*, there was a fee rather than a tax, because its purpose was to empower the Minister to impose a fee for services and facilities he had to provide. In *Maize Board*, the measure was found not to be a tax because it was 'not imposed on the public as a whole or on a substantial sector thereof' and its proceeds were not used for public benefit, but largely to cover administrative costs. In *Gaertner*, this Court considered the primary and secondary functions of customs and excise duties and held that, although the regulatory aspect of the duties served an important public function, the statute in question was 'essentially fiscal'."[34]

[28] The Court then concluded that this is consistent with the position in Canada, where a "sufficient nexus" is required between a governmental levy with the characteristics of a tax, and a regulatory scheme of a statute, to determine whether a charge is regulatory, as opposed to a tax. It is clear from this passage that while there is no definitive standard for the determination of whether a charge is a tax, regard must be had to the dominant purpose of the empowering provision.

[29] Our jurisprudence identifies a number of characteristics a court will consider in determining whether a charge is a tax, rate or levy. In *Maize Board*[35] the High Court cautiously supported the following definition of "tax" offered by the Zimbabwean Supreme Court in *Nyambirai v National Social Security Authority and Another*:[36]

(a) it was a compulsory and not an optional contribution,

(b) imposed by the Legislature or other competent public authority,

(c) upon the public as a whole or a substantial sector thereof,

(d) the revenue from which was to be utilised for the public benefit and to provide a service in the public interest.[37]

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[34] Id at para 47.

[35] *Maize Board v Epol (Pty) Ltd* 2009 (3) SA 110 (D).

[36] 1996 (1) SA 636 (ZS).

[37] *Maize Board* above n 36 at para 22, quoting *Nyambira* id at 643C-D.

[30] In *Shuttleworth*, this Court said that these factors are not requirements but they are "are open-ended but helpful guidelines" and in "each case the factors must be weighed carefully in order to reach a correct outcome".[38] In *Randburg Management District*[39] the Supreme Court of Appeal considered the meaning of these factors and how they are applied. That Court had to determine whether a self-described "levy" imposed on owners of property within a City Improvement District (CID) was a "levy" for the purposes of section 160(2) of the Constitution. If it was, then the Johannesburg Municipal Council could not have delegated the power to impose it to the Mayor, and it would be unlawful. The CID argued that the payments were not "levies" for the purpose of the Constitution because the levies were not intended to provide revenue to the State, but were payable to a private management body and as the "persons who benefited from the CID levies formed only a portion of the populace of the larger municipal area, the levies could not be regarded as being required for municipal services".[40]

[31] The Supreme Court of Appeal rejected both contentions. It held that—

> "the whole purpose of the CID is for it, through its management board, to work in conjunction with the municipality to provide services falling within the sphere of municipal government but not at the time being adequately provided by the municipality".[41]

[32] The services funded by the CID levies were therefore "designed to supplement and enhance those which the municipality is able to deliver".[42] Having regard to

[38] *Shuttleworth* above n 17 at para 52.

[39] *Randburg Management District v West Dunes Properties 141 (Pty) Ltd* 2015 ZASCA 135; 2016 (2) SA 293 (SCA).

[40] Id at para 21.

[41] Id at para 24.

[42] Id.

previous cases that sought to define a "tax", the Supreme Court of Appeal concluded that the levies were a tax or a levy because:

(a) CID levies clearly have as their purpose the raising of revenue to fund the provision of services to enhance those actually rendered by a municipality;
(b) they are compulsory and not optional;
(c) they are imposed by a municipality on a substantial sector of the public, namely those who own land within the CID; and
(d) the revenue derived therefrom is utilised to provide services of a municipal nature in the general interest of those members of the public in the CID.[43]

[33] *Randburg Management District* – which this Court referred to with approval in *Casino Association*[44] – is authority for the following propositions:

(a) a levy does not need to be paid into a general revenue fund;
(b) a levy does not need to benefit the public as a whole, but only a section of the public;
(c) a charge used to fund the provision of specific services can be a levy; and
(d) the fact that the levy was not, in fact, imposed by a legislative body does not mean it was not a tax – it means that the levy was an unlawful delegation of power.

[34] It must finally be considered whether section 25(1) permits the imposition of "taxes", "rates" or "levies" which are reserved by the Constitution for legislative bodies. There are four factors that are relevant in this determination, namely, whether the rates and levies are compulsory, levied uniformly, paid into a general revenue fund and used for general purposes of the traditional council.

[43] Id at para 29.

[44] *Casino Association* above n 9 at para 48.

[35] First, the rates or levies are compulsory, not voluntary contributions. Section 25(1) says the traditional council "may . . . levy a traditional council rate upon every taxpayer". This is the language used for the imposition of a tax.[45] Section 25(3) provides that a taxpayer "who fails to pay the traditional council levy may be dealt with in accordance with the customary laws of the traditional community concerned". The Limpopo Act contemplates consequences for non-compliance (failure to pay the levy "may be dealt with"). The rates must be published in the Gazette, and "shall be of force from the date mentioned in such notice". If they were voluntary, there may be a need to publish them, but there would be no need to state when they would be "of force" – people would be entitled to pay them or not whenever they were published. The need to specify a date on which the rates come into force is only necessary because they are compulsory.

[36] Secondly, the rate or levy must be levied uniformly. A charge is still a tax if it is imposed on a section of the population.[46] The Limpopo Act authorises the imposition of a charge on all the residents in a traditional authority's area of jurisdiction, just as the CID levy applied to all property owners within such District in *Randburg Management District*. The fact that the tax does not apply to everyone in Limpopo – just like the CID levy did not apply to everyone in Johannesburg – does not mean it is not a tax. The requirement shows both the uniformity of the rate or levy, and its compulsory nature. If the charge was voluntary, then there would be no need to require that it be levied on "every taxpayer". It would merely be paid by those who wished to pay.

[37] Thirdly, the rates or levies are not paid into a government revenue fund, but they are paid into the traditional council equivalent. They are paid into the same general account as all the traditional council's other funds. Section 24 lists the sources of a traditional council's funds, including "any amounts received by the traditional council

[45] The statute at issue in *Randburg Management District* above n 40 provided: "a municipality must levy an amount on behalf of the management body from the owners of rateable property". That was found to constitute a tax. See para 29.

[46] Id at paras 21-2.

under section 25". Section 25 permits the imposition of rates or levies. Section 26(1) provides that the Premier must cause to be opened in respect of each traditional council, an account "into which shall be paid all amounts received in terms of section 24 and from which all expenditure incurred in connection with any matter within the power of the traditional council concerned must be met". Section 25 levies or rates are not ring-fenced, or used to defray the costs of specific services provided to specific individuals. They are placed in the same pot as all other money the traditional council receives.

[38] Fourthly, the rates or levies must be used for the general purposes of the traditional council. The account opened in terms of section 26, is, in terms of the Limpopo Act, the source "from which all expenditure incurred in connection with any matter within the power of the traditional council concerned must be met". As all rates and levies are paid into that account, that is what they must be used for. The roles of traditional leadership are spelled out in the Limpopo Act, and include to: (a) promote the interests of the traditional community concerned; (b) in co-operation with the relevant municipalities and State departments, assist with the administration of the traditional community; (c) actively participate in the development of the area of his or her traditional community; (d) at the request of any government department or the relevant municipality, make known to all residents of the traditional community concerned the provisions of any new law; and (e) perform any functions allocated by any organ of State in accordance with the Act.[47]

[39] A traditional council must account to the Premier or another organ of State on how it has exercised its functions.[48] This is directly analogous to the role played by the CID in *Randburg Management District*, which the Supreme Court of Appeal held constituted the expenditure of funds for a public purpose and in the interests of the public. What the levies in fact imposed on communities in Limpopo are used for is

[47] Section 18(1) of the Limpopo Act.

[48] Section 18(3) of the Limpopo Act.

irrelevant. The challenge is to the Limpopo Act, and the Act requires the rates and levies to be paid into the general account, and used for general purposes.

[40] In my view, the rates and levies share all the characteristics of traditional taxes – they are compulsory charges, uniformly imposed, paid into a general fund, for the public good or the provision of services. The High Court was correct to conclude that section 25 of the Limpopo Act is unconstitutional and invalid and the order of invalidity of that Court must be confirmed.

Appeal against costs

Direct leave

[41] The applicants seek leave to appeal directly to this Court against the costs order made by the High Court. They submit that it is in the interests of justice that they be granted direct leave to appeal to this Court. They submit that this Court must hear the confirmation proceedings and it would be a waste of judicial resources to bring a separate application for leave to appeal in the High Court. It will not be a significant strain on this Court's resources also to grant leave to appeal on the issue of costs. The record is already before this Court. By contrast, if the applicants' appeal on the issue of costs was heard by a Full Court or the Supreme Court of Appeal, while the confirmation proceedings were heard by this Court, undesirable and unnecessary parallel litigation would be created.

[42] To the extent that the costs issue relates to the challenge to section 25 of the Limpopo Act, this Court has the jurisdiction to interfere with that order under its confirmation jurisdiction. That jurisdiction includes the power not only to confirm or refuse to confirm an order of invalidity. This Court also has the power to alter the ancillary orders the High Court made that flowed from the order of invalidity, including the costs award.

[43] In the circumstances, I agree that it is in the interests of justice for this Court to determine both issues (the challenge to section 25 and costs) simultaneously.

Merits

[44] The general rule is that a party that successfully brings a constitutional claim against the State is entitled to its costs.[49] The applicants were successful in their constitutional claim in the High Court, yet Semenya AJP made no order as to costs.

[45] In *Biowatch* this Court held that "particularly powerful reasons must exist for a court not to award costs against the State in favour of a private litigant who achieves substantial success in proceedings brought against it".[50] This Court re-affirmed this principle in *Tebeila Leadership Institute*[51] where it emphasised that "litigants successfully asserting their constitutional rights against State institutions should get their costs unless there are 'carefully articulated and convincing' reasons to deprive them of those costs".[52]

[46] In the High Court, counsel for the State respondents argued that the High Court should not apply the *Biowatch* principle as the Premier had defended the matter in order to demonstrate that contributions to the traditional councils are not made in terms of section 25. They further contended that the applicants had caused confusion in that "they had decided to abandon some of their claims at a late stage"[53] and 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".[54]

[49] *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

[50] Id at para 24.

[51] *Tebeila Institute of Leadership, Education, Governance and Training v Limpopo College of Nursing* [2015] ZACC 4; 2015 (4) BCLR 396 (CC).

[52] Id at para 17.

[53] High Court judgment above n 28 at para 32.

[54] Id at para 32.

[47] The High Court did not engage with these submissions other than to set them out without stating whether it agreed with them or not. In relation to the traditional authorities, the High Court held that "it will be inappropriate to order the traditional authorities to pay the costs"[55] based on an inability to pay. The traditional authorities had stated in their affidavits that without imposing compulsory levies on community members "the institution will be brought to their knees"[56] and the High Court concluded that the traditional authorities "will not . . . be in a position to pay costs".[57] Ultimately the High Court held – without clear explanation – that "this is a case where each party should be ordered to pay its own costs". At the hearing of this matter, counsel for the applicants indicated that the applicants will not be seeking a costs order against the traditional authorities.

[48] The applicants were successful on multiple fronts in the High Court. They opposed the respondents' multiple *in limine* (preliminary) objections. All these objections were dismissed. They sought an order that section 25 of the Limpopo Act was unconstitutional and invalid. That relief was opposed, but it was granted. They sought a declaratory order that customary law permits traditional leadership structures to impose only voluntary levies, and only after consultation with the community about the need for, amount and purpose of the levy. That relief was opposed, but it was granted. In addition, further ancillary relief was granted.

[49] The High Court provided no reasons for the costs order it made. It clearly did not exercise its discretion in making the order it did. In these circumstances, this Court can interfere with the costs order.

[50] The applicants achieved not just partial but overwhelming success against largely unnecessary opposition. *Biowatch* and *Tebeila Institute of Leadership* require that they be awarded their costs. The High Court was wrong to deny them these costs.

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[55] Id at para 33.

[56] Id.

[57] Id.

Directions issued by this Court

[51] After the hearing of this matter, the Chief Justice issued the following directions:

> "In view of the facts that the first, second, third and eleventh respondents only opposed costs in this Court and their written submissions filed in this Court comprise only ten pages, these respondents must file written submissions by Wednesday, 9 October 2024, addressing the following questions:
>
> (i) Why were four counsel briefed in this matter?
>
> (ii) Who decided that four counsel should be briefed?
>
> (iii) What order should be made if this Court decides that the costs of more than one counsel should not be covered by the State?
>
> (iv) In the event that more than one counsel is instructed to prepare the submissions arising from these directions, why was it necessary to do so?"

[52] In their response to these directions, the State respondents explained that when the matter started in 2016, the second, third and eleventh respondents were represented by Advocate Mathibedi SC and Advocate Mokadikoa-Chauke, who was a junior at the time. Senior Counsel status was conferred on Advocate Mokadikoa-Chauke in 2018. The two Senior Counsel were of the view that the matter was complex, involving aspects of constitutional and customary law, and they made a decision to engage a second junior to assist with research and other related matters. It was also submitted that the "involvement of the second junior would also serve to transform, empower and transfer skills". On this basis, a motivation was submitted to the office of the State Attorney, Polokwane with a request for the appointment of a second junior, which was approved by the second respondent and the Limpopo Provincial Department of Cooperative Governance and Traditional Affairs, in effect the third respondent.

[53] It was further explained that the National Department of Cooperative Governance and Traditional Affairs (in effect the first respondent) had appointed its own legal team, comprising of the late Advocate Lebala SC and Advocate Choeu. After the passing of Advocate Lebala SC, Advocate Mathibedi was approached by the State

Attorney with a request to lead Advocate Choeu on behalf of the National Department of Cooperative Governance and Traditional Affairs without charging any extra fees.

[54] The State respondents say that "it is glory and prestige for a black child to appear in the Constitutional Court, especially juniors who are appearing for the first time". The two Senior Counsel in the matter submit that they never contemplated withdrawing from the matter or asking their juniors to withdraw. They further contend that it "would not be simple for Senior Counsel to appear in the Constitutional Court alone to the exclusion of juniors or send juniors alone to the exclusion of seniors".

[55] In response to the question regarding the order that should be made if this Court decides that the costs of more than one counsel should not be covered by the State, the State respondents propose several options. First, that Advocate Mathibedi SC forego his fees in relation to the preparation and finalising of submissions and his appearance in this Court. Second, that Advocate Mokadikoa-Chauke SC and the two junior counsel forego 40% of their fees, relating to the preparation and finalisation of submissions and their appearance in this Court. The third option is that the two junior advocates (Advocate Choeu and Advocate Dube) are entitled to full fees for their respective appearance for the first respondent and the second, third and eleventh respondents. The final option is that all counsel forego their fees, relating to the preparations and finalisation of submissions and their appearance in this Court.

[56] The submission from the State respondents in respect of costs arising from responding to this Court's directions, is that all their counsel forego their fees in this regard.

[57] The State respondents were represented by four advocates in this Court, including two Senior Counsel. Their appearance in this Court was only to oppose the appeal in respect of costs. There can be no good reason, and none was offered by the State respondents in their response to the directions from this Court, as to why it was necessary to brief four counsel, including two senior counsel, in this matter. State

respondents must be cognisant of the fact that when they engage in litigation, they do so at the expense of the public purse. Briefing four counsel for purposes of opposing a costs order was not justified.

[58] In *Compensation Solutions*[58] the Supreme Court of Appeal held:

> "The judgment cannot be concluded without dealing with the Commissioner's decision to appoint five counsel in appeal 1175/2021. When the matter was called on 5 September 2022, the State parties were represented by seven counsel in total, a senior and junior in appeal 997/2021 and a senior and four juniors in appeal 1175/2021. This Court called for an explanation as to why it was deemed necessary to appoint so many counsel. When the appeal was eventually heard, the State parties were only represented by two counsel in appeal 1175/2021 and as previously, the two other counsel in appeal 997/2021. Money that could be made available for the payment of compensation to worthy claimants was wasted on unnecessary legal costs. There was simply no explanation as to why that many counsel were briefed. It would accordingly not be appropriate for the State Attorney to recover from its clients in appeal 1175/2021 the fees and expenses of more than one senior and one junior counsel."[59]

[59] The option presented by counsel for the State respondents that the two junior counsel should not be deprived of their fees in this matter is appealing to me. The senior advocates, more so than junior counsel, should have been aware that four advocates appearing in this matter, was not warranted and taken the lead in remedying the situation.

[60] In conclusion, I add that the time may have come to do more than simply impose adverse ad hoc costs orders in matters where legal costs could and should have been curbed. There should be an ethical duty on legal representatives to consider the most effective reasonable use of resources *before* the costs are incurred. Ordinarily, this ethical duty appears in professional codes of conduct. For example, in England and

[58] *Compensation Commissioner v Compensation Solutions (Pty) Ltd* [2022] ZASCA 165; 2022 JDR 3587 (SCA).

[59] Id at para 34.

Wales, the Code of Conduct published by the Bar Standards Board outlines a general duty to act in the best interests of each client (CD2). The general duty to act in the best interests of each client also includes "a duty to consider whether the client's best interests are served by different legal representation, and if so, to advise the client to that effect" (Rule rC17).[60]

[61] Whilst the Code of Professional Conduct & Ethics of the National Bar Council of South Africa does not include a similar duty with such specificity, principle 6.2 states: "An advocate should serve the client in a conscientious, diligent and efficient manner." I consider that legal representatives (including the State Attorney), acting conscientiously, diligently, and efficiently, should advise clients on the number and seniority of counsel required relative to the nature and complexity of the matters in question. This issue is raised for the attention of the organised profession to consider and implement. Rather than such matters being dealt with on an ad hoc basis by a Court, a set of rules and principles may need to be developed to deal with circumstances such as these in the future. A copy of this judgment should be forwarded to the Legal Practice Council, the General Council of the Bar of South Africa and the Pan African Bar Association of South Africa.

Order

[62] The following order is made:

1. Condonation for the late filing of the application for confirmation and the application for leave to appeal directly to this Court is granted.

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[60] Guidance on this rule states:

> "Your duty to comply with Rule rC17 may require you to advise your client that in their best interests they should be represented by:
>
> 1. a different advocate or legal representative, whether more senior or more junior than you, or with different experience from yours;
> 2. more than one advocate or legal representative;
> 3. fewer advocates or legal representatives than have been instructed; or
> 4. in the case where you are acting through a professional client, different solicitors."

Bar Standards Board "The Bar Standards Board Handbook Version 4.8" (21 May 2024), available at: https://www.barstandardsboard.org.uk/the-bsb-handbook.html.

2. The High Court's order of invalidity is confirmed.
3. Section 25 of the Limpopo Traditional Leadership and Institutions Act 6 of 2005 is declared inconsistent with the Constitution and invalid.
4. Leave to appeal directly to this Court is granted.
5. The High Court's costs order is set aside and replaced with the following: "The first, second, third and eleventh respondents shall pay the applicants' costs, including the costs of two counsel."
6. The first, second, third and eleventh respondents shall pay the applicants' costs in this Court, including the costs of two counsel.
7. The State Attorney shall not be entitled to recover from its clients the fees and expenses of more than two junior counsel in this Court.
8. Counsel for the first, second, third and eleventh respondents are not entitled to fees for the preparation of the submissions in response to the post-hearing directions issued by this Court.

For the Applicants:	G Budlender SC, M Bishop and N Muvangua instructed by the Legal Resources Centre.
For the First, Second, Third and Eleventh Respondents:	T Mathibedi SC, M Mokadikoa-Chauke SC, N Choeu and D Dube instructed by the State Attorney, Polokwane.
For the Fourth to Tenth Respondents:	O L R Mudau instructed by SM Mpati Attorneys.