

Limpopo royal family feud could change customary law

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Courts to rule on key issues linked to succession.



A case before the Constitutional Court could introduce a new era of customary law. Graphic: Lisa Nelson / GroundUp

- The courts have been asked to rule in the battle over the succession to the VhaVenda throne.
- One of the issues to be considered is whether or not only men can rule the kingdom.
- In her battle for the throne, Masindi Clementine Mphephu has also asked the court to declare that no person associated with corruption may become king or queen of the VhaVenda.
- Toni Mphephu-Ramabulana, who had acceded to the throne, has been linked to the VBS Mutual Bank debacle.

The court battle to determine who should be the king or queen of the VhaVenda may very well introduce a new era of customary law in South Africa. At the heart of the case are issues such as whether only male contenders are allowed to rule and whether known fraudsters should be contenders for the highest title.

It also raises the question of whether the courts should assist in developing customary law, in cases where the kingdoms neglect to do so, to bring it in line with the country's Constitution.

An application to amend a notice of motion was served before Judge President Moletje George Phatudi in the Limpopo High Court last week. The amended notice of motion asks the court to provide clarity on several issues before the main case to determine the VhaVenda leader commences.

Background

The “Masindi case” dates back to December 2012 when the then-21-year-old Masindi Clementine Mphephu [filed papers](#) in the Limpopo High Court. It was three months after then-President Jacob Zuma had published a notice in the Government Gazette recognising Toni Mphephu-Ramabulana as king of the Venda nation. Masindi claimed that she was the rightful heir to the throne and had been overlooked because of her gender.

It was almost four years before the first ruling was made. In December 2016, Judge President Ephraim Makgoba [dismissed](#) Masindi's case. He was not convinced that the applicants had exhausted all other avenues, such as the Commission on Traditional Leadership Disputes and Claims, to resolve the dispute. He was also not convinced that the issue of male primogeniture was central to the case. Judge Makgoba later also refused them permission to appeal his verdict.

While this was happening, Masindi's legal team managed to obtain an [interdict](#) to stop the inauguration of Toni Mphephu as king. They later successfully applied for permission to appeal directly to the Supreme Court of Appeal (SCA).

On Friday, 12 April 2019, the SCA announced its [judgment](#), which came as a severe blow to the Mphephu-Ramabulana Royal Family. The five Supreme Court judges agreed with the High Court on some of its findings but disagreed on most of the important issues raised. They also disagreed with Judge Makgoba's stance that the courts should not give direction in such matters. "The courts are vested with authority to adjudicate customary law issues in appropriate cases and to that end Section 211 of the Constitution obliges them to apply and give effect to customary law where it is implicated," the judgment reads.

The SCA ruled that the process to appoint a new leader must start afresh. The case was referred back to the Limpopo High Court for a new hearing before another judge. The SCA emphasised that the Royal Family has an obligation to reform traditional practices such as those that promote gender discrimination. The House of Traditional Leaders was also ordered to provide input to the court.

After waiting for more than a year, the legal team of the Mphephu-Ramabulana Royal Family [filed papers](#) at the Constitutional Court, asking that the SCA's decision be set aside. Masindi Mphephu's legal team also filed a [counter-application](#) asking that the stay order of the SCA (which meant that Toni continued as an interim ruler) be set aside and that she be awarded costs in the various cases.

The royal family's application was dismissed, but Masindi's was entertained by the Constitutional Court, which ruled that it was in the interest of justice to hear her case. On Friday, 12 November 2021, Judge Sisi Khampepe delivered the [judgment](#). It was a unanimous decision for Masindi, supported by her seven fellow judges.

The SCA's order to allow Toni Mphephu-Ramabulana to continue to reign was summarily set aside. "It could be years before the review proceedings are finally settled ... It also means that Mr Mphephu-Ramabulana will continue to unlawfully occupy the throne in circumstances where his appointment has been found to have been unconstitutional and invalid," the judges ruled. A cost order was also awarded in Masindi's favour for all the cases up to that point.



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Corruption clause

The extremely slow pace of the legal system is very evident in the Masindi case. A pre-trial conference was held early in February 2022, but it became clear that the Royal Family would raise numerous technical objections.

The first hurdle Masindi's legal team now must clear is to get the court's approval to amend their notice of motion. They argue this is necessary because of events which have taken place since the original papers were filed, such as the SCA ruling and the ruling in the Constitutional Court. They also argue that Toni Mphephu's implication in fraud at [VBS Mutual Bank](#) emphasised the need to bring in a "corruption amendment".

Masindi's legal team wants the court to make a declaration that no person associated with corruption may become king or

queen of the VhaVenda. “This amendment is essential because, since the hearing in the High Court, there has been an avalanche of evidence to demonstrate that the first respondent is associated with corruption pertaining to the VBS Bank,” they argue in their application.

The amendments dwell at length on the need for an “anti-corruption” clause. “The fact that they [traditional leaders] are not subject to elections, and hold positions for life, means that they are all the more compelled to be scrupulously incorruptible and honest. It is therefore essential that in these proceedings that will determine who will end up as life-long king or queen of the VhaVenda, this issue is aired and scrutinised,” they argue.

In the amended notice of motion, Masindi’s legal team requested that all the affidavits filed by the parties in the SCA and the Constitutional Court form part of the record of evidence.

This is likely a move aimed at also introducing evidence of perjury, since they believe senior members of the Royal Family lied under oath to protect Toni Ramabulana.

The request to amend the notice of motion was only opposed by the eighth respondent, the Mphephu-Ramabulana Royal Family Council. The other respondents, which include the South African President, the Limpopo Premier, and the national and provincial houses of traditional leaders, opted not to oppose the amendments.

The Dzekiso wife

An argument previously raised by the Royal Family is that Masindi was not born from a “Dzekiso” or “candle wife”. In cases where a king has several wives, there often is a rule that the successor may only come from the children of the specially selected wife. It is argued that VhaVenda custom prohibits the successor to the crown from being the child of a musiwana (commoner), which also means that neither Masindi nor Toni would qualify.

In the amendments, the problems of such an arbitrary mechanism to choose a ruler are highlighted. Masindi is the only child of the late ruler, Dimbanyika, which means that there is no need for such a choosing mechanism, her legal team argues. The court is asked to declare that VhaVenda customary law makes provision for this, or needs to be developed to make provision that an only child be considered as being from the Dzekiso wife.

A further amendment addresses the question of Masindi being born before her father became king. The Royal Family argued that only children born after a king was inaugurated may be in line to succeed him. Masindi disputes that there is any such rule, and has been supported in this regard by the National and Provincial Houses.

Still a long way to go

Judge Phatudi is expected to make a ruling before the end of February. However, this does not mean that the case will be heard within the next few months. Masindi’s attorney Johann Hammann said that they are pushing to set a date for a hearing.

The issue of an interim leader is also still far from being settled. In July last year, the Mphephu-Ramabulana Royal Council asked the Constitutional Court to make a ruling as far as the appointment of an interim leader is concerned. The Limpopo High Court previously ruled that an interim leader cannot be appointed while a review application is pending.

The Royal Family wants to appoint Mavhungu David Mphephu (commonly known as Japan Mphephu) as acting king, but this is opposed by the Limpopo Premier and the MEC, as well as by Masindi. In Masindi's case, one of their arguments is that Japan Mphephu is not a proper candidate because he allegedly lied under oath in his affidavits.

The case is expected to be heard before the Constitutional Court on Thursday 29 February.

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