NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

CASE NO: 68501/2010

DATE:12/04/2012

JUSTICE M PON DO MBINI SIGCAU	Applicant
and	
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
THE COMMISSION ON TRADITIONAL LEADERSHIP DISPUTES AND CLAIMS	Second Respondent
CHAIRPERSON OF THE COMMISION ON TRADITIONAL LEADERSHIP DISPUTES AND CLAIMS	Third Respondent
ZANUZUKO TYELOVUYO SIGCAU	Fourth Respondent
MINISTER OF LOCAL GOVERNMENT AND TRADITIONAL AFFAIRS	Fifth Respondent
PREMIER : EASTERN CAPE PROVINCE	Sixth Respondent
NATIONAL HOUSE OF TRADITIONAL LEADERS	Seventh Respondent
EASTERN CAPE HOUSE OF TRADITIONAL LEADERS	Eighth Respondent
IKUMKANI AMAMPONDO ASE NYANDENI	Ninth Respondent

DE KLERK, AJ

[1] The applicant launched this review application as a result of President's Minutes published as no.'s 406 and 407 , respectively, both on the 3rd November 2010 , by the first respondent , recognizing the kingship of AmaPondo and recognizing King Zanozuko Tyelovuyo Sigcau [the Fourth Respondent] as its king[1]. Previously the applicant used to be Paramount Chief of Eastern Pondoiand , having been nominated by the fourth respondent's grandfather , Nelson Sigcau , seconded by one Stanford Sigcau and having been unanimously accepted as such by the Regional Tribal Authority on the 10th December 1978[2] to succeed his father , Botha Sigcau , as Paramount Chief, after the latter's demise . These minutes followed on President's Minute No 144[3], published in terms of sec 26(3) of Act 41 of 2003 , as amended , on the 7th April 2010 , accepting the recommendations of the Commission , referred to in paragraph [2] infra .

[2] The afore said minutes were published subsequent to the investigation and decision of a commission , appointed in terms of the Traditional Leadership and Governance Framework Act , Act No 41 of 2003 ["the old act"] , as amended by the Traditional Leadership and Governance Framework Amendment Act , Act No 23 of 2009 ["the new act"] . It should be mentioned already at this stage that the old act was amended by the new act, the date of its commencement being the 25th January 2010 .

[3] A brief chronology of events relevant to the ultimate decision of the Commission , conveyed by means of a report[4] to the first respondent on 9 February 2010 , may assist in

1 "Pleadings" , Bundle 6 , pp 537 -9
2 "Record" , Vol 5, Bundle 9 , pp 862 -3
3 "Pleadings" , Bundle 6, pp 536
4 "Record" , Vol4, Bundles 8 & 9, pp 707 - 829

understanding the ultimate decision in this judgement:

(a) Sections 211 and 212 was incorporated in the Constitution of the Republic of South Africa , 1996 , certified by the Constitutional Court and provide as follows :

RECOGNITION

211(1) The institution , status and role of traditional leadership , according to customary law are recognised ;subject to the Constitution .

(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs , which includes amendments to or repeal of that legislation or those customs .

(3)The courts must apply customary law when that law is applicable , subject to the Constitution and any legislation that specifically deals with customary law.

ROLE OF TRADITIONAL LEADERS

212(1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities .

(2) To deal with matters relating to traditional leadership , the role of traditional leaders , customary law and the customs of communities observing a system of customary law -

(a) national or provincial legislation may provide for the establishment of houses of traditional leaders ; and

(b) national legislation may establish a council of traditional leaders .

(b) As a result of section 212 the Traditional Leadership Framework Act , Act No 41 of 2003 ["the old act] , was launched through Parliament , with date of commencement being 24th September 2004 .

(c) On the 4th November 2004 and in terms of section 22 of the old act the second respondent , commonly termed THE NHLAPHO COMMISSION [Commission on Traditional Leadership Disputes and Claims] , was established , with a two-pronged instruction - firstly to investigate the legitimacy of the then 12 paramountcies, to ultimately decide how many of them qualify as kingships and , secondly , to identify the kings of each kingship .

Section 22 of the old act provided as follows :

"22. (1) There is hereby established a comission known as the Commission on Traditional Leadership Disputes and Claims .

(2) The commission must carry out its functions in a manner that is fair, objective and impartial "

The mandate of the commission was set forth in section 21 of the old act, providing :

"21. (1)(a) Whenever a dispute concerning customary law or customs arises within a traditional community or between traditional communities or other customary institutions on a matter arising from the implementation of this Act , members of such community and traditional leaders within the traditional community or customary institution concerned must seek to resolve the dispute internally and in accordance with customs .

(b) Whenever a dispute envisaged in paragraph (a) relates to a case that must be investigated by the Commission in terms of section 25(2) , the dispute must be referred to the Commission and paragraph (a) does not apply .

(2)(a) A dispute referred to in subsection (a) that cannot be resolved as provided for in that subsection must be referred to the relevant provincial house of traditional leaders , which house must seek to resolve the dispute in accordance with its internal rules and procedures.

(b) If a provincial house of traditional leaders is unable to resolve a dispute as provided for in paragraph (a) , the dispute must be referred to the Premier of the province concerned , who must resolve the dispute after having consulted -

(i) the parties to the dispute ; and

(ii) the provincial house of traditional leaders concerned."

(d) The commission completed the first part of its task during 2008 and decided that there are seven kingships , namely :

(i) AbaThembu ;

(ii) AmaXhosa;

(iii) AmaMpondo ;

(iv) AmaZulu ;

(v) AmaNdebele of Manala and AmaNdebele as a whole ;

(vi) Bapedi ba Maroleng

(vii) VhaVenda Kingship .

(e) Having completed its primary task , the Commission [second respondent] then commenced the second leg of their investigation , namely to establish who should be recognized as kings in the various kingships , inter alia also in the kingship of AmaMpondo (over which kingship no dispute was mentioned during the second phase of the second respondent's task [except that the present applicant at one stage during the hearing almost dwelled into facts relevant thereto , but was reminded by the chairman that it was not part of the current proceedings] or during the hearing of the review application). It was not disputed that there .were various kingships and incumbents thereof [kings] which were contested country wide , inundating the second respondent in litigation .

(f) The Commission , under chairmanship of its Deputy Chairman , Professor Moieleki , the third respondent herein , investigated the incumbency of the kingship of AmaMpondo as the

result of a claim thereto by the fourth respondent - the applicant claiming at the same time that he was the ukumkani of the AmaMpondo . The record of those proceedings reveals the following chronology :

(i) The first cession commenced on the 28th January 2008 and lasted till the 30th January 2008[5]. During this cession a number of technical points were raised in limine , of which some was raised again in the present proceedings , being firstly that the matter is res judicata , in that Davies , J. in the Cape Provincial Division and after that the Appellate Division of the Supreme Court of South Africa (in 1944) has already found that the applicant's father was recognised as Paramount Chief of the AmaMpondo aseQuakeni by the then Governor-General and thereafter , and that the Commission cannot upset a decision by the Courts of this country.

The second respondent dismissed these points taken by the applicant.

(ii) At the request of the applicant the matter was postponed to the 31st March 2008 and its hearing then lasted till 3 April 2008 . During this cession[6] the fourth respondent stated his case , without calling any witnesses and closed his case after completing his own testimony . Thereafter the applicant started his case by first calling some fairly elderly witnesses to enable their evidence to be recorded . The last witness to testify was the applicant himself. The record reflects his testimony as Kumkani Sigcau , whereas the evidence of the fourth respondent , who conducted his own case (applicant having been represented by {junior} counsel) was referred to as that of Mr Sigcau . A further cession had to follow , as all evidence had not yet been placed before the commission .

(iii) The third and final cession was held on the 2nd to 6th June 2009[7], during which cession the fourth defendant applied to re-open his case and called two witnesses to substantiate his

5 Record , Vol 1, Bundle 1, pp 1 - 63
6 Record , Vol 2 , Bundle 1 p 64- Bundle 4 p 404
7 Record, Vol 3 , Bundle 5 p 405 - Bundle 7 p 706

case . Both parties were then requested to present any further evidence to support their case by means of affidavits , including their closing arguments and they were put on terms to supply the latter by 16th July 2009 .

The further evidentiary material and written submissions included the full record of the proceedings in the Cape Provincial Division as well as the report of the Appellate Division's decision in 1944 . It also includes court papers of other applications which the parties considered relevant to the issues , e.g. between the applicant and the Government of the Transkei as well as proceedings by Magingqi Sigcau and other members of the Royal Family of the AmaMpondo aseQuakeni .

(iv) It is now accepted that the second respondent arrived at its ultimate decision on the 21st January 2010 and conveyed its recommendations to the first respondent by means of a 122 [hundred and twenty two] page report[8] on the 9th February 2010.

it was as a result of the second respondent's report to the first respondent that Presidential Minute No 144 saw the light on the 7th April 2010[9].

[4] The functions of the second respondent were spelt out in section 25 of the old Act:

"25.(1) The Commission operates nationally and has authority to decide on any traditional leadership dispute and claim contemplated in subsection (2) and arising in any province .

(2)(a) The Commission has authority to investigate, either on request or of its own accord -

(i).....

(ii) a traditional leadership position where the title of the incumbent is contested;

(iii).....

(iv).....

(v).....

8 Record , Vol 4 , Bundle 8 p 707 - Bundle 9 p 829

9 "Pleadings" , Bundle 6, pp 536

(vi).....

(b).....

(c).....

0) .....

(ii).....

(3)(a) When considering a dispute or claim ,the Commission must consider and apply customary laws and the customs of the relevant traditional community as they were when the events occurred that gave rise to the dispute or claim .

(b) The Commission must -

(i) in respect to a kingship be guided by the criteria set out in section 9(1)(b) and such other customary norms and criteria relevant to the establishment of a kingship;"

[5] Section 26 of the old Act directed the second respondent as far as its decisions are concerned :

"26.(1) A decision of the Commission is taken with the support of at least two thirds of the Members of the Commission.

(2) A decision of the Commission must, within two weeks of the decision being taken , be conveyed to -

(a) the President for immediate implementation in accordance with section 9 or 10 where the position of a king or queen is affected by such decision; and

(b) the relevant provincial government and any other relevant functionary which must immediately implement the decision of the Commission in accordance with applicable provincial legislation in so far as the decision does not relate to the recognition or removal of a king or queen in terms of section 9 or 10.

(3) Any decision taken by the Commission must be conveyed to the President.

Due to the continuous reference to sections 9 and 10 , it would be apposite to have reference thereto :

9.(1) Whenever the position of a king or queen is to be filled , the following process must be followed :

(a) The royal family must, within a reasonable time after the need arise for the position of a king or queen to be filled , and with due regard to applicable customary law -

(i) identify a person who qualifies in terms of customary law to assume the position of a king or queen , as the case may be , after taking into account whether any of the grounds referred to in section 10(1)(a) , (b) and (d) apply to that person: and

00.....

(aa).....

(bb).....

(b) the'President must, subject to subsection (3) , recognise a person so identified in terms of paragraph (a)(i) as a king or queen , taking into account-

(i).....

(ii).....

(aa).....

(bb).....

(cc).....

(iii).....

(2) The recognition of a person as a king or queen in terms of subsection (1)(b) must be done by way of -

(a) a notice in the Gazette recognising the person identified as king or queen ; and

(b) the issuing of a certificate of recognition to the identified person .

(3) Where there is evidence or an allegation that the identification of a person referred to in subsection (1) was not done in accordance with customary law , customs or processes , the President -

(a) may refer the matter to the National House of Traditional Leaders for its recommendation ; or

(b) may refuse to issue a certificate of recognition ; and

(c) must refer the matter back to the royal family for reconsideration and resolution where the certificate of recognition had been refused .

10.(1) A king or queen may be removed from office on the grounds of-

(a).....

(b).....

(c) wrongful appointment or recognition ; or

(d)..... "

[6] Section 23(1) provided that the President must appoint a Commission of not more than 15 persons as members , who are knowledgeable regarding customs and the institution of traditional leadership .

[7] The fourth respondent \o6ge6 his claim to the kingship of AmaMpondo on 26 April 2007[10] After the Commission completed its preliminary task of identifying the kingships to be recognised , the Commission commenced with the investigation of claims and disputes regarding either the recognition or not of a kingship and claims to [the incumbency of] the

10 Record , Vol 5 , Bundle 9 , pp 833 - 842

position of king . As remarked previously , the Commission recognised seven kingships and apart from its investigation at that stage , it was then and is presently inundated in litigation regarding its various decisions .

[8] In terms of section 25(5) the Commission had to complete its mandate within a perlo6 of five years or within such longer period as the President may determine . Pursuant to this provision , the Commission's Intial term , which would have terminated on 3 November 2009 , was duly extended by the President to 31 January 2010 . As has been stated before , the Commission made its decision regarding the incumbency of the kingship of AmaMpondo or 21 January 2010 and delivered its report with its recommendations to the President on ' February 2010 .

It follows then that the Commission completed its task regarding the incumbency of tr kingship of AmaMpondo on a date just prior to the coming Into effect of the new ac amending the old act on 25 January 2010 , but instead of conveying a decision taken by its, it recommended to the President that the fourth respondent be regarded as the king of the AmaMpondo .

[9] When this review hearing commenced , counsel for the applicant outlined the scheme of his argument by referring to no less than 10 points he termed points in limine :

1) Neither the second , nor the third respondent were entitled to be before the Court;

2) The Commission has no legal personality ;

3) The report brought out by the Commission is of no force or effect as the Commission ceased to exist before it was handed in on the 9th February 2010 , as the new act has come into effect and the "old Commission's" mandate had lapsed ;

4) Section 26 of the new act is NOT retrospective in its application - the Commission should have followed the procedure prescribed by the old act;

5) The locus standi in iudicio of the Commission came under attack , in that the third respondent had no further interest in the matter once its report was filed with the first respondent - the real parties to be represented before court should have been the first and the fifth respondents ;

6) The fourth respondent has neither opposed , nor is he represented before the Court;

7) In view of the decision written by Goldstone J [as he then was] in GERHARDT vs THE STATE PRESIDENT , 1989 (2) SA 499 (T) , the third respondent couid not file an affidavit on their behalf as that would amount to inadmissible hearsay evidence ;

8) The first respondent's decision , pronounced on the 5th of November 2010 was null and void , as it was not taken within 60 (sixty) days (if the Commission's decision was taken on the 21st January 2010 , the report should have been handed to the first respondent on the 4th February 2010 , but even where it was handed to him 5 days late on the 9th February 2010 , the date of the 5th November 2010 was way more than 60 days);

9) The decision of the first respondent should be reviewed and set aside as the first respondent failed to act in terms of section 26(3) of the new act; - and -

10) Annexure "JMS 2(1)" to the pleadings[11] , the Press Statement dated 29 July 2010 does not amount to a notice in terms of section 9(2) of the new act:

"(2) The recognition of a person as a king or a queen in terms of subsection

(1Kb) must be done by way of-

(a) a notice in the Gazette recognising the person identified as king or queen ; and

(b) the issuing of a certificate of recognition to the identified person/'

Thereafter counsel for the applicant indicated that he would deal with the merits of the application .

[10] In support of his first point in limine applicant relied on the wording of section 28(11) of

11 Record , Vol 5 , Bundle 9 , pp 833 - 842

the new act, which provides :-

"(11)(a) The Commission established by section 22 as amended by the Traditional Leadership and Governance Framework Amendment Act , 2009 (hereinafter referred to as "new Commission") , is the successor in law of the Commission as it existed immediately before that Amendment Act (hereinafter referred to as the "old Commission).

(b) All disputes and claims that were before the old Commission are deemed to have been lodged with the new Commission."

Reference was made to the fact that the old Commission , appointed by the President , consisted of not more than 15 members , whereas the new Commission , appointed by the Minister , would consist of only 5 (five) members[12]. According to the argument , the old Commission ceased to exist on the 31st January 2010 , the new act having commenced on 25 January 2010 , introducing the new Commission and the old Commission's mandate having only been extended to 31st January 2010 . Therefor the new Commission should be before Court , not the Commission lead by the third respondent , whereas the third respondent's deponent should have been the chairperson of the new commission , not Professor Moleleki.

A new Commission has as yet not been appointed .

Counsel also referred to the fact that the Commission was not a juristic person with a continuous existence , but was established by the old act and no legal personality was conferred on it by the old act.

The Court was also referred to Stafford vs The Special Investigation Unit 1999 (2) SA 130 (EC)139 B - D and to paragraphs 169 , 183 , 186 and 188 of LAWS A , Vol 2 , 2nd Re-Issue p

12 Section 23(l)(a) of the new act ["a chairperson and not more than four persons"]

147 and further , as well as paragraph 9 at page 545 of the same volume . It was further pointed out that only certain sections of the Commissions Act, 1947, referred to in section 25(6) of the old act [2 , 3 , 4 , 5 and 6 - dealing with the securing of witnesses etc.] was made applicable to the Commission . There was therefore no vesting or transfer of powers from the old to the new Commission . The old Commission could thus not sue or be sued as it lacked legal personality .

Counsel appearing for the first , second , third and fifth respondents argued that the Commission in terms of the old act (and even in terms of the new act) is sui generis , as it was neither appointed by the President, nor in terms of the Commissions Act, 1947 , but in terms of the Traditional Leadership and Governance Framework Act, 2003 , especially if one has regard to the purpose and preamble of both the old and the new acts , the relevant parts of which provides :-

"To provide for the recognition of traditional communities ;...
to provide a statutory framework for leadership positions within the institution of traditional leadership , the recognition of traditional leaders and the removal from office of traditional leaders ; .... to provide for the functions and roles of traditional leaders ; to provide for dispute resolution and the establishment of the Commission on Traditional Leadership Disputes and Claims ;

WHEREAS the State , in accordance with the Constitution , seeks -
• to set out a national framework and norms and standards that will define the role and place of traditional leadership within the new system of democratic governance
• to transform the institution in line with constitutional imperatives ;

• to restore the integrity and legitimacy of the institution of traditional leadership in line with customary law and practices ;

AND WHEREAS.....

AND WHEREAS THE Constitution recognises -

• the institution , status and role of traditional leadership according to customary law ; and

• a traditional authority that observes a system of customary law ; AND WHEREAS -

• the State must respect , protect and promote the institution of traditional leadership in accordance with the dictates of democracy in South Africa ;

• the State recognises the need to provide appropriate support and capacity building to the institution of traditional leadership ;

• the institution of traditional leadership must be transformed to be in harmony with the Constitution and the Bill of Rights so that -

- democratic governance and the values of an open and democratic society may be promoted ; and

- gender equality within the institution of traditional leadership may progressively be advanced ; and

• the institution of traditional leadership must -

- promote freedom , human dignity and the achievement of equality and non-sexism ;

- derive its mandate and primary authority from applicable customary law and practices ;

- strive to enhance tradition and culture ;

- promote nation building and harmony and peace amongst people ;

- promote the principles of co-operative governance in its interaction with ail spheres of

government and organs of state ; and

- promote a sufficient , effective and fair dispute- resolution system , and a fair system of administration of justice , as envisaged in applicable legislation ."

In view of the fact that it is the Commission in terms of the old act whose decision was taken before the expiry of its mandate and whose decision is now being taken on review , the correct respondents to be before Court are in fact the second and third respondents . Counsel for the respondents also argued that the Stafford-decision is distinguishable as the Special Investigation Unit had no legal successor.

[13] As far as the legal personality of the second respondent is concerned , the applicant argued that the Commission did not have any legal personality , as stated in paragraph [10] above and therefore cannot be sued or sue .

The simple answer is that the applicant saw fit to take the second respondent on review and joined it as a party to the proceedings . The Commission did not intervene as a respondent to become a party to the proceedings .

[12] As to the third point in limine the applicant submitted in essence that a Commission which has ceased to exist cannot bring out a report, notwithstanding that a new act came into operation before the expiry of the old Commission's extended mandate , as the new act created a new Commission .

In this regard it was argued on behalf of the respondents that it was not the filing of the report that was the decisive moment, but the taking of the Commission's decision , which was done before the expiry of the term of its mandate and the report was merely the writing evidencing and motivating its decision - due to the commencement of the new act , the "'decision' was

converted into a"recommendation".

[13] Dealing with the fourth point in limine it was forcefully argued by the applicant that the new act has no retrospective application .
Respondents' counsel argued that there was no need for the new act to apply retrospectively , as the second respondent completed its mandate within its term of existence . The Commission in fact followed the old act in taking its decision . Only the decision was not conveyed to the first respondent as a "decision" , but in the form of a "recommendation" , for the first respondent to act upon.

[14] As far as the locus standi in iudicio of the second respondent is concerned (the fifth point in limine) , that has to a large extend been dealt with when both counsel were dealing with the first point in limine , in paragraph [10] above . Applicant argued that once the report was brought out , the second respondent had no further interest in the matter , as the first respondent was bound to follow the recommendation of the second respondent , unless the first respondent acted in terms of the provisions of section 26(4) and supplied reasons why he did not follow the second respondent's recommendation . Again , the applicant elected to join the second respondent as a respondent.
The respondents' reply was with reference to JACOBS EN 'N ANDER vs WAKS EN ANDERE 1992 (1) SA 521 (AD) 534C - D :
"....die beoordeling van die vraag of 'n litigant se belang by die geding kwalifiseer as 'n direkte belang , dan wel of dit te ver verwyder is , [is] altyd afhankiik van die besondere feite van elke afsonderlike geval , en geen vaste of algemeen gelclende
reels kan neergele word vir die beantwoording van die vraag nie..... "
The second respondent in fact had a very real and substantial interest in these proceedings

as its whole investigation of the fourth respondent's claim was at stake .

[15] The fourth respondent was criticised for not being represented in Court (the sixth point in limine) , although he was present in Court during the review hearing . If one has regard to the fact that he appeared in person at the Commission's hearings, one possible reason why he did not have somebody to represent him , may be financial in nature , but there may also be other considerations . He might perhaps have sufficient confidence in the Commission's investigation and recommendation . The Court cannot speculate on the absence of representation on his behalf , as he was not the only defendant not represented in Court , seeing that the sixth to ninth respondents were also not represented . The sixth respondent decided to abide by the Court's decision and the others did not file notices of intention to oppose . There is nothing in law obliging him to have a representative and he cannot be forced to have one .

[16] The seventh point in limine : the applicant stated that there were eight prayers in its amended notice of motion which the first and fifth respondents had to answer[13] . The applicant argued that he joined them in terms of Rule 10 of the Uniform Rules of Court in that only the first respondent [the fifth respondent being the responsible Minister] can answer to those prayers . Furthermore, the third respondent could not answer on their behalf , in view of the decision of Goldstone , J , as he then was, in GERHARDT vs STATE PRESIDENT AND OTHERS 1989 (2) SA 499 (T) 504E - G - it would be hearsay evidence and , accordingly , inadmissible . Counsel for the respondents (first , second , third and fifth) , who all filed a notice of intention to oppose the review application through the State Attorney nevertheless could and did argue the mentioned prayers on the first and fifth respondents' behalf. The

13 Pleadings, Bundle 1, pp 67 - 69 , prayers 2 - 9

Court acknowledged Goldstone J's approach .

[17] The eighth point in limine was that the first respondent's decision was out of time and therefore null and void . No decision was conveyed to him before 31st January 2010 when the second respondent's mandate terminated through the effluxion of time , and it couid therefore not have been validly conveyed on the 9th February 2010 , so the argument went . Furthermore , no decision was taken within 60 days and the 5th November was clearly way out of time .

Counsel for the first respondent answered this argument with reference to the terms of section 26(3)of the old act, in which no time limit was applicable within which the Commission had to convey its decision to the President or for the first respondent to recognise the recommended king .

[18] Next it was argued (the ninth point in limine) that the first respondent's decision should be reviewed and set aside as he failed to act in time . As stated in the immediate preceding paragraph [17] , respondents argued that no time limit was imposed upon the first respondent to recognise the recommended king .

[19] The tenth point in limine that annexure JMS 2(1) was not a notice as was prescribed by section 9(2) and 26(3) of the [old] act.
tt was argued on behalf of the said respondents that sections 26(2)(a) and (b) are not applicable and that the only analogy to section 9 is in section 25(3)(a) , when considering a dispute or claim , the Commission must consider and apply customary law and the customs of the relevant traditional community as they were when the events occurred that gave rise to

the dispute or claim . However , so it was argued by respondents , that would only happen when the position of a king or a queen is to be filled .

In casu there was an incumbent in the position [the applicant] , when the Commission investigated the fourth respondent's claim to the throne of the kingship of the amaMpondo and it was not a question of a position of a king or a queen to be filled. It was equally not a matter of a king or a queen to be removed from office , as envisaged by section 10(1)(c) .

[20] With reference to paragraphs 92.5[14] and 92.7[15] the applicant commenced its argument on the merits of the review application by stating that the second respondent did not heed the audi alteram parfem-principle in that the applicant was not given an opportunity to be heard as to why the fourth respondent and not he himself was to be the ubukumkani of the AmaMpondo .

The answer to this submission by the applicant was that he had every opportunity to present his case at the hearings of the second respondent , which he used by calling a number of witnesses on his behalf before he himself testified at length before the Commission .

There is no substance in this argument of the applicant.

[21] Much emphasis was placed on the hearings in the Cape Provincial Division before Davis , J [c. 1938] which ultimately ended up in the Appellate Division in 1944 . Those decisions concerned litigation regarding the appointment of the applicant's father [Botha Sigcau] as Paramount Chief in terms of section 23 of Act 38 of 1927 , the so-called Black Administration Act .During the hearing in 1938 another Paramount Chief of the AmaMpondo [Western Pondoiand] , who wrote a book on Pondo customs and customary law , also testified to the effect that allegedly the customs favoured the applicant's father , whom the

14 Pleadings, Bundle 1, p38
15 Pleadings, Bundle 1, p39

applicant succeeded in 1978 .'The Court was invited to respect those decisions as rendering the matter res judicata , as was attempted to also persuade the Commission at its first hearing .

There does , however, appear an interesting dictum in the judgment of the late Watermeyer, CJ , at p 78 of the reported decision :

"There remain two other points, discussed in the course of the argument, which must be dealt with.

The first one arises out of the allegation made in paragraph 6 of the declaration that the plaintiff was: "in accordance to Native Law and Custom... duly recognised as such heir by the people of Pondoiand East" this allegation was denied in the plea, but some evidence was put before the court, on which it might be possible to contend that meetings of the tribe had been held and that the majority of those present favoured the claims of plaintiff. Counsel for the plaintiff not only drew that conclusion, but contended that in a disputed matter, such as this, the customary and proper manner to settle the dispute was by taking the decision of a tribal meeting, and that such a decision was taken in this case which settle the dispute in plaintiffs favour...

As matters stand, these questions were not investigated, and no decision upon them has been given in this action, nor can such a decision be given."[16]

There was especially reference to the evidence of Magingqi Sigcau during the proceedings in the CPD [1938] in that she was not consistent about her position , when she was very young and recently married to her husband Mandlonke as his first wife , and later in the old Transkei General Division of the then independent homeland's Supreme Court , when she claimed [in

16 Record, Vol 5, Bundle 13, p.1304.

1983] that she was his Great Wife [as opposed to his Right Hand Wife as she testified in 1938].

Respondents argued that sight should not be lost of her reply under cross examination in the first mentioned case that these things were decided by the men and she doesn't really know the customs[17]. The focus should rather be on the testimony at the second respondent's hearings , where the evidence of the respondent , as well as that of the applicant's own witnesses tended to favour Magingqi's assertion that she in all probability was the late Mandlonke's Great Wife[18].

The respondents [as mentioned before] emphasised that the Court was requested to review the second respondent's decision to appoint the fourth respondent as king of the AmaMpondo - it was not an appeal against the second respondent's decision . In this regard the court was referred to a number of cases , to which can be added FOODCORP (PTY) LTD vs DEPUTY DIRECTOR GENERAL , DEPARTMENT OF ENVIRONMENTAL AFFAIRS AND TOURISM , BRANCH MARINE AND COASTAL MANAGEMENT , AND OTHERS , 2006 (2) SA 191 (SCA)196F-G/H :

" The distinction between appeals and reviews must be maintained since in a review the court is not entitled to reconsider the matter and impose its view on the administrative functionary. In exercising its review a court must treat administrative decisions with 'deference' by taking into account and respecting the division of powers inherent in the Constitution. This does not 'imply judicial timidity or an unreadiness to

perform the judicial function'..... PAJA , requires a simple test , namely whether the decision was one that that a reasonable decision-maker could not have reached or, put

17 Record , Vol 5, Bundle 10 , pp925 - 926

18 Record , Vol2 , Bundle 3 p 290 [Ms Madikizela]; Bundle 4 pp 311-312 , 314 , 344 [Ms Jam Jam]; Bundle 4 , p 375 [Mr Gideon Sigcau] ; Bundle 7 , p 650 [Mr Ncoyenij; p 669[Ms Magqwaru Sigcau]; Vol , Bundle 14, p 1317 paragraph 7.10 as opposed to p 1313[Answering Affidavit by all five respondents in Magingqi's 1983-Application]

slightly differently a decision-maker could not reasonably have reached".

On the concept of "deference" , in particular , the Court was referred to , inter alia ,the following :

Hoexter Administrative Law in South Africa , pp 143 and 517

Logbro Properties CC vs Bedderson NO and Others , 2003 (2) SA 460 (SCA) 471A -D , paragraphs [21] and [22]

Be! Porto School Governing Body and Others vsPremier Western Cape and Another 2002 (3) SA 265 (CC)

Minister of Environmental Affairs and Tourism and Others vs Phambili Fisheries (Pty) Ltd ; Minister of Environmental Affairs and Tourism and Others vs Bato Star Fishing (Pty) Ltd 2003 (6) SA 406 (SCA) paragraphs [47] - [53]

Bato Star Fishing (Pty) Ltd vs Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC) paragraphs [46], [48], [49], [50] and [52]

Baxter Administrative Law pp 712 - 713

Oudekraal Estates (Pty) Ltd vs City of Cape Town 2004 (6) SA 222 (SCA) , paragraph [36]

Chairperson , Standing Tender Committee and Others vs JFE Sapeia Electronics (Pty) Ltd and Others 2008 (2) SA 638 (SCA) paragraph [28]

The respondents' counsel was firmly of the view that only the old act applied to the review of the second respondent's decision of 21s! January 2010 and dismissed the applicant's submission that section 28(9) of the new act should be applicable to the position of the applicant . He also referred to the definition of "king" in section 1 of the old act , meaning a traditional leader-

(a) under whose authority , or in whose area of jurisdiction, senior traditional leaders exercise

authority in accordance with customary law ; and

(b) recognised as such in terms of this act.

and also section 1(2) :

Nothing contained in this Act may be construed as precluding members of a traditional community from addressing a traditional leader by the traditional title accorded to him or her by custom , but such traditional title does not derogate from , or add anything to the status , ro!e and functions of a traditional leader as provided for in this Act .

Apart from a definite submission that the old [or new] act is not unconstitutional , it was also submitted that especially section 8 [of the old act] is in consonance with the Constitution :

"RECOGNITION OF TRADITIONAL LEADERSHIP POSITIONS

8. The following leadership positions within the institution of traditional leadership are recognised :

(a) Kingship;

(b) senior traditional leadership ; and

(c) headmanship."

It was in fact after the official announcement of the various kingships and paramountcies that the instant claim was investigated by the second respondent.

To bolster his submissions , counsel for the mentioned respondents argued that there was no recognition of kingships before the enactment of the old act and that in terms of section 28(7) of the old act the Commission had to (["must] in terms of section 25(2)) investigate the position of paramountcies and paramount chiefs that had been established and recognised ,

and which were still in existence and recognised , before the commencement of the [old] act, before the Commission commences with any other investigation in terms of that section . Counsel further argued that as the applicant was not a king when the decision of the Commission was taken (with the support of at ieast two thirds of the members of the Commission - section 26(1)) , the provisions of section 26(2)(a) [conveyance of its decision to the President within two weeks for immediate implementation in accordance with section 9 or 10] could not apply and that in terms of section 26(3) no time limit was applicable within which the Commission had to convey its decision to the President.

[22] One of the Commissioners , Advocate Ndengezi , was suspected and accused of bias against the applicant , as he was alleged to have tried a case in the Supreme Court , but Advocate Ndengezi was a Magistrate at the time and could not preside in the Supreme Court . He was only afterwards admitted as an advocate and has never presided in the Supreme Court . In this regard the second respondent was criticised for not having accepted a letter[19] during the hearings , dealing with this very complaint, the second respondent considered the content of the letter which was handed in by a person who alleged "they" had a "watching brief" but the instructors identity was never revealed , as a result of which the letter was not admitted . After the second respondent had already handed in its report on the 9th February 2010 , one M FAKU made an affidavit , attested on 29th March 2011 , attempting thereby to put the letter before Court. Respondents' counsel applied for the striking out of this material , correctly so . The third respondent dealt with the request for the recusal of Advocate Ndengezi in his answering affidavit[20] and nothing contained in these parts of the pleadings points to either bias or lack of bona fides .

19 Pleadings,Bundle 3 , pp 203-4
20 Pleadings , Bundle 4 , p 332 , par 133.11 with a curriculum vitae of the advocate in par 179 at pp 365 - 7

[23] Judging the methodology employed by the second respondent[21] , it cannot be found that the functions were not carried out fair , objective and impartial , as required by section 22(2) of the old act . Reasons were given for its rejection of the points in limine , which are reasonable[22].

The second respondent had regard to the genealogical history and customary law of succession of the AmaMpondo . The claim/case of the fourth respondent was first considered and thereafter the case of the applicant[23].

In its determination , the issues to be determined by the second respondent was outlined[24] and thereafter analysed[25], where after the evidence was analysed[26], to arrive at its conclusion[27] that in terms of customary law and customs of the AmaMpondo and the "Framework Act" [Traditional Leadership and Governance Framework Act] the fourth respondent is the rightful successor to the throne of the AmaMpondo . Its final finding being that[28]:

"The appointment of Botha to the position of Paramount Chief which was subsequently inherited by the Respondent , Mpondombini Justice Sigcau , was irregular and not in accordance with the customary law and customs of amaMpondo and the Framework Act".

The applicant can , in any event, not reiy on the provisions of section 28(8)(b) of the new act, that he should be regarded as king of the AmaMpondo , even though he was recognised as Paramount Chief of Eastern Pondoland , as this was made subject to the investigation and recommendation of the second respondent.

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21 Record , Vol 4, Bundle 8 , pp 712 - 716
22 Record , Vol 4, Bundle 8, pp716 - 721
23 Record, Vol 4, Bundle 8, pp 721 - 743 and pp 743 - 783
24 Record , Vol 4 , Bundle 8 p 783
25 Record , Vol 4 , Bundle 8 , pp783 - 784
26 Record , Vol 4, Bundles 8 - 9 , pp 784 - 828
27 Record , Vol 4 , Bundle 9 , pp 828 - 829
28 Record , Vol 4, Bundle 9, p 828, paragraph 7.1.2

[24] It can safely be stated that the methodology applied by the second respondent in arriving at its conclusion was lawful , reasonable and procedurally fair[29] and in accordance with section 33(1) of the Constitution , 1996 , as well as section 3(1) of the Promotion of Administrative Justice Act, Act No 3 of 2000 , as amended ["PAJA"] . In the end the second respondent provided comprehensive written reasons for its conclusion , thereby complying with the dictates of section 33(2) of the Constitution .

As PAJA was enacted as a result of section 33 of the Constitution, the second defendant's conduct of its investigation into the fourth respondent's claim and its Determination must satisfy the requirements of section 3(2) of PAJA . It is clear from the record of the proceedings before the second respondent and its Determination[30] that ail the requirements of section 3(2) had in fact been met.

[25] Despite the allegation of bias (which has been dealt with in paragraph [22] above) , the following subsections of section 6(2) of PAJA cannot find any application in the instant review proceedings : subsections (a) , (c) , (d) , (e), (f), (i) and (g) .

Sections 6(2)(b), f(ii) and (h) will be dealt with in due course .

[26] As far as subsection 6(2)(b) is concerned , the relevant facts were the following :

26.1 The second respondent took its decision in terms of section 26(1) of the old act on the 21st January 2010 ;

26.2 The date of the commencement of the new act was the 25th January 2010 ;

26.3 The second respondent's extended term of authority terminated on the 31st January 2010 ;

29 Record , Vol 4, Bundle 8, pp 712-716

30 Record , Vol 4, Bundles 8 & 9, pp 707 - 807 and 808 - 828

26.4 The content of the Determination [31] was conveyed to the first respondent on the 9th February 2010.

It was argued by the applicant that in terms of section 26(2) of both the old and the new act that the content of the Determination had to be conveyed to the first respondent on or before the 4th February 2010 and , accordingly , the decision was null and void being conveyed 5 days later than the peremptory 14 day period . Counsel for the respondents , on the other hand , argued that section 26(2) was not applicable and that section 26(3) of the old act had been complied with .

To assist the Court to decide whether it was a mandatory and material procedure or condition prescribed by an empowering provision which was not complied with , counsel for respondents advanced an argument based on the interpretation of the old act (which he argued was the only act applicable to the second respondent's terms of investigation) . Counsel argued thus :

(a) At the time of the investigation by the second respondent into the claim of the fourth respondent , there was no king of the AmaMpondo . The applicant was the Paramount Chief of East Pondoland and there was a Paramount Chief of Western Pondoland ;

(b) The second respondent decided that the kingship of the AmaMpondo should be recognised as a single kingship and it was so accepted by the first respondent and everybody else . including the applicant;

(c) Due to the fact that there was no king of the AmaMpondo, before the second respondent's investigation of the fourth respondent's claim „ section 9(1) of the old act could not apply , as there was no position of a king as yet to be filled and , accordingly , it was not necessary to involve the Royal Family , nor was it necessary to follow the provisions of

31 See note 30 above

section 26(2) .

(d) There were no time constraints within which to recognise a person as a king as envisaged by section 9(2) .
(e) Equally , there was no king to be removed from office on the grounds of wrongful appointment or recognition , as envisaged in section 10(1)(c) - the applicant was the Paramount Chief and recognised as such in terms of section 28(1) , subject to a decision by the second respondent in terms of section 26 .

(f) The dispute caused by the fourth respondent's claim had to be referred to the second respondent, in terms of section 21 (1)(b) , to be investigated by the second respondent in terms of section 25(2) and , accordingly , section 21(1)(a) does not apply and the dispute was not to be solved internally .
This argument is meritorious and indeed correct , as the numbered subparagraphs of this paragraph ([26]) shows that the decision in terms of section 26(1) was indeed taken before the commencement of the new act , indicating that all of the second respondent's investigation and deliberation must have been done under and in terms of the old act. As for the remainder, the interpretation of the old act is in terms of its ordinary grammatical meaning

[27] Counsel for the applicant aiso argued that the second respondent ;s reasons for disqualifying Paramount Chief Botha Sigcau in favour of Chief Nelson Sigcau were inadequate and neither rational , nor logical , with particular reference to the second respondent's Determination at Volume 4 , page 766 , paragraph 5.9.12 [the reference therein to Eastern Pondoland should be a reference to Western Pondoland (Nyandeni)], as well as at page 793 , paragraph (c) , up to the end of paragraph (d) at page 795 .

There is no substance in this argument , as the second respondent dealt with Paramount Chief Victor Poto's book[32] , his mediation in the concurrent claims of Botha Sigcau and Nelson Sigcau after the death of Paramount Chief Mandionke , and his evidence before the 1938-Commission throughout its Determination[33]. It is clear that the second respondent's criticism of Chief Victor Poto's evidence before the 1938-Commission can be regarded as both rational and logical , as well as well-founded .

[28] It is clear from an overview of the whole Record of the second respondent's investigation into the fourth respondent's claim[34] that the second respondent in its Determination did not fail to take all relevant evidence into account , as argued by the applicant, but that it thoroughly dealt with all the evidence and submissions , both oral and in writing , presented to it both at the hearings and afterwards in writing . Its criticism of the evidence of Paramount Chief Victor Poto , in particular , was justified , as is also evident from the answering affidavit by the third respondent. The whole "controversy[35] about Magingqi was satisfactorily explained in the third respondents answering affidavit[36].

The applicant's argument , based on the fact that the third respondent informed the second respondent at a meeting heid on 10 August 2009 that their decision had lapsed as it had not been conveyed to the first respondent within 14 days[37] , that, therefor, section 26(2) [of both acts] applies , resulting in the second respondent's decision of 21 January 2010 also being invalid , as it was conveyed 5 days later than the 14 day-period to the first respondent , cannot prevail , as it was correctly argued by the respondents that only the old act was

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32 Record , Vol 7, Bundle 17 , pp 1653 - 1715 , "Ama-Mpondo ibali ne Ntalo Ngu Victor Poto Ndamase

33 Record , Vol 4, Bundle 8 p 725 par 5.1.10 ; p 766 par 5.9.12 ; p 777 par (d); p 786 par (f); p790 par (iii) - par (cc) at p 792 ; p 793 par (c) - par (d) at p 795; p 797 par (c)(1); Bundle 9 , p 822 par (k}(i) - (k)(ii) at p 823

34 Record , Volumes 1-7 , Bundles 1- 18, pp 1-1802

35 Pleadings, Vol 5, pp 484-5, par (h)

36 Record , Vol 2 , Bundle 4, p 304 line 5 and Record , Vol 3 , Bundle 5 p 484 , c. lines 11 - 16 , answered in Pleadings , Vol 3, p 278, par 52

37 Exhibit "D" , annexure "K" thereto , 2nd paragraph on the second page thereof

applicable , that this was not a case where either section 9 or section 10 was applicable and that, accordingly , section 26(3) applied , imposing no time limit on the second respondent to inform the first respondent of its decision .

Closing his argument , the applicant argued that it was irrational of the first respondent to declare the fourth respondent king of the AmaMpondo before the removal of the applicant as such . The respondents' answer to this was that the applicant was never regarded as king of the AmaMpondo - he was only recognised as Paramount Chief of the AmaMpondo aseQuakeni after the commencement of the old and new acts and would only have been recognised as king AFTER the investigation and decision of the second respondent - if that decision were that the applicant be recognised as such . However , the investigation and decision of the second respondent were in the fourth respondent's favour and the applicant could therefor never have been regarded as king of the AmaMpondo .

The approach of the respondents in this regard is the correct approach and is followed in this judgment.

[29] In closing the argument on behalf of the first, second , third and fifth respondents it was submitted that the third respondent dealt decisively[38] with the argument regarding the letter[39] submitted to the second respondent during its investigation of the fourth respondent's claim , calling for the recusal of Advocate Ndengezi on the ground of his alleged bias against the applicant. Finally regard should be had to Presidential Minute No 144 , dated 07 April 2010 [within two months after the 9th February 2010] in which is stated4[40]:

"... in terms of section 26(3) of the Act I accept the recommendations of the Commission [second respondent]."

38 Pleadings, Bundle 4, pp 312-3 , paragraph 117 . A curriculum vitae of Adv Ndengezi appears in paragraph 179 at pp 365-6

39 Pleadings , Bundle 3 , pp 203-4

40 Pleadings, Bundles, p 536

Presidential Minute No 407[41] starts with the same phrase :

"... in terms of section 26(3) of the [Traditional Leadership and Governance Framework]Act, 2003 (Act 41 of2003)

where after five kings of the recognised kingships [as recommended by the second respondent] were simultaneously recognised in terms of section 28(8) and five deemed kings were simultaneously recognised in terms of section 28(9) [both subsections] of the new Act . The latter recognition would lapse on the death of the incumbent kings , in terms of section 28(9)(c) of the new act.

[30] Lastly the court was reminded by respondents of their application to strike out[42] the alleged inadmissible evidence of Sabatha Mbalekwa . The reasons advanced for the striking out of this affidavit are sound , especially where the second respondent made a ruling regarding the attachment to the affidavit (letter referred to in note 39 , supra) already during its investigation of the fourth respondent's claim .

regarding the attachment to the affidavit (letter referred to in note 39 , supra) already during its investigation of the fourth respondent's claim .

[31] As provided for in Rule 53 of the Uniform Rules of Court, the applicant amended Part B of its Notice of Motion , after having received the record of the proceedings before the second respondent[43].

Prayer 1 (and all its sub-prayers) deals with the review and setting aside of the second respondent's "determination or recommendation dated July 2010" , which clearly is referring to the second respondent's decision , taken on the 21st January 2010 , and the Determination

41 Pleadings, Bundie 6, p 537-8
42 Pleadings, Bundle 4, pp 364-5 , paragraph 177 (including ail its subparagraphs
43 Pleadings , Vol 1, pp 65 - 69

handed to the first respondent on the 9th February 2010 .

There is no substance in any of the sub-prayers of prayer 1 of the Notice of Motion . It is clear from the Determination[44], as dealt with in the course of this judgment, that the criticism as voiced in the various sub-prayers is without foundation . The Determination is well reasoned , fair and unbiased and founded squarely on the evidence adduced in the fourth respondent's case and the applicant's case , as well as written submissions by the applicant and fourth respondent and such admissible written material as had been submitted after the oral hearings .

The second respondent acted in accordance with its mandate , within the parameters of the old act and did not contravene any provision of PAJA .

Prayer 2 invited the Court to find that section 211 of the Constitution only empowered the Royal Family or a structure formed according to custom , on who new Kings/Queens should be and when an old King/Queen can be removed . Such an interpretation would be too restrictive , in view of section 212 of the Constitution, which provided for the enactment of legislation to regularise the aspect of kingships and to establish who the Kings/Queens should be.

applicant , without the involvement of the AmaMpondo in any way] and section 26 [to the extent that it grants the first respondent the power to remove/appoint Kings/Queens] . It has already been pointed out that the old act was enacted as a direct result of the provisions of sections 211 and 212 of the Constitution4 [45]. It cannot be regarded as unconstitutional as its whole purpose was to regularise matters and rectify wrongs of the past , as set out in its preamble .

44 Record, Bundle 4, Volumes 8 and 9, pp 707 - 829
45 Paragraphs [3](a) & (b), pp3 - 4 , above

As far as Prayer 5 is concerned , the Court has found that sections 9 and 10 do not find application , as was pointed out in paragraph [26] herein before .
Due to the fact that the applicant was a Paramount Chief and recognised as such and not as ikumkani, section 10 does not apply and the applicant would not be removed as a king , but replaced as traditional leader by the fourth respondent as King . Prayer 6 therefor falls away . Prayer 8 is for all intents and purposes similar to prayer 6 and also falls away . The same reasoning also applies to Prayer 9, seeing that the applicant was never recognised as King of the AmaMpondo .

[32] From the conclusion in paragraph [31] above , it is clear that the applicant could not satisfy the Court on a balance of probabilities that he is entitled to any of the relief sought in Part B of his Amended Notice of Motion . That being the position , it follows that the order granted by his lordship , Mr Acting Justice Hiemstra , which was granted on 8 November 2010 , pending the outcome of Part B of this Application , must lapse .

[33] In the result, the following order is granted :-
33.1 The order granted by his lordship , Mr Acting Justice Hiemstra , which was granted on 8 November 2010 , pending the outcome of Part B of this Application , lapses .
33.2 The application to strike out the affidavit of Sabatha Mbalekwa is granted ;
33.3 The applicant's application is dismissed ;
33.4 The applicant is ordered to pay the costs of the first , second , third and fifth respondents , such costs to include the costs occasioned by the employment of two counsel .

L S DE KLERK ACTING JUDGE

NORTH GAUTENG HIGH COURT

PRETORIA .

19th MARCH ,2012.