REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

29/7/16

CASE NO: 87483/2014

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

29.07.2016

SIGNATURE **DATE**

ENOCH MAKHOSOKE MABHENA	APPLICANT
And	
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	FIRST RESPONDENT
COMMISSION ON TRADITIONAL LEADERSHIP DISPUTES AND CLAIMS	SECOND RESPONDENT
THE CHAIRPERSON OF THE COMMISSION ON TRADITIONAL LEADERSHIP DISPUTES AND CLAIMS	THIRD RESPONDENT

THE MINISTER FOR COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	FOURTH RESPONDENT
THE PREMIER OF MPUMALANGA PROVINCE	FIFTH RESPONDENT
THE NATIONAL HOUSE OF TRADITIONAL LEADERS	SIXTH RESPONDENT
THE MPUMALANGA HOUSE OF TRADITIONAL LEADERS	SEVENTH RESPONDENT
MBUSI MAHLANGU	EIGHTH RESPONDENT

JUDGMENT

AC BASSON, J

[1] This application deals with the crisp question whether the President of the Republic of South Africa had the necessary power to declare the eighth respondent (Mr Mbusi Mahlangu) as a deemed King of the deemed Kingship of the Ndzundza- Mabhoko on 5 November 2010.

[2] The applicant is Mr Enoch Makhosoke Mabhena (hereinafter referred to as "the applicant") who refers to himself as the King of the aManala and

amaNdebele *as a whole*, recognized in terms of traditional customs and according to the Traditional Leadership and Governance Framework Act.[1]

[3] The respondents are the President of the Republic of South Africa ("the President" – the first respondent); the Commission on Traditional Leadership Disputes and Claims ("the Commission" – the second respondent); the Chairperson of the Commission on Traditional Leadership Disputes and Claims (the third respondent); the Minister for Cooperative Governance and Traditional Affairs (the fourth respondent); the Premier of Mpumalanga Province (the fifth respondent); the National House of Traditional Leaders (the sixth respondent); the Mpumalanga House of Traditional Leaders (the seventh respondent) and Mr Mbusi Mahlangu (the eighth respondent).

[4] The applicant cites Mr Mahlangu as the eighth respondent in his capacity as recognized in an *ultra vires* manner (in terms of a notice published by the President in the Government Gazette) as the "Deemed King" of the (incorrectly) recognized "Deemed Kingship of the Ndzundza-Mabhoko". (I will return to the submissions for alleging that the recognition of the eighth respondent was *ultra vires* herein below.)

[5] Only the fourth and eighth respondents opposed the relief sought in this application.

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[1] Act 41 of 2003.

The dispute

[6] The President published a notice in the Government Gazette (Notice 1027 of GG 33732 dated 5 November 2010 – hereinafter referred to as "the notice) in terms of which the applicant (King Enoch Makosonke Mabhena) is recognised as the king of the Kingship of the amaNdebele of Manala and amaNdebele *as a whole* and the eighth respondent (King Mbusi Mahlangu) is recognised as the deemed king of the Kingship of the Ndzundza-Mabhoko.

[7] This notice forms the subject matter of these proceedings. The applicant seeks an order that –

(i) the said notice be set aside in so far as it refers to King Mbusi Mahlangu (the eighth respondent) as the deemed king of the Kingship of Ndzundza-Mabhoko in terms of the Traditional Leadership and Governance Framework Act;[2]

(ii) the President recognises the applicant as the king for the Kingship amaNdebele of Manala and amaNdebele as a whole in terms of the provisions of section 26(2)(a) of the old Act prior to its amendment coming into effect on 25 January 2010;

(iii) the Premier recognises the eighth respondent as senior traditional leader for the Ndzundza-Mabhoko in terms of the provisions of section 26(2)(b) of the old Act;

(iv) the recognition of King Enoch Makhosoke Mabhena as the king for the Kingship amaNdebele of Manala and amaNdebele as a

[2] Act 41 of 2003 as amended.

whole be published in the Government Gazette within one month from the date of this order;

(v) the recognition of Mr Mbusi Mahlangu as senior traditional leader for the Ndundza-Mabhoko be published in the Government Gazette within one month from the date of this order;

(vi) the respondents who oppose the application be ordered to pay the costs of the application (such costs to include the costs of both senior and junior counsel) jointly and severally the one paying the other to be absolved.

[8] In essence the prayers sought in the Notice of Motion are directed against the President's recognition of the eighth respondent as a deemed King of the deemed Kingship of the Ndundza-Mabhoko as being *ultra vires* in terms of the Traditional Leadership and Governance Framework Act of 2003 as amended.

Preliminary points

[9] Various preliminary points were raised on behalf of the eighth respondent. Firstly, the applicant has no *locus standi* to bring this application on behalf of the aManala and AmaNdebele as a whole without authorisation in the form of a special resolution from the Manala Mbongo Royal Family and the Manala Mbongo Traditional Council. Secondly, the non-jonder of the Ndzundza-Mabhoko Kingships, the Manala-Mbongo Kingship and their Traditional Councils, the Ndzundza-Mabhoko Royal Family and the Ndzundza Mabhoko Traditional Council constitutes a material non-joinder as any decision of this

Court will have a direct impact on the interest of the aforementioned parties. Thirdly, the President had a discretion and a duty to apply his mind to the question whether the decision of the Commission to the effect that the applicant's family house of Manala-Mbongo is the rightful lineage to hold the position of King of aManala and amaNdebele as a whole to the exclusion of the paramountcy of the Ndzundza-Mabhoko within the amaNdebele people, must be implemented. Fourthly, the applicant misconstrues the decision of the Constitutional Court in *Sigcau v President of South Africa and others*[3] in light of the fact that the issues *in casu* are completely different from those which prevailed in the *Sigcau* matter.

[10] I do not intend dealing with the preliminary matters at the outset but will deal with them as part and parcel of my reasons for my order.

Background

Constitutional framework

[11] Section 211 and especially section 211(1) of the Constitution of the Republic of South Africa[4] ("the Constitution") recognizes the institution, status and role of traditional leadership according to customary law.

[12] Section 212(1) of the Constitution provides that national legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities. Section 212(2) of the Constitution further provides, *inter alia*, for the establishment of a Council of Traditional

[3] 2013 (9) BCLR 1019 (CC).
[4] Act 108 of 1996.

Leadership empowered to deal with matters relating to traditional leaders, customary law and the customs of communities observing customary law.

The Traditional Leadership and Governance Framework Act[5]

[13] In order to give effect to the structure envisaged by the Constitution, the Traditional Leadership and Governance Framework Act was enacted in 2003. This Act (the old Act) was subsequently amended ("the new Act") in 2010. (Although the Amendment Act merely amended certain provisions and did not replace the Traditional Leadership and Governance Framework Act as a whole, I will for convenience sake refer to the unamended Act as "the old Act" and the amendments as "the new Act".)

[14] The amendments to the old Act only came into effect on 25 January 2010.

[15] The Traditional Leadership and Governance Framework Act, *inter alia*, provides for the recognition of traditional communities, the establishment and recognition of Traditional Councils and for the establishment of the Commission on Traditional Leadership Disputes and Claims ("the Commission"). Chapter 6 of the old Act deals with the dispute resolution functions of the Commission: Section 25 of the old Act sets out the functions of the Commission and section 26 deals with the decisions of the Commission. The amendment replaced chapter 6 with a new chapter 6. Of particular relevance to this matter is the fact that both sections 25 and 26 have been replaced with a new section 25 and section 26. I will return to

[5] Act 41 of 2003.

some of these amendments herein below in so far as they are relevant to the dispute in this matter.

[16] In terms of section 1 of the old Act, a king is a traditional leader recognised in terms of the Act. In terms of the section 1 of the new Act, a kingship or queenship means a kingship or queenship recognised in terms of section 2A of the new Act.

[17] The old Act made specific provision for a dispute resolution process whenever a dispute concerning customary law or customs arose within a traditional community or between traditional communities or customary institutions on a matter arising from the implementation of this Act. In such event members of the community and traditional leaders within the traditional community or customary institution concerned must seek to resolve the dispute internally and in accordance with customs. Where a dispute relates to a case that must be investigated by the Commission, the dispute must be referred to the Commission.

[18] As already pointed out, the Act provides for the establishment of a Commission on Traditional Leadership Disputes and Claims. In terms of section 25(1) of the old Act, the Commission operated nationally and had the authority to decide on any traditional leadership disputes as envisaged in section 25(2). Where there is doubt as to whether a kingship, senior traditional leadership and headmanship was established in accordance with customary law and customs, the Commission had the authority to investigate

the dispute (section 25(2)(i)). The Commission had the specific authority to investigate a dispute either on request or of its own accord (section 2(a)).

[19] Section 9(2) of the Act requires that the recognition of a person as a king or queen *must* be done by way of a notice in the Gazette recognising the person identified as king or queen and the issuing of a certificate of recognition to the identified person. This section remained unaffected by the amendments.

[20] The new Act, however, introduced a new dispensation in respect of the Commission's powers when dealing with disputes. In terms of section 26(1) of the old Act, the Commission could take a "decision" with the support of at least two thirds of the members of the Commission. Once a decision has been taken, the Commission must within two weeks of the decision having been taken, convey it to the President. Once the decision has been conveyed to the President, the President is required to immediately *implement* the decision in accordance with section 9 or section 10 where the position of king or queen is affected by such a decision (section 26(2)(a) of the old Act).

[21] In terms of section 26 of the new Act, the Commission can no longer take a "decision "but may merely make a "recommendation" with the support of at least two thirds of the members of the Commission. Once a recommendation has been made, the Commission must within two weeks of the recommendation having been made, convey it to the President and the

Minister where the position of a king or queen is affected by such a recommendation. The President must within a period of 60 days make a decision on the recommendation (section 26(3) of the new Act).

[22] Although the recognition of kings and queens in terms of the old Act is not affected by the new Act, the amendment fundamentally altered the final process of recognition by the President: Whereas the old Act obliged the President to merely implement any "decisions" of the Commission commenced or made prior to the commencement of the new Act (25 January 2010), the new Act now confers a discretion upon the President to implement which is now only a "recommendation" and no longer a "decision" of the Commission.

Relevant facts

[23] In this matter the Commission, of its own accord, investigated the paramountcies of the Manala-Mbongo and the Ndzundza-Mabhoko. More in particular the investigation was to determine whether the paramountcy of Manala-Mbongo and the paramountcy of Ndzundza-Mabhoko were established in accordance with customary law and customs. They are collectively known as the amaNdebele.

[24] The findings of the Commission were published in a document entitled *"Determination on Manala-Mbongo and Ndzunza Mabhoko Paramountcies"*. From this document it appears that the Commission followed a two stage approach in determining this question: During the first stage evidence and

information were gathered through separate hearings for the paramountcies of the Ndzundza-Mabhoko and Manala-Mbongo.

[25] During the second stage the Commission conducted its own research. The parties had been furnished with a set of questions arising from the research and were expected to respond to the said questions during a hearing that was held jointly. During the public hearings selected members of the Ndzundza-Mabhoko and the Manala-Mbongo Royal Households and other appointed by them testified under oath. All parties were afforded an opportunity to challenge the versions of the two royal houses and state their case.

[26] On 15 January 2008 all nine members of the Commission concluded, *inter alia,* that the amaNdebele Kingship existed and resorted under the lineage of Manala and that in terms of the old Act, the Ndzundza-Mabhoko paramountcy is not a kingship but remained part of the kingship of the amaNdebele *as a whole.* It was further the view of the Commission that the kingship of the amaNdebele is to be restored and that this can only be done under one king.

[27] The Commission also investigated the dispute regarding the kingship of the amaNdebele. The result of this investigation is encapsulated in a document entitled *"Determination on the Kingship dispute of amandebele between Johannes Dlize Mabena and Mbulawa Enock Mabena (Makhosoke II)*". The Commission decided firstly that, in terms of customary law and customs of

the amaNdebele, Johannes Dlize Mabhena (the claimant) is not entitled to the posision of king of aManala. His claim was therefore dismissed. Secondly, Makhosoke II (the applicant) was determined to be the rightful lineage to hold the position of king of aManala and amaNdebele *as a whole*. The Commission accordingly determined in terms of the old Act that "*according to the customary law of succession of amaNdebele, the house of Mbongo I, which is the house of the current incumbent, Makhosoke II [the applicant], is the rightful lineage to hold position of King of aManala and amaNdelele as a whole*". It was consequently the determination of the Commission that King Enoch Mabhena (King Makhosoke II – the applicant) is the rightful king of the Manala and amaNdebele as a whole.

[28] On 21 January 2010, the Commission made a decision again under the old Act that the status of Ndzundza could only be that of *ikosi* and that according to customary law and customs of the amaNdebele, his descendants could only inherit such position.

[29] On 21 January 2010, the Commission made a further decision in terms of the old Act that "*in terms of the law and customs of amaNdebele and the Framework Act, the nature of the position of the late paramount chief of Ndzundza-Mabhoko, Cornelius Nyumbako Mahlangu (Mayitjha III), is that of senior traditional leader*".

[30] It is important to point out that these decisions were made in terms of the old Act as they were made prior to the commencement of the new Act on 25 January 2010.

[31] On 5 November 2010, the President in a notice in the Government Gazette (*supra*) purportedly gave recognition to the decisions of the Commission in terms of section 28(8) read with section 2A of the Traditional Leadership and Governance Framework Act, 2003 that the amaNdebele of Manala and the amaNdebele as a whole is recognized as a kingship with King Enoch Makhosoke Mabhena as the king. Further in terms of section 28(9) of the Act, the Ndzundza-Mabhoko is recognised as a deemed kingship with King Mbusi Mahlangu as the deemed king.

[32] In so far as there may be a dispute in respect of which Act the President published the notice, it is important to point out that the President, in referring to section 28(9) and section 2A, clearly published the notice in terms of the new Act and not in terms of the old Act as neither sections referred to in the notice exist in the old Act.

[33] The recognition of King Mbusi Mahlangu as the "deemed king" of the "deemed kingship" of Ndzundza-Mabhoko in the notice is in conflict with the decisions made by the Commission.

[34] Before I proceed to the crux of the dispute, I need to make two observations: Firstly, I express no opinion in respect of whether the decisions made by the

Commission are correct or not, nor whether the decisions were irrational or unreasonable. Before this Court is not a review of the decisions made by the Commission. Accordingly it falls outside of the scope of these proceedings to determine whether the Commission's factual findings were unreasonable or irrational. Consequently I am bound to defer to the decisions made by the Commission as they stand until such time they have been reviewed and set aside. In this regard I also take note of the fact that the Commission was at the time a specialised body established in terms of the old Act to apply customary law when adjudicating disputes between parties.[6] Consequently, should this Court decide to set aside the notice of the President, the Commission's decision in respect of the applicant's position as the rightful king of the amaNdebele and of Manala and the amaNdebele as a whole remains valid and intact.[7] The Commission's decision in respect of the eighth respondent likewise stands. Secondly, the only issue before this Court is whether the President had acted outside of his powers when the said notice was published in the Government Gazette in the sense that the President failed to implement the "decisions "made by the Commission prior to the implementation of the amendments.

[35] I have already referred to the fact that the old Act (2003) was amended in 2010. In terms of the amendments the Commission (as established in terms of the old Act) ceased to exist with effect from 31 January 2010. A new Commission was established by the amendment Act. What is, however,

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[6] This was also the view expressed by the Constitutional Court in *Nxumalo v President of the Republic of South Africa and others* 12014 (12) BCLR 1457 (CC).
[7] See Nxumalo at paragraphs [17] – [18].

important to restate is the fact that the old Act was only amended with effect from 25 January 2010.

[36] In this matter - as was the case in *Sigcau* - the Commission made certain "decisions" before the Act was amended. Those decisions were conveyed to the President to be published as a notice in the Government Gazette. If it is found that the President had to exercise his powers in terms of the old Act – even though the notice was only published some months after the decisions were taken and some months after the Act was amended - and not in terms of the new Act, the decision of the President as set in the notice falls to be set aside.

[37] The legal position regarding the powers of the President in terms of the Act was succinctly summarized the Constitutional Court in *Nxumalo v President of the Republic of South Africa and others*:[8]

> "[14] In my view, the bases upon which the respondents attempt to distinguish the present case from *Sigcau* are without merit. The principle upon which *Sigcau* is based is that, if a functionary purports to exercise under one Act a power that that Act does not confer upon him or her, that exercise of power is unlawful even if there is another Act that confers such power on the functionary. Here the President believed that he had power to decide the applicant's claim and he purported to do so in terms of the new

[8] 2014 (12) BCLR 1457 (CC).

Act. In this regard, he misconstrued the position. The new Act was not applicable. The Framework Act was applicable. *Under the Framework Act, the President had no power to decide claims such as the applicant's claim. It was the Commission that had the power. The President's obligation under the Framework Act was to implement the decision of the Commission. In the present case, he did not do so but sought to make his own decision under the new Act.*[9]

[15] This Court held in *Sigcau* that the President should have acted in terms of the Framework Act and not the new Act. That meant that the President had acted outside his powers. The notice containing his decision was set aside. We also set aside the decision of the High Court dismissing the review application that had been brought by Mr Sigcau in respect of both the decision of the Commission as well as the President's notices.

[16] *In Sigcau, the President's notices were set aside on the basis that he had "acted under a wrong Act.* [10]There is no reason why this matter should not be decided on the same principle. It is, therefore, proper that we should set aside the President's notice in this case as well..."

[38] I interpose here to briefly deal with the submission on behalf of the respondents that any reliance on the decision of the Constitutional Court in *Sigcau v President of the Republic of South Africa and others (Centre for*

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[9] My emphasis.
[10] *Ibid.*

Law and Society as amicus curiae)[11] is misplaced. I do not agree. The Constitutional Court in *Sigcau* set out the legal position in respect of what the powers of the President are in terms of the old Act *vis à vis* the new Act. The legal position was confirmed by the Constitutional Court in *Nxumalo*. In *Sigcau* the President's notices were likewise set aside on the basis that he had acted under a wrong Act.

[39] This approach was also clearly set out and endorsed by the Court in *Minister of Cooperative Governance and Traditional Affairs v Sigcau*:[12]

> "[70] The applicants' argument is supported by a number of structural and prudential considerations. Before the amendment of the Act, the legislative scheme in relation to the recognition of paramountcies as kingships clearly mandated the Commission to act as the decision-maker, with the President's role being confined to "immediate implementation". As the designated specialist, quasi-judicial body, the Commission could expect a measure of deference for the limited period in which its investigative and decision-making functions were directed at redressing the pre-existing institutional distortions. To expect the President to take his own decision on the same subject decided by the Commission would introduce a measure of duplication, a cumbersome process and insensible inefficiency. It would make no sense for the Commission to be empowered to investigate and make a decision

[11] 2013 (9) BCLR 1091 (CC).
[12] 2015 JDR 2536 (GP).

on a claim or dispute, only for its findings to be rendered redundant by a fresh process undertaken by the President, which gave precedence to the choice of the royal family above the decision of the Commission. The investigation conducted by the Commission would be rendered futile and its decision valueless. The outcome would be anomalous in that after gathering evidence, hearing all interested parties, and making an impartial decision based on custom, the Commission's decision would simply fall away in the face of a unilateral nomination by the royal family in terms of section 9(1)(a) of the Act. This could never have been the intention.

[71] Moreover, the interpretation favoured by the respondents would duplication of functions and decision-making in relation to the criteria and considerations applicable in terms of section 9(1)(b) of the Act. The same issues would be decided twice by different functionaries. And the President would be faced with possibly competing decisions in relation to the ultimate decision: one from the Commission and the other from the royal family. If the President adopted the decision of the Commission he would have to refuse the nomination presented by the royal family, would be obliged to remit the matter to the royal family for reconsideration and would have to continue doing so until the royal family agreed with the choice of the Commission. On the other hand, if he accepted the nomination of the royal family, then the Commission's decision would be rendered pointless.

[72] A finding that so cumbersome and needless a process was not intended by the legislature is supported by the textual argument that section 26(2)(a) of the Act in its un-amended form required "*immediate*" implementation. The wording implies that once the decision of the Commission was conveyed to the President within two weeks of it having been made, it had to be implemented straightaway. The legislature did not contemplate a second lengthy process of engagement involving the President and the royal family, where the latter's approval of the Commission's decision would in effect be sought. In addition, if a process under section 9 is followed, then the President cannot be said to be *implementing* a decision of the Commission. He would instead be making his own decision. Implementation does not necessarily involve an act of completion or perfection. In this instance it means the carrying out of, or giving formal effect to a concluded administrative action of a statutory body. It is the execution of a complete decision.

[73] To reiterate: insistence on the President conducting a full process under section 9 of the Act would undermine the legislative purpose in establishing the structural arrangements to deal with traditional leadership claims and disputes in the manner reflected in the text of the statute read as a whole. From a prudential or cost-benefit analysis, there is no sense or value in pursuing a duplicated process. In investigations done under section 25(2) of the Act prior to its amendment, the language and context of the

statute confirmed that the decision of the Commission was intended to prevail over the preference of the royal family. The Commission was called upon to deal with an extraordinary situation aimed at redress of past distortions, whereas section 9 of the Act creates a mechanism for the ordinary succession to vacant kingships.

[74] In the premises, I agree with the applicants that section 26(2)(a) of the old Act cannot be construed to require the President to engage in the full process envisaged under section 9 of the Act. The literal interpretation urged for by the respondents would not have sensible or business-like results. A more restricted meaning is justified by the context. Accordingly, the applicants are entitled to the declaratory relief sought in paragraphs 2 and 3 of the notice of motion".

[40] In the present matter it is clear from the facts that the Commission concluded its functions and made its decisions under the old Act. Its term of office came to an end on 31 January 2010. Only in November 2010 did the President in a notice in the Government Gazette made the decision public. In *Sigcau* the Commission likewise completed its functions and made a decision pior to its terms of office coming to an end on 31 January 2010. In that matter the President also only made its decision public some months later. In *Sigcau* the Constitutional Court pertinently dealt with the question which Act applies in such circumstances: the old or the new Act? The matter in *Sigcau* was further significantly decided in circumstances where the Commission (as in

the present matter) made a decision in circumstances where the old Act still applied. Because the Commission exercised its functions and completed its functions – which culminated in a decision – the old Act also applied to the final stage of the procedure - which is the President's notice:

"[21] In the present case, the Commission investigated and made its decision on 21 January 2010, before the new Act came into operation.The Commission's procedures were thus initiated and substantially completed under the old Act. The procedures under the old Act thus remained in place to be followed in respect of the final stage of the procedure, that is, the President's notice."

[22] It is clear from the notice above that the President purported to give effect to the Commission's decision under the provisions of the new Act.

[23] The provisions of the new Act in relation to the proceedings of the Commission are different from the provisions of the old Act. It is not necessary to set out and analyse the differences in detail. Suffice it to point out that under the old Act the Commission was authorised to make "decisions" in respect of disputes referred to it, but under the new Act it could only make recommendations. The procedure for dealing with the Commission's recommendations under the new Act also differs materially from the process of implementation of the Commission's decisions under the old Act.

[24] The implementation of the Commission's decisions under the old Act could thus not be done under the provisions of the new Act. In

argument it was suggested that reference to the provisions of the new Act in the notice was a mistake. The problem with this, however, is that nowhere in the papers does the President say that it was a mistake".

[41] The Constitutional Court in *Sigcau* set aside the notice on the basis that the President purported to exercise powers not conferred on him by the provisions of the old Act.

[42] In the present set of facts I am likewise of the view that the President should have acted in terms of the old Act and not the new Act. Although the recognition of kings and queens in terms of the old act was not affected by the new Act, one important amendment, as already pointed out, was brought about with regard to the final process of recognition by the President: In terms of the old Act, the President is obliged to merely implement any "decisions "of the Commission. It is only in the new Act that a discretion is conferred upon the President to implement what is now merely a "recommendation" by the Commission. Under the old Act the President had no discretion to deviate from the findings of the Commission.

[43] The President accordingly acted outside his powers when he purportedly published the notice under the new Act. The President at the time derived his powers from the old Act and consequently merely had to implement the decisions made by the Commission. Consequently the notice containing his decision must therefore be set aside.

[44] I debated with counsel on behalf of the applicant whether the Court should order anything more than merely setting aside the said notice and it was conceded that an order to this effect would suffice.

[45] Before I make my order I briefly need to briefly turn to the preliminary points raised on behalf of the eighth respondent and some of the other submissions regarding the nature of these proceedings.

[46] On behalf of the eighth respondent it was submitted that what is before this Court is a review of the decision of the President and that the Court should therefore not entertain the application because, *inter alia*, the record of the proceedings needs to be discovered before this Court can take a proper decision. I do not agree.

[47] In the present matter the applicant is seeking an order setting aside the said notice published in the Government Gazette in so far as the President did not have the necessary power to deviate from the decisions made by the Commission. A review under the Promotion of Administrative Justice Act[13] ("PAJA") is therefore misplaced. This Court is not seized with a review of the reasonableness of a decision made by the President as all that was required of the President was to give effect to the decision of the Commission. The President was therefore not required to make a decision and accordingly not required to give consideration to the views of the Royal Family nor to engage

[13] Act 3 of 2000.

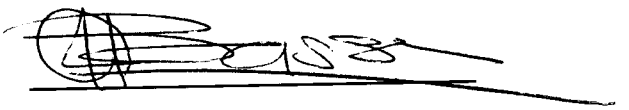
with them.[14] Consequently, there is also no merit in the submission that the Royal Family ought to have been joined in these proceedings as their views have no bearing on the outcome of this application. The question before this Court is not whether the President ought to have consulted with the royal family and ought to have engaged with them. The simple question before this Court is whether the President had acted outside of his powers in issuing the notice which effectively ignored the decisions made by the Commission. I have already decided that the President had acted outside of his powers hence my view that the decision as published in the notice falls to be set aside.

[48] Order:

1. The notice of the President dated 5 November 2010 published in the Government Gazette (Notice 1027 of GG 33732 in so far as it refers to King Mbusi Mahlangu (the eighth respondent) as the deemed king of the Kingship of Ndzundza-Mabhoko in terms of the Traditional Leadership and Governance Framework Act, Act 41 of 2003 as amended is set aside.

2. The fourth and eighth respondents are ordered to pay the applicant's costs including the costs of two Counsel, jointly and severally, the one paying the other to be absolved.

[14] See also: *Minister of Cooperative Governance and Traditional Affairs v Sigcau* (*supra*).



AC BASSON

JUDGE OF THE HIGH COURT

Appearances:

For the applicant	:	Adv Muller SC and Adv IZ Pansgrouw
Instructed by	:	Schoeman & Associates
For the fourth Respondent	:	Adv AP Laka SC and Adv PA Managa
Instructed by	:	State Attorney, Pretoria
For the eight Respondent	:	Adv SM Lebala SC and Adv MH Mphahlele
Instructed by	:	JM Masombuka Attorneys