IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

18/10/16

CASE NUMBER: 22654/2011

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

18/10/2016 ..... DATE

..... SIGNATURE

In the matter between:

KING BANGILIZWE MAXHOBAYAKHAWUZELA SANDILE **APPLICANT**

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA **FIRST RESPONDENT**

CHAIRPERSON OF THE COMMISSION ON TRADITIONAL LEADERSHIP DISPUTES AND CLAIMS **SECOND RESPONDENT**

MINISTER OF COOPERATIVE GOVERNMENT AND TRADITIONAL AFFAIRS **THIRD RESPONDENT**

NATIONAL HOUSE OF TRADITIONAL LEADERS **FOURTH RESPONDENT**

EASTERN CAPE HOUSE OF TRADITIONAL LEADERS **FIFTH RESPONDENT**

PREMIER OF EASTERN CAPE PROVINCE **SIXTH RESPONDENT**

KING MPENDULO SIGCAWU **SEVENTH RESPONDENT**

JUDGMENT

TLHAPI J

INTRODUCTION

[1] This is an application to review and to set aside two decisions in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). The decisions are that of the President and the Commission in which the following relief is sought:

> "*1 Reviewing and setting aside the decision of the First Respondent taken on or about 29 July 2010, in which he failed to recognise the amaRharhabe paramountcy;*
>
> *2 Reviewing and setting aside the decision of the Commission on Traditional Leadership Disputes and Claims taken on an unknown date, in which it rejected the applicant's claim and that of the amaRharhabe people in respect of recognition of the amaRharhabe paramountcy;*
>
> *3 To the extent necessary, extending the period of 180 days in section 7 of the Promotion of Administrative Justice Act 3 of 2000 to the date of the institution of the present application;*
>
> *4 Directing the first and second respondents, together with any other*

respondent opposing this application, to pay the Applicant's costs."

The application was opposed by the first, second and third respondents.

[2] Again, added to the decision not to recognize the status of the amaRharhabe Paramountcy was another decision by the second respondent, taken on an unknown date which declared King Sandile's position as paramount chief to be that of a senior traditional leader. The latter decision was suspended and replaced with one that stated that King Sandile was to remain King until his death.

[3] King Bangilizwe Maxhobayakhawuleza Sandile "King Sandile", is the ninth generation paramount chief of the amaRharhabe. His Paramountcy consists of 40 traditional councils, each presided over by a Senior Traditional Leader. He is regarded by all as a traditional leader of higher status in charge of each one of the 40 traditional councils. The said traditional councils were established under the Administrative Authorities Act, 1984 (Ciskei) and the Traditional Leadership and Governance Act 2005 (Eastern Cape). On 17 September 1990 King Sandile was appointed Paramount Chief of the '*Rharhabe and cognate tribes in the Ciskei,*' with effect from 1 October 1990, 'KSX4'.

[4] The second respondent, The Commission on Traditional Leadership Disputes and Claims was established in terms of s22(1) of the Traditional Leadership and Governance Framework Act 41 of 2003, ("the Act") and came into operation on 24 September 2004. The Act recognized three positions within the institution of traditional leadership, that of ***Kingship; Senior Traditional Leadership*** and ***Headmanship*** in terms of section 28(7):

" TheCommission must in terms of section 25(2), investigate the position of paramountcies and paramount chiefs that had been recognised, and which were still in existence and recognised, before the commencement of this Act, before the

Commission commences with any other investigation in terms that section".

Section 25 of the Act provides:

"*(1) The Commission operates nationally and has authority to decide on any traditional leadership dispute and claims 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) a case where there is doubt as to whether a kingship, senior traditional leadership .....was established in accordance with customary law and customs;

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

The Commission chaired initially by Prof T Nhlapo was established to perform the following asks, being, an investigation into the position of the then twelve paramounticies 'established under the Administration statutory regime, to decide whether they qualified as kingships, to investigate the position of existing paramount chiefs and to determine matters brought under section 25(2) of the Act.

[5] After the Commission presented its report to the President, the President without giving reasons accepted and decided to implement the determination of the Commission not to recognize the amaRharhabe paramountcy and, he pronounced on the status of the applicant, King Sandile and that of his successors.

BACKGROUND TO THE AMARHARHABE PARAMOUNTCY

[6] It is necessary to begin by stating the divergent accounts of the origins of Kingship / Paramountcy in the pre-constitutional era among the AmaRharhabe and amaGcalekas sketched in the founding affidavit deposed to by King Sandile; the answering affidavit as deposed to by Prof Mohlomi Albert Moleleki("Prof Moleki") and the replying affidavit of her Majesty Queen Noloyiso Sandile ("Queen Sandile"). The accounts briefly point out to the difference in the approach by which each party viewed as relevant to the determination of the Paramountcy of the amaRharahabe . Queen Sandile was substituted as applicant upon the death of King Sandile. Without now pronouncing on the application to strike out the supplementary and supporting affidavits, their content shall for the record be summarised.

KING SANDILE

"19. *The AmaRharhabe are descendants of the Right Hand House of Phalo, King of the amaXhosa who died circa 1775. According to the history of the amaXhosa Phalo had two sons who both became prominent in the history of the amaXhosa: Gcaleka, his son from the Great House and Rharhabe his son from the Right Hand House. Rharhabe was by brrth senior to Gcaleka by several years.*

20. *During the reign of Phalo, there was a disruption of the politics of the amaXhosa that led to a split of the amaXhosa into amaRharhabe and amaGcaleka. This important fissure of the House of Phalo took place between the two half brothers and their followers when Gcaleka, soon after reaching manhood, tried to control the Great House while Phalo was still*

ruling. He failed in his attempts. Rharhabe who had opposed Gcaleka's designs to the throne, decided to move to a new country with a section of the tribe under his leadership. There had also been tensions between the two half brothers.

21. *Rharhabe's decision to "secede" in the circumstances was accepted by Phalo and his Councillors. Rharhabe duly left Phalo's Chiefdom and settled across the Kei River. Initially, Phalo left in the company of Rharhabe and crossed the Kei with him in the latter's search for a new home. He however later returned to his headquarters in the Transkei where he died and was succeeded by Gcaleka, as head of the Great House.*

22. *After crossing the Kei with Rharhabe, Phalo is said to have disappeared from public life and did not take any further notable part in the control of the affairs of the amaXhosa until his death in 1775. Meanwhile, Rharhabe had lost no time is asserting himself by military force over the tribes across the Kei (many of whom had much earlier moved away from the main body of the amaXhosa in pursuit of an independent political existence) until the acknowledged PARAMOUNT Chief. He settled there after defeating the authority of Hinsati of the amaLawu. He settled there after defeating the latter and subjecting his tribe under his authority. It is emphasised that Hinsati and his tribe had not at any stage prior thereto been part of the amaXhosa Kingdom.*

23. *The amaRharhabe have been politically independent since the time of the "secession" of Rharhabe described above.....*

24. *The Rharhabe Paramountcy/Kingship has been acknowledged by both Colonial and Apartheid authorities prior to the coming into operation of the*

Bantu Administration Act, 1927.

25. *The Rharhabe paramountcy has thus existed since circa 1740, and its legitimacy has never been contested by the traditional communities by which it is constituted, the colonial and the apartheid era authorities. The said traditional communities and the amaRharhabe in general have at all material times accepted the position of descendants of Rharhabe as Paramount Chiefs of the amaRharhabe"*

QUEEN SANDILE'S AFFIDAVIT DELIVERERED IN TERMS OF RULE 53

This is a response to the Commission's determination on the status of the amaRharhabe paramountcy and to the content of the review record which addresses the historical development of the Rharhabe and Gcaleka paramountcies. Reference is made to the historical authorities used by the Commission and to leading published authorities which ought to have reasonably been considered by the Commission in their investigation. It is contended that the key events charted in the supplementary affidavit were irreconcilable with the determination made by the Commission and upon which the President's decision is based. According to Queen Sandile these findings and decisions will not withstand review, that is, having regard to certain key events in the history of the amaXhosa. The key events pointing to the independence of the amaRharhabe and which it is contended should have been considered by the Commission, is dealt with under the following headings:

"29.1 The dynastic split between the Gcaleka and Rharhabe components of the amaXhosa; 29.2 the political implications of Gcaleka's graduation as divine doctor; 29.3 Rharhabe secedes from the Great House; 29.4 Rharhabe establishes a new and

independent centre of political control west of the Kei River; 29.5 The death of Rharhabe and the period under Ndlambe as the amaRharhabe King Regent – era of consolidation of Rharhabe Kingship; 29.6 The amaGcaleka's attempt to exercise influence over the amaRharabe paramountcy affairs;29.7Amagqunukwebe, Imidange, amaMbalu and amaHeke pay allegiance to amaRharhabe Kingship; 29.8The political context of the battle of maLinde; 29.9 Consolidation of amaRharhabe kingship sovereignty during the period of Maqoma as regent king; 29.10 The expulsion of the amaRharhabe out of the "ceded" territory of Victoria East; 29.11 King Mgolomabne Sandile's accession as King of the amaRharhabe; 29.12 AmaRharhabe declarations of war against the British colonial government and the conclusion of peace agreements were independent acts of sovereignty; 29.13 British Kaffraria proclaimed over west of the Kei in 1847 leaving Gcaleka paramountcy independent; 29.14 British dominance over the amaGcaleka and amaRharhabe sovereignty; 29.15 Attempts to expel the amaRharhabe from their country and undermine Rharhabe sovereignty; 20.16 The Killing of Hintsa during the war of 1834 -35, and the aftermath; 29.17 and Archie Velile Sandile's accession as King of the amaRharhabe."

1. The history of the amaRharhabe and amaGcaleka Kingships is said to predate the arrival of the British Government in that area of the Eastern Cape in 1795. Although there was recognition and respect by the amaRharhabe Kingship of the representation of seniority of the amaGcaleka Kingship in the amaTshawe ancestral line, this was merely 'nominal and for ritualistic purposes' ('the account

by Rev. R RDugmore: "*A Compendium of Kaffir Laws and Customs*" document by Colonel John Maclean'). The British found that the amaXhosa, who had long settled to the East and West of the Kei River, though having a common ancestry, were recognised and respected as two independent polities, each controlled by a King as political head. Up to this day these two Kingships are known by the names of their progenitors.

2. The independence of the amaRharhabe is also demonstrated by the manner in which in which the Missionaries independently sought permission to teach and established the Christian Faith among them and, the manner in which the Colonial authorities and their emissaries interacted, taught the Christian religion and, established diplomatic ties with the amaRharhabe Kingship.

3. Among the amaRharhabe, the King presided as Chairman of his Council Which adjudicated over criminal and civil cases independently of the amaGcaleka Kingship and there was no right of appeal 'to the Court of the amaGcaleka King'. However, on certain occasions the Kings of these two independent polities would be invited to resolve matters arising mainly in mediatory capacities. Further pointers to independence of the amaRharhabe Kingship is to be seen in the strength of their military and how independently of the amaGcaleka, they fought wars on Rharhabe land territory with the British.

4. Professor Timothy Stapleton ('in the Department of History, Trent University') in a supporting affidavit, contended that there was a unanimous finding by most historians since the early 20th century that ' the split' resulted in the formation of separate and independent Kingships dating as far back as the 1700's. In pre-

colonial Africa there evidence of formation of 'a splinter group from the royal family moving away to form a new independent state', this occurring after conflict within the state. Although the amaRharhabe respected the ancestral seniority of the amaGcaleka, his opinion was that "*by the 1820's the two represented separate independent states that could and did act in their own. For historians and political scientists, an important element in proving the existence of a sovereign state is the ability to exercise coercive force, in other words to make decisions about going to war against other groups . On many occasions the amaRharhabe leaders of the late 1700 and 1800's made their own decisions about going to war and making peace, sometimes with other African states and sometimes with the British, which were different and separate from the decisions of the neighbouring amaGcaleka leaders.*"

PROF MOLELEKI IN RESPONSE TO KING SANDILE IN THE ABOVE PARAGRAPHS IN THE FOUNDING AFFIDAVIT

"78. *....It is however, stated that the age of Rharhabe was immaterial in deciding the issue of succession. The material and determining factor here is that of birth from the Great House to which Rharhabe did not belong hence he was not entitled to assume the position of kingship.*

79. *It was not unusual for a Right Hand House (similar to that of Rharhabe) to create a new traditional community independent of, but subordinate to the Great House in respect of family, ceremonial matters and those affecting the community of amaXhosa as a whole. The leader of such an 'independent' community did not assume the position of King.*

Gcaleka did not attempt to take control of the Great House during Phalo's

reign. Gcaleka, as successor-in-title, had to take lessons on traditional leadership whilst his father Phalo, was alive. Gcaleka did not have callous plans for the throne as, on the contrary, he was legitimately destined to succeed his father to the throne. Thus Rharhabe opposed Gcaleka's legitimate claim. Rharhabe had designs to be king.

80. *Rharhabe did not decide to 'secede'. His ambition to substitute Gcaleka as king of amaXhosa motivated him to remove himself from the proximity of his senior brother (in terms of the amaXhosa customary law of succession) who was poised to become king after the death of Phalo.*
Rharhabe remained within Phalo territory (Chiefdom) when he crossed to occupy the land west of the Kei. This is borne out by the following historical facts:

(a) *Gwali, son to the Right Hand House of Phalo, was already settled west of the Kei River with his followers, amaGwali, when Rharhabe made his move.*

(b) *Similarly, Mdange, a brother to Tshawe (the father of Phalo), asked for Permission from Phalo to move across the Kei River. This he did after Installing Phalo as king of amaXhosa. His followers were called imiDange. It must be noted that Mdange was Rharhabe's paternal uncle.*

(c) *Likewise, Langa a brother of Phalo and leader of amaMbalu, had also obtained permission from Phalo to settle across the Kei.*

(d) *By the same token, the InquaKhoi, who were ruled by Hinsati, and who had been defeated by the alliance of Mdange and Gwali and thus subjugated by those who owned allegiance to Phalo, also occupied the area across the Kei.*

(e) *Furthermore, Phalo himself resided at Zeleni, west of the Kei, which was one of his Great Places.*

(f) *Moreover, Phalo accompanied Rharhabe across the Kei because he wanted to see Rharhabe settled and installed as an overseer over his people who had already settled across the Kei.*

It must be noted that Gcaleka succeded Phalo not as King of amaGcaleka but as King of amaXhosa as a whole.

AmaRharhabe always maintained and spoke the same language, isiXhosa, and kept the same culture and customs of amaXhosa and thus always remained part of the fabric of the amaXhosa nation

81. *Although some of the tribes moved away from the Great House (main body) to create new traditional 'independent' communities, they however always remained subordinated to the Great House in respect of family, ceremonial and customary matters as well as matters affecting various communities which made up the nation of amaXhosa as a whole. In terms of custom the expanding communities always remained 'junior' to the Great House.*

Hinsati and his followers had already been subjugated by imiDange and amaGandi (who were part of the Xhosa nation) long before the arrival of the Rharhabe followers.

It could not have been problematic for the leaders of the communities west of the Kei to acknowledge Rharhabe as the most senior 'chief' among them. However, the most senior 'chief' (ingotya) among amaXhosa, remained Gcaleka. The cause of conflict between Rharhabe and the communities west of the Kei was his insistence that he be recognised as inkosi enkulu (king) who was on par with his senior brother, Gcaleka. Those communities

always regarded themselves as falling within the entire 'empire' of amaXhosa and therefore under the overall leadership of Gcaleka.

The chiefdoms of amaGwali, imiDange, amaNtinde, amaMbalu and amaGqunukhwebe established themselves as separate enclaves in the Zuurveld, between the Fish and Bushman Rivers. When around 1814, Charles Henry Somerset, Governor of the Cape Colony, suggested the 'spoor law' to Nqika, Rharhabe's heir, Nqika balked at the idea he was to undertake returning all stolen cattle to Government. He is reported to have retorted 'still every chief rules and governs his own people.' This meant that he was responsible only for his own tribe. This is further evidence that he was not king of the territory across the Kei.

82. *It is denied that amaRharabe ever seceded from the nation of amaXhosa. History and available material does not bear out such a contention of secession. History shows that Rharhabe was accompanied by his father, Phalo, across the Kei in order to 'introduce' him to the amaTshawe communities who had already settled on this territory and who fell under the ultimate rule of AmaXhosa kingship.*

83. *The acknowledgement of Rharhabe Paramountcy/Kingship by the Colonial and Apartheid authorities is telling and must be viewed within the historical context outlined above.*

QUEEN SANDILE IN RESPONSE TO PROF MOLELEKI IN THE ABOVE PARAGRAPHS IN THE ANSWERING AFFIDAVIT

"38. *The essence of the relationship between the Rharhabe Paramount and the Gcaleka Paramount is that the Rharhabe Paramount acknowledges the Gcaleka Paramount as ritually senior in rank (umkhuluwa) but the Rharhabe Paramount is independent; and does not accept any implication of political subordination to the Gcaleka Paramount.*

39. *The Rharhabe Paramountcy's ascendance among the Western Xhosa was consolidated under the Rharhabe Regent Paramount Ndlambe who took office in 1782, during the minority of Nqika. The consolidation entailed initial subjugation of imiDange, amaMbalu, amaGwali, amaNtinde and amaHleke. By 1792 Ndlambe had broken the resistance of the amaGqunukwembe and brought them under the Rharhabe Paramountcy. Therefore, in a period of 10 years, Ndlambe had consolidated all Western Kei amaXhosa under the Rharhabe Paramountcy.*

40. *Accordingly, while at some earlier stage (during the reign of King Phalo) it could have been argued, that there were disparate co-segments of amaXhosa in Western Kei under the domination of a central political authority, by 1792 the entire Western amaXhosa communities had been brought under the political domination of the amaRharhabe Paramountcy.*

41. *When Nqika assumed his position as Rharhabe Paramount he intensified his uncle's policy; and engaged independently with the British, while strengthening his personal power among the amaRharhabe. Attempts by the Gcaleka Paramountcy to assert itself over the Western amaXhosa were resisted by Nqika and he fought a war against the Gcaleka Paramount in 1794 which he won, capturing Hintsa the Gcaleka Paramount, although he was allowed to escape. This defeat of the Gcaleka Paramount pushed the*

amaGcaleka Paramount permanently across the Kei.

42. *As a result of this the Kei came to be accepted as the political 'border' between the two centres of power, the Rharhabe Paramountcy in the Western Kei and the Gcaleka Paramountcy in the Eastern Kei long before the coming into operation of the Native Administration Act in 1927.*

43. *The dominance of the amaRharhabe Paramountcy in Western Kei was sealed when the area west of the Kei was brought under British jurisdiction in 1847. The Western Kei amaXhosa were then turned into British subjects, while the Gcaleka Paramountcy remained independent, until its annexation.*

44. *Therefore, while at some stage before the dynatic split, Rharhabe was the Right Hand House under the central political authority of Phalo, over time there was no longer one but two central authorities, one under the Rharhabe Paramountcy, and the other under the Gcaleka Paramountcy.*

54.2 *As regards Ngqika's response to Charles Henry Somerset, he reportedly stated that although he was a King, each head of the Chiefdoms owing allegiance to him, was responsible for the government of his own people. This was indeed the true nature of the political structure of the Western amaXhosa, which included a substantial degree of local self-governance. The Rharhabe Paramount did not interfere in the government of the chiefdoms under the Rharhabe Paramountcy; notwithstanding their allegiance to him. It was nevertheless accepted that Ngqika was the Paramount of all the Western Kei amaXhosa. The deponent distorts the quotation from Milton's "Edges of War"*

55. The term 'secede' was used in inverted commas to denote the detachment of Rharhabe from the jurisdiction of the Great House as a result of dynastic split, resulting in the creation of two kingships, one ranking above the other culturally, but politically independent.

56. To the amaXhosa under the amaRharhabe Paramountcy of Western Kei, Ngqika (and Sandile) was iNkos' enkulu (King) and the same term was accorded to the amaGcaleka Paramount Hintsa and Sarhili."

THE COMMISSION'S INVESTIGATION AND DETERMINATION

[7] In a letter dated 23 June 2005 the erstwhile chairperson the Commission Professor T Nhlapo informed King Sandile of the Commission's investigation and of its intention to visit and to meet all the royal houses and to hold public hearings to :

*' **investigate the position of paramountcies and paramount chiefs that had been established and recognised, and which were still in existence and recognized before the commencement of this Act"**. The Commission is instructed to do this before other investigation in terms of section 25(2) .....*
In view of the above, the Commission will be visiting all existing royal houses in the near future in order to hold public hearings and meet with royal family members. In case of the Eastern Cape, these hearings will be held in the weeks 4 – 8 July and 18 – 22 July 2005."

King Sandile averred that no visits were undertaken by the Commission to the Royal Houses in the 40 traditional communities in the Rharhabe Paramountcy. The millions of amaRharhabe resident outside the 40 designated areas received no notice from the Commission. Furthermore, neither he nor any member of the amaRharhabe were

informed that the objective of the Commission was to 'investigate and determine whether the Rharhabe Paramountcy qualifies for recognition 'as a kingship Under the Framework Act or whether it was established in accordance with customary law.' The Notice gave the impression that the Commission was to investigate and gather evidence on existing paramountcies. There was further no indication that the legitimacy of the Rharhabe Paramountcy was in contention.

[8] The hearings commenced between 18 and 19 July 2005. The amaRharhabe delegation was heard between 20 and 21 July 2005. They made oral submissions and responded to questions by members of the Commission. No research by the Commission, or documentation submitted by third parties on issues adverse to the paramountcy of the amaRharhabe was availed prior to or at the hearing. This material included historical records and archival research, some of which was available before to the 2005 hearings. This material had not been 'tested against the view of the amaRharhabe'.

[9] It was some two years later where Prof Nhlapo in a letter to King Sandile dated 3 May 2007 stated that the Commission had in the final stages of the final individual determinations realised that it was legally required to make available to him all material it had available, which had not been availed to him and which included 'historical records and archival research' for his 'views and actions'.

[10] The material was made available under cover of a letter from Prof T Nhlapo dated 11 June 2007, which required written submissions to be made by no later than the 29 June 2007 and inviting him to make oral submissions on the material at a hearing scheduled for 16 July 2007. The letter stated further:

> *"It is important for me to emphasise that the issues now being put before you do not in any way represent the Commission's thinking. We simply think that it will assist us*

to arrive at the truth to have your reaction to these statements, however controversial you might consider them to be."

The letter did not explain why the material was not availed to the amaRharhabe before June 2005 to enable them to evaluate the material and to conduct their own research, to refute content adverse to them. A very short notice was given to the king and amaRharhabe to consider the material. Prince Siqithi Maqoma on behalf of King Sandile attended and made oral submissions on 16 July 2007. The issues to be dealt with were contained in '**KSX8**' and certain documents were attached for his response. In '**KS9**' the Commission was made aware of the little time afforded to the amaRharhabe to evaluate the material, to conduct their own research and to refute content which was adverse to them. They complained that some of the documents were unreadable and clearer and retyped documents were later furnished.

[11] It is averred that during the hearing and after hearing the amaGcaleka and amaRharhabe, a new document purporting to have been prepared by the House of Phalo was furnished by the amaGcaleka delegation. The house of Phalo refers to the Rharhabe and Gcaleka Houses. The document '**KSX14**',was a response to research conducted on behalf of the Commission by one William Kekale Kaye, and it disputed 'the independent political existence of the amaRharhabe'. The Rharhabe's did not give input to its preparation but merely noted its contents at the hearing. Concern by King Sandile was raised that the amaGcaleka representative was allowed to introduce new matter in response and the Rharhabe delegation requested an opportunity to reply thereto and the request was denied '**KSX15** and '**KSX16**'. Besides the amaRharhabe were not informed in the letter of invite to bring their representatives along or that the amaGcaleka would be making submissions adverse to their paramountcy.

[12] On 18 April 2008 under hand of the President, King Sandile was notified of the

release of the Commission's report on the position of the Rharhabe Paramountcy '**KS17**'. The letter also talked about the implementation process provided for in Section 26 (2) of the Act, to the effect that the decision of the Commission which affected a king or queen must, within two weeks of the taking of such decision be communicated to the President, for implementation in terms of 'section 9 and 10 thereof. The implementation process as described was not engaged. The Commission released the report to the Rharhabe paramountcy on 29 April 2009 and announced that the determination would not be implemented since it still had to investigate the position of each incumbent paramount chief before completing its mandate in terms of section 28(7) of the Act. The Department of Local Government and Traditional Affairs of the Province of the Eastern Cape, in a memorandum dated 19 May 2008 to all its staff, confirmed the Commissions determinations and directive regarding implementation.

King Sandile averred that the Traditional Leadership and Governance Framework Amendment Act, 2009 was introduced to implement the determination of his status which was not in terms of section 9 and 10. On 30 July 2008 the Rharhabe paramountcy informed the Commission that it rejected the Commission's determination and intended bringing legal action, 'KS20'.

[13] Representatives of the Rharhabe paramountcy requested a reopening of the investigation by the Commission at the hearing on 6 October 2008. This request was declined and the amaRharhabe delegation withdrew from the proceedings. The final determination of King Sandile's status as Senior Traditional Leader was published on the Commission's website on 29 April 2009.

THE DECISION OF THE PRESIDENT

[14] On 30 July 2010 the President announced that the Commission had presented its

report to him and that he had accepted its findings. King Sandile summarised 'KSX23' as follows :

> " 44.1 *South Africa has only seven legitimate Kingships and Kings. Another 6 Kingships/ Queenships whose status would come to end on death of the current incumbents of the position of King in each case.*
>
> *44.2 Regarding the Gcaleka and the Rharhabe paramountcy the Commission had recognised only one Kingship of the amaXhosa under King Zwelonke Sigcawu , of the amaGcaleka.*
>
> *44.3 Future investigations and determinations of Kingships and their incumbents would be determined by a new commission set up in terms of the 2009 Amendment to the Framework Act.*
>
> *44.4 The amaRharhabe paramountcy is not recognised as a Kingship but shall be deemed to be a Kingship until death. Upon my demise, my successors will be recognised by the Premier as Principal Traditional leaders and the paramountcy will be recognised as a Principal Traditional Leadership"*

[15] According to King Sandile the Commission was undertaken in terms of Chapter 6 of the Act, which was followed by the report and determinations made by the Commission. This was indicated in the information sheet issued by the Ministry of Co-operative Governance and Traditional Affairs that preceded the President's statement, communicating his decision, deeming the Rharhabe paramountcy an interim one and his position, that of King, till his death. King Sandile contended that the 2009 amendments to the Framework introduced in terms of section 28(9) of the Act were made at a time when the Rharhabe paramountcy had 'legitimate and historically based claims and where notice had already been given to challenge the Commissions determinations. He contended further that the amendments were made in an effort to placate the 'incumbent paramount chiefs into acquiescence' in the

determinations of the Commission.

[16] King Sandile contended that the determination by the Commission that the kingship of the amaXhosa was established under amaGcaleka alone was flawed. It failed to recognise the ' historical exigencies' which resulted in the well documented effects that the 'split' had in the creation of the two independent paramountcies of the amaGcaleka and amaRharhabe. There was further failure to give recognition to the fact that customary law was determined by taking into account and recognising 'the inherent flexibility and dynamic nature' of customary law.

[17] Prof Moleleki deposed to the answering affidavit as acting chairperson of the Commission. He was actively involved in the Commission from inception and was appointed after the resignation of Prof Nhlapo during 2007. He conceded that the President's announcement and reliance on provisions of the 2009 Act and of referring to the Commission's determination as recommendations was incorrect. The Commission had decision making powers in terms of section 26 of the 2003 Act and that the President's duty was to have announced the Commission's decision and not as 'recommendations'. He further averred that the Commission had authority to decide on traditional leadership disputes and claims in terms of sections 25(2)(a)(vi), which provided that where good grounds existed consideration had to be given to events that preceded 1 September 1927. He contended that the Commission's decisions were 'reasonable, rational and fair and that they accorded with the provisions of the Constitution of the Republic of South Africa ('the Constitution') and PAJA. He denied that the Commission had misconstrued the need to establish 'uniformity' as provided in section 9(1)(b)(i).

[18] He averred that the applicant had participated in the effort to establish the Commission and had fully embraced it. Although the proceedings were not court proceedings they involved 'the examination of witnesses, cross-examination; re-

examination and questions of clarity by the Commissioners.' The hearings in the first phase were conducted in two sessions, the first hearing was held with the amaGcaleka and the second hearing with the amaRharhabe. The applicant had timeously been furnished with all material including submissions which were adverse to its claim. Ample opportunity was given to prepare and to make oral and written submissions. Based on the evidence obtained during the initial hearings of the amaGcaleka and amaRharhabe and before proceeding to the second stage, the Commission conducted its own research. The applicant was invited to avail any additional information for consideration before the final decision was made by the Commission . The purpose of the second stage of the hearings was to provide a set of questions based on the research and to obtain response from the parties on information gathered during its research. Prior to the second meeting being convened, the applicant was notified that he would be given an opportunity to 'amplify, contextualise, explain, question, refute or support any or all of the outstanding items of evidence' and a list of issues to be addressed was annexed,KSX8. At the hearing the delegations were given an opportunity to make presentations and to interrogate each other and to be interrogated by the Commissioners.

[19] Prof Moleleki contended that the purpose of the first phase was solely to determine the status of the paramountcies of the amaRharrhabe and amaGcaleka. The determination was that:

- 'Customary Law of Succession among amaXhosa is governed by the principle of primogeniture.'

- 'In terms of the amaXhosa customary law of succession, only the first born son of the Great Phalo could succeed Phalo. Thus Gcaleka was the rightful

successor. Rharhabe, the first born son of the Right Hand House of the king of amaXhosa, could at best establish a separate chieftainship / traditional Leadership that would be semi-independent, but not of equal status to the Great House'

[20] At the second hearing the applicant was legally represented by Advocate Izak Smuts. According to Prof Moleleki the amaRharhabe tried to revisit the decision of the Commission made in the first phase. The issue was whether the applicant could contest such a decision. After the Commission had clarified its position and that the purpose of the second phase hearing was to determine the position of the applicant in terms of section 28(7) of the Act, the applicant, his legal team and delegation withdrew from the proceedings. The conclusion of this second phase decided that the applicant was a Senior Traditional Leader. It was denied that the decisions made by the Commission were susceptible to review on any of the grounds stated by the applicant..

SUPPLEMENTARY AFFIDAVIT AND CONFIRMATORY AFFIDAVITS

[21] There was an application for the striking out of the supplementary and confirmatory affidavits. According to Prof Moleleki these were impermissible as this application for review of the decisions and or determinations of the Commission must be based on the record of the proceedings that unfolded before the Commission. In as far as the supplementary affidavit purported to adduce the same or similar evidence to that of King Sandile or his witnesses at the hearings, the allegations are disputed. It was further denied that the deponent to the supplementary affidavit was a queen, in view of the fact that King Sandile's status as 'King' ceased at his death in terms of s28(9)(c)(ii) of the Framework Act. Furthermore, the affidavits had introduced new matter which was not presented to and considered by the Commission when an opportunity was given at the hearings to do so and where the applicant had failed or refused to do so. The applicant had further not given

reasons why it had failed to adduce such evidence at the hearings. The applicant further was invited to direct the court to the precise citation of the pages of the authorities relied upon in such affidavits.

CONDONATION

[22] King Sandile contended that there were a number of factors that contributed towards this application not being launched within the applicable time frames. The President did not immediately implement the Commission's determination on the amaRharhabe paramountcy and on his status. The implementation was delayed by the Commission pending the outcome of the determination on his status. He contended that the President by not implementing the determination for an extended period, effectively suspending such determination. Then came the amendments to the Act which was meant to allow the 'incumbent paramount chiefs to retain their status till death.'

[23] The Commission and the relevant authorities were consulted and litigation was considered as a last resort. The decision of the President was announced on 29 July 2010. King Sandile averred that he only instructed his attorneys to brief counsel to obtain legal opinion whether the impugned decisions were reviewable. He also had to seek advice from experts in customary law and history pertaining to the issues that had relevance to his status and that of the amaRharhabe.

[24] Careful research reaffirmed his view that the findings of the Commission were unsustainable. Funding had to be sought for the appropriate legal representation and for briefing of counsel with expertise in the issues addressed in this application. The 180 day period within which it was expected the review application should have been launched commenced from 29 July 2010 and would have expired on 29 January 2011. He contended that having regard to the complexity of the issues and the volume of relevant documentation

which had to be considered, the delay was not substantial.

GROUNDS FOR REVIEW

[25] King Sandile contended that the decisions of the Commission and the President had to be reviewed and set aside in terms of PAJA on the following grounds:

- section 6(2)(d) of PAJA in that the decisions were materially influenced by an error of law;
- section 6(2)(e)(iii) of PAJA in that the decision was materially influenced by errors of fact and was taken because irrelevant considerations were taken into account;
- section 6(2)(f)(ii)(cc) of PAJA in that the decision was not rationally connected to the information before the Commission; and
- section 6(2)(h) of PAJA in that the decision was unreasonable.

[26] It was averred that the Commission's procedure was flawed in that there was 'inadequate notice at various stages of the proceedings; the Commission failed to provide the amaRharhabe relevant documents or adverse submissions which, either at all or sufficiently timeously to enable them to respond; the Commission admitted and relied upon inadmissible evidence; and the Commission failed to take into account admissible evidence adduced by the amaRharhabe;'

[27] Another ground of review related to the contention that the Commission had erred in its interpretation and application of section 9 of the Act in relation to the criteria it used to determine Kingship and in particular the incorrect interpretation of section 9(1)(b)(i) in as far as it was determined that there was a need to establish 'uniformity' in 'its assessment of the Rharabe Kingship'.

In as far as the President was concerned another ground for review was in terms of section 6(c) of PAJA 'in that the action was procedurally unfair'.

A further ground of review was in respect of the amendments to the Act that were allegedly passed in order to allow the incumbent paramount chiefs to retain their positions until death. It was contended that the amendments were meant to allow administrative action which was not 'authorised by the Act.

THE LAW

[28] Section 211 of the Constitution gives recognition to the 'institution, status and role of traditional leadership according to customary law. Customary law is therefore 'one of the primary sources of law under the Constitution'. Our courts and traditional communities have from time to time also engaged in the development of customary law and this development should be consistent with and always 'in accordance with the norms and values of the Constitution'. Therefore, when adjudicating over a customary law matter a court is expected to be 'mindful of its obligations as set out in section 39(2) of the Constitution, and the guidelines of the process to be engaged set as out in ***Shilubana and Others v Nwamitwa*** 2009 (2) SA 66 (CC) paragraphs 42 – 49; and ***MM v MN*** 2013 (4) SA 415 (CC) para 24.

[29] It was further common cause that the decisions of the President and the Commission constituted 'administrative action' that fell to be reviewed under PAJA. The applicant also relied on further grounds as stated above.

[30] In addressing the standard the court had to apply in review, Mr Arendse submitted that deference had to be accorded to the decision of the Commission, ***Bapedi Marota Mamone v Commission on Traditional Leadership Dispute and Claims and Others***

2015 (3) BCLR 268 (CC) para 78, 79, 80, 92, 107.

While Mr Marcus conceded that deference had to be given in appropriate cases, according to him there was no scope for deference in this matter in that there was challenge not only to the legality of the decisions taken, deference was not applicable to statutory interpretation and where it had to be determined whether the procedures were fair or unfair. In ***Bapedi*** supra at para 82 the following is stated:

> "*This Court, may not neglect its duty to scrutinize the rationality of the Commission's decision. But, in doing so, it must be cognisant of the Commission's special expertise as well as the wealth and complexity of the factual evidence it considered in its wide- ranging enquiry. The fairness of that process, where representations were solicited from interested parties, was not challenged."* (my underlining)

The President's Decision (Chapter 6 of the Old Framework Act ('the old Act') and Chapter 6 in terms of the new Chapter 6 of the Framework Act ("the new Act")

[31] There existed a fundamental difference in the process of decision making under the old and the new Act. In terms of section 26 of the old Act the Commission was authorised to make decisions which were then conveyed to the President to be implemented by him. In terms of section 26 of the new Act the Commission could only make recommendations to be conveyed to the President for his decision. The President announced in Government Gazette No. 33732, No 1027 published on 5 November 2010 that 'in terms of section 28(8) read with section 2A of the Traditional and Governance Framework Act, 2003 (Act No.41) (the Act),' he recognized the listed kingships and kings and .....that in terms of section 28(9) of the Act, that he among others gave deemed recognition to the amaRharhabe kingship and

of its incumbent, King Sandile.

[32] Mr Marcus submitted that this notice falls to be set aside, as the President was not allowed to apply the new Framework Act, in giving effect to a decision made by the Commission as it was mandated to do in terms of the old Framework Act. He argued that the setting aside would be in keeping with the decision in ***Sigcau v President of the Republic of South Africa*** 2013 (9) BCLR 1091 (CC) and ***Nxumalo v President of the Republic of South Africa*** 2014 (12) BCLR 1452 (CC)

[33] Mr Arendse's submissions were articulated in his Heads of Argument, where he submitted that nothing turned on the President having invoked the new Act, that the 'President took no decisions of its own.. ...regardless of the unfortunate terminology used in the ....notices; as the final outcome would have been the same even had he invoked the old Act.' In the main, the President 'accepted and implemented the decisions made by the Commission...that in the present case the President's role was merely secondary; even should this Court set aside the President's decision, as was the case in *Nxumalo,* it is discernable from that of the Commission and does not taint the validity of the Commission's decision'.

[34] In dealing with the President's notice in ***Sigcau*** *supra,*the following was said:

> *"[21] The Commission's procedures were thus initiated and substantially completed under the old Act. The procedure of 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 above notice 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 difference 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 recommendation under the new Act, also differs materially from the process of implementation of the Commission's decision under the old Act.

[24] The implementation of the Commission's decision under the old Act could thus not be done under the provision of the new Act. In an argument it was suggested that the reference to the provisions of the new Act in the notice was a mistake. The problem with this, however is that nowhere in the paper does the President say that it was a mistake.

[25] On the contrary, a perusal of the notice indicates that the President *elected to invoke the new Act.....*

[27] .....it cannot be said that a notice issued under the new Act can be taken to have been issued under the old Act."

In ***Nxumalo*** *supra,*

"[14] 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 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."

[35] Mr Marcus argued that the difference between this matter and the ***Sigcau*** was that in this matter the President's decision and that of the Commission was attacked on four separate grounds and that in the constitutional court the review decision was still pending so there was nothing before the constitutional court by way of review. In **Nxumalo** *supra* the review did not have to consider the issue of procedural fairness . In my view, and in light of the above decisions, the argument by Mr Arendse that nothing turned on the President having invoked the new Act has no merit. Agreeing that the decision is of no consequence would amount to one endorsing an illegality. The decision of the Commission could only have been put into effect or be implemented by an announcement by the President under the correct Act, in this instance, the old Act.

[36] Mr Marcus submitted that in as far as it was argued that the use of terminology by the President was unfortunate, it was only the President himself who could say so. As I see it, this referred to the answering affidavit deposed to by Prof Moleleki. It is trite that one person in an affidavit could not give evidence concerning another person where no confirmatory affidavit was filed to confirm such evidence, ***Crawford Lindsay Von Abo v The President of the Republic of South Africa*** 2009 (2) SA 526 (T) para 46. Mr Marcus argued further that where the Commission had found that King Sandile was a Senior Traditional Leader, a position recognised by the old Act, the President announced in terms of the new Act that King Sandile would be recognised as a Principal Traditional Leader, which was clear indication that the two decisions were substantially different. What was present was the express statement by the President in his announcement which showed that there was a clear understanding that the Commission's mandate was under the old Act and that his announcement was tabled in terms of the new Act.

The inference to be drawn is that there is clear indication that the President understood what he was doing and that he purported to exercise a discretion to take a

decision that differed from that of the Commission. I am of the view that the President's decision must be set aside.

The Commission's Failure to Afford a Proper Hearing

[37] Mr Marcus submitted that the Commission's 'investigative and decision making process' was attacked on grounds of procedural fairness, and on incidents as stated in paragraphs 7 – 11 and 13 above.

Mr Arendse submitted that the proceedings were fair and that having regard to the methodology adopted by the commission, which was disclosed to the parties, the principles of procedural fairness are not applicable in this case. The invitation to participate in the hearings was extended to the general public and to the 40 traditional communities aligned to the amaRharhabe. The concluding remarks of Prince Ncamasho at the first hearings were an indication that there was 'a huge amount' of consultation with the amaRharhabe. The Commission made available its research material after the first hearing and the follow up hearing on 16 July 2007 was not meant to conduct a fresh investigation but was an opportunity given to the Rharhabe and Gcaleka paramountcies to give further input.

[38] In my view, the initial invite does not give indication that in addition to investigating existing paramountcies the Commission was going to investigate and make decisions on the legitimacy of the amaRharhabe paramountcy as against that of the amaGcaleka, nor is there any indication initially that the Kinships were being contested. It however became apparent when the follow up meeting two years later was arranged that there was more to the investigation than was initially imparted in writing to these two paramountcies. Mr Marcus submitted that critical to the follow up hearing of 16 July 2007 was the fact that a new document was produced by the amaGcaleka delegation which purported to be a document emanating from the House of Phalo. Despite the fact that the House of Phalo referred to the

Rharhabe and Gcaleka houses of the amaXhosa, the amaRharhabe were not party to its preparation and the maRharhabe were seeing it for the first time at the hearing.

[39] What followed was a decision by the Commission not to recognize the amaRharhabe paramountcy. A request to reopen and to give input into the legitimacy and independence of the amaRharhabe, was denied at the opening of the second phase hearings. Mr Marcus argued that the decision of the commission and also that of the President, which was based on the prior finding fell to be set aside, on the basis of what has been consistently applied by our Courts, as appears in ***MEC for Health Eastern Cape and Another v Kirkland Investments (Pty) Ltd t/a Eye and Lazer Institute*** 2014 (3) SA 481(CC) at para 102 *(which confirmed as appears in foot note 74 page 511, the decision in* ***Seale v Van Rooyen NO and Others*** *2008 (4) SA 43 (SCA) ((2008) 3 All SA 245) at para 14 "the acts performed on the basis of the validity of a prior act are themselves invalid if and when the first decision is set aside , in para 13 the court rightly rejected an argument in misconceived reliance on Oudekraal, that the later (second) act could remain valid despite the setting aside of the first")* It is the decision of the Commission that is being attacked on the basis that it was procedurally unfair.

[40] In 'KSX 6' the Commission with regard to material which was not availed to the amaRharhabe stated:

> *"After a wide-ranging debate on the implications of this state of affairs on the obligation placed on us to be fair at all times and to observe all the requirements of administrative justice, we have come to the conclusion that we are legally required to seek your opinions and responses to any material that is relevant to your situation"*

The complaint related to the 'consolidated report' said to be in response to a request by the Commission for comment on its research, it also disputed the legitimacy and independence of the amaRharhabe 'KSX14'. In my view, of importance is to look at the reaction of the amaRharhabe to this document at the hearing . A request by King Sandile on 18 July 2007

to be given an opportunity to respond to this new matter was denied. With regard to the complaint on what transpired at the hearing of the 16 July 2007 King Sandile stated two days after the hearing 'KSX 15' :

> *"with the benefit of hindsight, I am of the view that we should have been afforded an opportunity to reply. Indeed that course should have been taken by the commission."*

The response from the chair of the Commission Prof Nhlapho was the following, 'KSX16':

> *"I am writing to express my regret that you felt unfairly treated. I am unable to agree that this was in fact the case. The Commission considers itself quite capable of assessing the stories that it was told and of taking account of dramatisation or exaggeration in any testimony. We have been doing this over some forty hearings in the last few years. I am also unable to agree that the procedure itself is flawed. Again this is the procedure we have applied consistently in our past hearings. Not being a court of law, we have devised procedures that help us arrive at an understanding of the issues while allowing all parties to have a say. It would have been irregular to alter this procedure just for the hearings under discussion."*

Mr Marcus argued that that the material had not been tested against the view of King Sandile and the amaRharhabe and that the Commission held back on documentation which dealt with the very important issue that it had to consider. Furthermore, the amaRharhabe were given very short notice to give oral evidence and to make written submissions on the questions posed by the Commission.

[41] Full participation by all participants in any proceeding is the essence of a fair hearing as it not only recognises the dignity of the participants, it gives credence to the process. It also gives the participants an opportunity to influence the outcome of the proceedings;

Joseph and Others v City of Johannesburg 2010 (4) SA 55 (CC), at para 42. **In *De Lange v Smuts NO and Others*** 1993 (3) SA 785 (CC) the following was stated at para 131:

> *".....at heart, fair procedure is designed to prevent arbitrariness in the outcome of the decision.....Everyone has a right to state his or her own case, not because his or her own version must be accepted, but because, in evaluating the cogency of any argument, the arbiter, still a fallible human being must be informed about the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than chance."*

[42] Mr Marcus submitted that the procedure was fundamentally unfair and that a failure to afford a proper hearing vitiated the decision of the Commission. He argued that the concept of legitimate expectation conferred a right to be heard on the amaRharhabe. The concept was 'an intergral part' of the *audi alteram partem* principle which was well established in our law, ***Administrator, Tvl and Others v Traub and Others*** 1989 (4) SA 731 (A) at 761 D-G; ***Administrator Cape and Another v Ikapa Town Council*** 1990 (2) SA 882 (A).

[43] In my view, in order to put the application of this concept into perspective one needed to go back to the reason for the follow up hearing. Besides a complaint about the utterances of Mr Mda and if one had regard to the record of proceedings the issue was also that the 'consolidated report' emanated from the House of Phalo. According to Mr Arendse the purpose of the follow up meeting was not to conduct a fresh investigation but was meant to give input on new material and on the commissions' research.

The Commission itself was cognisant of the gravity of the decisions it was expected to give and then it observed the *audi alteram partem* rule when it invited the parties to the

follow up meeting. One cannot trivialize the importance of that document which the amaRharhabe say came to their attention for the first time at such hearing. The document was important in that it was requested by the Commission and it was going to be considered by it in arriving at its decision. The amaRharhabe maintain that it contained information adverse to their interests. The fact that the Commission itself deemed it necessary in its letter to observe the rules of natural justice, it had no reason in my view to deny the amaRharhabe audience on issues arising out of such document. I wish to point out to what was said by Prof Moleleki at the beginning of the hearings: at page 5 and 6of the transcript: *"we are going to be here today and tomorrow, but we are likely to come back several times in the future, so this is going to be a long and arduous process, we need your cooperation".*

Based on the concept of legitimate expectation 'which is an integral part' of the *audi alteram partem* rule, the amaRharhabe had a right to insist upon the Commission to be heard.

Supplementary affidavit and Error of Fact and Relevant Considerations

(Mr Marcus assisted by Mr Brickhill)

[44] Firstly, there was objection to the filing of the supplementary and confirmatory affidavits on grounds that new matter was raised outside of the perimeters of the Commission. Mr Arendse submitted that no other forum had mandate to 'analyse and decide' on the paramountcies and paramount chiefs. Furthermore, that since the applicant enjoyed legal representation before the Commission no explanation was offered why such new matter was raised in such affidavits and not before the Commission. He criticised the annexing of whole books of literature to the papers. Mr Arendse filed a post hearing note in response to Mr Marcuts's 'notes on argument' and these related to the admissibility of the supplementary affidavit, error of fact and condonation

[45] It is common cause that the supplementary affidavits dealing with the 'living customary law' of the amaRharhabe, were served before the answering affidavit and that they have gone unanswered. Although it is contended that the facts therein be struck out, such facts, in as far as they were not dealt with by the respondents, remained uncontested and are not in dispute.

[46] Mr Marcus argued that the supplementation was not limited to the record of the proceedings, ***Johannesburg Consolidated Investment Co v Johannesburg Town Council*** 1903 TS 111 at 115. The requirements for fair proceedings obliged the Commission to consider all relevant matter, and that a 'material mistake of fact even if made in ignorance constituted a reviewable irregularity, ***Government Employees Pension Fund and Another v Buitendag and Others*** 2007 (4) 2 (SCA) para 11***; Pepcor Retirement Fun and Another v Financial Serives Board and Another*** 2003 (6) SA 38 (SCA) para 47. In order to justify a striking out the "(i) *matter must be scandalous, vexatious or irrelevant*, and *(ii)the court must be satisfied that if such matter is not struck out, the party seeking such relief would be prejudiced*"; para 26 deals with the test to determine relevancy and para 136 states the rule '*that a party who seeks to strike out must nevertheless on affidavit deal with the allegations made that he seeks to strike out.*" ***Helen Suzman Foundation v President of the Republic of South Africa*** 2015 (2) SA 1 (CC)

[47] Mr Arendse relied on the case of ***Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another 2008 (2) SA SCA*** para 14, 15 and 16. Para 14: 'that an applicant was not allowed to make out a new case in a supplementary affidavit; Para 15 that circumstances to be relied upon had to be set out in the founding affidavit ...and amplified ' in so far as may be necessary' in the supplement affidavit by new information that had since become available; Para 16 the new information did not justify the lengthy supplementary affidavit, ostensibly brought under rule 53(4). He conceded that an applicant for review may supplement the founding affidavit, however, he submitted that the supplementary affidavit

was unjustifiably lengthy it totalling 76 pages excluding annexures as compared to the 33 pages of the founding affidavit. The court had to reject those pages not arising from the record.

In my view the facts in *Lufuno* supra are distinguishable to the present. There the parties had by agreement bound themselves, in the event of a dispute regarding payment for services, that adjudication be by way of private arbitration. That adjudication was in turn regulated by the Arbitration Act 42 of 1965. It was held that the review if any was confined to grounds of procedural irregularity provided for in terms of section 33(1) of the said Act. By agreeing that the arbitrators award 'shall be final and binding on the parties', the parties had waived their right to have the merits reconsidered.

[48] The new information that had since become available related to the discovery of three secret meetings that Andrews had with Bopanang. The court found that putting aside the three 'secret meetings', Lufuno in the lengthy supplementary affidavit raised a 'completely new case' and that it was not suggested that the court *a* quo's discretion was ' *exercised capriciously or upon a wrong principle or upon any other ground justifying interference by a court of appeal".* In the Constitutional Court, the **Lufuno** matter concerned the interpretation of section 34 of the Constitution and how it should be applied to the Arbitration Act, the majority judgement left intact the decision of the High Court and SCA on the merits.

In this matter the respondent failed to deal with what it contended was new matter. It was argued for the applicant that the Commission being the decision maker was obliged to consider all relevant facts. In my view, it is not open to the court on the basis that such evidence ought to have been placed before the commission, to out rightly decide to strike them out without considering the facts presented by both parties and the reasons why it should be struck out or not.

[49] Mr Arendse submitted that the supplementary affidavit was filed four years after the commission's decision and that the applicant had failed to identity precisely, information considered by the Commission. This amounted to a trial by ambush and the applicant had failed to heed the invite in the answering affidavit to direct the court to the relevant information. Furthermore that the whole content of the books produced did not constitute new information, in that the substance of the information was before the Commission therefore the decisions relied upon, among others Pepcor and Buitendag did not find application. This argument in my view has no merit.

[50] Mr Arendse seems to criticize the reliance by the applicant on authority by Prof Periers who was one of the commissioners and who participated in the decision not to recognise the kingship of the amaRharhabe. The supplementary affidavit gives guidance on some of the authorities relied upon by mentioning authors, names of the books and pages. For example, at page 221/222/237 it is mentioned that in the book by the very Prof Periers ("The House of Phalo pages 48 and 131) the independence of amaRharhabe was recognized. The respondents could have responded to this statement. For example (not raised by the parties Page 54 of the record), and concerning Prof Periers: he was prevented by the chairperson in the initial hearings from asking a question which he considered was fair but controversial. If the applicant says in the supplementary affidavit, one of your commissioners in his book and other writers agreed with the version that the amaRharhabe were independent, the respondent should have responded.

[51] Mr Arendze gave examples where in the record there appears evidence of the version of the amaRharhabe's claim to independence and the authorities relied upon. Some of the literature referred to served before the Commission. The applicant contends that there has been no response in the answering affidavit with the issues in the supplementary affidavit on the material which served before the commission and additional authorities

provided which supported the version that the Kingship of the amaRharhabe was not based on the principle of primogeniture

[52] Besides information obtained at the hearings, based on stories that were handed down from generation to generation, and literature, the material involved historical events, research and divergent views that spanned 250 years of governance of the 31 traditional communities headed by senior traditional leaders under the amaRharrhabe paramountcy, which demonstrated the existence of an independent kingship. These facts are dealt with in paragraph 29 of the supplementary affidavit. Mr Brickhill argued that the answering affidavit foreclosed the possibility of the recognition of a dual kingship. The Commission took the stance that male primogeniture as existed in 1740 was the deciding factor, thus making only Gcaleka, first son of the Great House, successor to Phalo. This approach he argued was defended also in the heads of argument for the respondent which 'rejected the possibility that customary law had evolved to recognise dual kingships. Its decision, with the stroke of pen, for the first time took away the status of the amaRharhabe which was 'a single narrative of independent kingship, ...consolidated and established' over many years.

[53] Although there were facts sufficient for substituting the decision of the Commission, the applicants were not praying for such order. In my view, the quality of the Commission's final determination should be seen to have interrogated and considered all the facts and material available, including such information the Commission refused to hear and information predating the cut-off date. After all, the complaint was about a decision not to recognise the legitimacy of the Rharhabe paramountcy and that of its incumbent.

[54] Customary law was a living system as recognised and confirmed by the constitutional court; ***Pilane v Pilane*** 2013 (4) BCLR (CC) at para 34:

"*..customary law is a vital component of the constitutional system, recognised and*

protected by the Constitution while ultimately subject to its terms. The true nature of customary law is as a living body of law, active and dynamic, with an inherent capacity to evolve in keeping with the changing lives of the people whom it governs"

The test for determining the content of customary law said Mr Brickhill 'was looking backwards, looking to the present and as stated in ***Shilubana and Others v Nwamitwa*** 2009 (2) SA 66 (CC) para 49"

"if development happens within the community, the court must strive to recognise and give effect to that development, to the extent consistent with adequately upholding the protection of rights."

In a recent decision our courts recognised that customary law had developed where the Xhalanga community in the Eastern Cape had over 60—100 years adopted a system of electing its own head man, rather than having one chosen on their behalf from the royal house, ***Premier of the Eastern Cape and Others v Ntamo and Others*** (2015) ZAECBHC 14 (18 August 2015). Having regard to the above matters, it should be accepted that today there is greater need to appreciate that the development of customary law is a reality, that customary law is mutable, therefore it was important for the Commission to have considered claims to such development especially where it is alleged to have existed. This in my view would have been in line with the mandate in terms of section 28 (7) of the Act.

The Commission's Interpretation of section 9 (1)(b) of the old Act and the 1927 cut off

[55] Mr Brickhill submitted that the Commission's interpretation that the need to create uniformity only meant one kingship was incorrect. It ruled out the possibility of dual kingships from the beginning. He argued that this was evident from the manner in which the Commission went about its investigation as seen from the extract from the Commissions

determination and decision. While it commenced correctly in identifying the issues as 'requiring in essence, a finding whether two independent kingships were established,' under its heading 'Analysis of Issues' the following is stated:

> **"9.2.1 In pursuit of uniformity in the Republic as envisaged by the Framework Act the Commission takes cognisance of the following principles:**
>
> **(a) The establishment of an independent traditional community under one leader;**
> **(b) Welding together diverse cultural and linguistic elements or communities each with its own recognisable traditional leader under one principal traditional leader;**
> **(c) The traditional community should not have lost its independence through indigenous political processes which resolved themselves during the centuries before colonial intrusion;**
> **(d) The principal traditional leader should rule over the entire traditional community with linguistic and cultural affinities rather than a section thereof." (emphasis added)**
>
> Commission's Determination, annexure "B" to answering affidavit pages 447-448 and sub-paragraphs.

It was argued that the Commission interpreted 'the 'uniformity' considerations along *"principles"* that were not properly part of the statute at all' and that tended to indicate that the section required or preferred, "one leader"; "welding together"; "one principal traditional leader' to rule "over the entire traditional community." This approach he said precluded both the amaGcaleka and amaRharhabe from interpreting 'uniformity' to mean, one kingship only per community. The responsibility on the Commission was to interpret the application of the Act in such a way that it conforms to the Constitution.

[56] Mr Brackhill submitted that the commission was empowered to investigate disputes after the cut off date of 1 September 1927 in terms of section 26(6) of the old Framework Act. This was however qualified in that, in terms of section 25(5)(a)(vi) they were entitled to investigate and consider events that preceded the cut-off date and that nowhere in the

answering affidavit does the Commission give 'good grounds' which would have entitled it to temporarily extend its authority to look into the independence of the amaRharhabe. In my view these kingships were investigated as if there was a dispute about kingship whose origins were vested in customary law only, that had been lodged and which the commission had to investigate and make a finding.

Condonation

[57] Mr Arendse submitted that this application was wholly and unreasonably late. The application was launched three years after the decision on kingship was taken on 28 April 2008. This decision did not affect the position of late King Sandile it related to Kingships only Of importance was a letter written on behalf amaRharhabe on 30 July 2008 notifying the Commission that its decision was not accepted and that the applicant intended instituting legal proceedings.

[58] He argued that it was recorded at commencement of the second leg of hearings that the amaRharhabe were legally represented by Advocate Smuts and his junior. There was a request to revisit the 2008 decision of the Commission on grounds that it was not a final decision. There was engagement with him on the appropriate forum to hear a review application. The Commission he said made it clear that they were *functus officio* and that their decision was final. This would mean that administrative action cannot be reviewed because the commission was *functus officio.* I agree with Mr Marcus that this line of argument would be 'destructive' of any of the grounds of review a litigant is entitled to raise including error fact and an error of law.

[59] Mr Arendse argued further that there was no legal basis to reconvene the commission. He argued that he was not certain whether the old Act would be applicable as

the mandate of the commission had been terminated and that it no longer sits. The decision not to give recognition was made under the old Act, under 'transitional arrangements' which differed from the process now applicable under the new Act. The decision of the Commission must still stand because 'all the President had to do at the time was just publicise the decision in the Gazette, ***The Minister of Cooperative Governance and Traditional Affairs and Others v Wezizwe Feziwe Sigcau and Others (40750/2014; Gauteng Division of the High Court, Pretoria)***

[60] Mr Marcus argued that the matter was distinguishable from this one in that it was not a review application and at para 42 on page 288 where Judge Murphy stated that:, *"the applicants do not seek to review any administrative action on the grounds of .....illegality or procedural fairness".*

[61] Mr Arendse further argued that it was not possible, for the applicant to have compromised his position by entering into the second phase when they were not happy with the fundamental issue of kingship. He submitted that the same points raised then were now raised as new evidence in the founding and supplementary affidavits. Furthermore, that the the failure by counsels for the applicants to pursue the condonation application in oral argument was suggestive of a lack of confidence in the merit of its reasons for lateness. This latter argument is without merit.

[62] As I see it the record reflects that the issues raised by Advocate Smuts related to his request to revert to the decision taken by the Commission and the debate revolved around whether the decision of 2008 was an interim or final one. This is only one of the many issues raised as grounds of review in this application. Mr Arendse argues that been 2005 and 2008 before the decision there was nothing stopping the amaRharhabe from making representations to the Commission. This loses sight of the fact that they had been denied an opportunity to make representations during July 2007 on issues that were adverse

to their assertions of independence.

[63] Mr Arendse argued that the main task of the Commission was to investigate the distortions caused by our colonisers and the apartheid regime, whether the existing paramountcies were genuinely established under customary law at the time and not today. According to him the Commission was bound by the mandate in the empowering statute and they concluded after considering the versions from both sides that 'golden rule' of male primogeniture was applicable. The methodology adopted was disclosed to the parties and accepted and the material some material referred to in the supplementary affidavit, for example Milton's Book was referred to by the Commission.

[64] In my view the Act should not be interpreted to mean that the Commission was directed only to investigate distortions to the customary law as it existed as at time of the 'split and cut off date, thereby empowering the commission to make decisions that would have the effect of wiping out an entire history of a people.

[65] Mr Brickhill argued that while the Commission's view was that their decision was final, the decision was taken in 2008 and only communicated to the President via the Minister in 2010. To the amaRharhabe the process presented an incomplete picture informed by hindsight during 2010 in that the President referred to the Commissions finding as a recommendation and to his decision which meant the final decision. According to the applicant the timing ran from the President's decision. It was argued that from 2010 to 2013 the legal position on the decision of the commission was not clear until determined by the constitutional court when the President's decision was set aside. Furthermore given the applicable timeframe which expired on 29 January 2011 the delay was not substantial. It was therefore not unreasonable for the applicant to have launched the application when it did.

[66] In my view, of importance is that the applicants are not seeking this court to substitute the decision of the commission, but that the matter be referred back for proper investigation and consideration by having regard to the issues raised in this review. I agree that the Commission as initially constituted is no longer in existence. It is therefore the duty of the First Respondent to initiate a process that would address this matter. Condonation should be granted not because the applicant expects the court to be sympathetic, but because this application is one that touches on decisions that have affected so many lives, it is a decision that strikes to the core of their belief in who they are in the overall family of the amaXhosa. Thirty-one traditional communities and their King say on hindsight were now realize that the decisions were wrong, and based on the various grounds of review we say the process preceding the 2008 decision was procedurally unfair and the President's decision in 2010 was legally incorrect. The Commission and the Commissioners repeatedly throughout the record insisted on fairness. The follow up hearing was motivated by an understanding among them that fairness had to prevail. The respondents will not be prejudiced by a re-consideration. It should not be about the impossibility of the process being revisited, it should be about a people who say our situation is different and we have a right to demand that we should have been heard then before the decision was taken and again that consideration be given to our version and how that should be interpreted in light of the Constitution.

[67] In the result the following order is given:

1. The decision of the First Respondent taken on 29 July 2010 is reviewed and set aside;
2. The decision of the Commission on Traditional Leadership Disputes and Claims in which it rejected the Applicant's claim and that of the amaRharhabe people in respect of the recognition of the independence of the amaRharhabe

paramountcy is reviewed and set aside.

3. The period of 180 days in section 7 of the Promotion of Administrative Justice Act 3 of 2000 is extended to the date of institution of the present application.
4. The First, Second and Third respondents are ordered to pay the costs of this application including costs of two counsel.

TLHAPI VV

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	**27 NOVEMBER 2015**
JUDGMENT RESERVED ON	:	**27 NOVEMBER 2015**
ATTORNEYS FOR THE APPLICANT	:	**SMITH TABATA INC.**
ATTORNEYS FOR THE RESPONDENTS	:	**BHADRISH DAYA ATT.**