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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

- (1) REPORTABLE: ~~YES~~/NO
 (2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
 (3) REVISED

CASE NO: 5948/2018

6/9/2019

In the matter between:

HASANI THOMAS MULAMULA

FIRST APPLICANT

MULAMULA ROYAL FAMILY

SECOND APPLICANT

MULAMULA TRADITIONAL COUNCIL

THIRD APPLICANT

and

PREMIER OF THE PROVINCE OF LIMPOPO

FIRST RESPONDENT

**LIMPOPO PROVINCIAL COMMITTEE ON TRADITIONAL
 LEADERSHIP DISPUTES AND CLAIMS**

SECOND RESPONDENT

MDUNGAZI JOSEPH MALULEKE

THIRD RESPONDENT

**COMMISSION ON TRADITIONAL LEADERSHIP
 DISPUTES AND CLAIMS**

FOURTH RESPONDENT

**LIMPOPO PROVINCIAL HOUSE OF TRADITIONAL
 LEADERS**

FIFTH RESPONDENT

JUDGMENT

MAKGOBA JP

- [1] The Applicants brought an application seeking to review and set aside three related decisions taken in terms of section 26 of the Traditional Leadership and Governance Framework Act 41 of 2003, ("the Framework Act") namely:
- 1.1. a decision taken on or about 6 September 2017, by the Limpopo Provincial Committee on Traditional Leadership Disputes and Claims ("the Committee"), to recommend to the Premier of Limpopo Province ("the Premier") that the claim submitted by the Third Respondent, Mr Joseph Mdungazi Maluleke "(Mr Maluleke)" be upheld; and
 - 1.2. two decisions taken by the Premier:
 - 1.2.1. on or about 25 April 2018, to accept Mr Maluleke' s claim; and
 - 1.2.2. on or about 11 June 2018 to dissolve the senior traditional leadership in the lineage of Risimati John Mulamula, thus removing the First Applicant from his position as a senior traditional leader.
- [2] The application primarily seeks to review and set aside the decision of the Committee to recommend that Mr Maluleke' s (Third Respondent's) claim in respect of the First Applicant's senior traditional leadership position be upheld , as well as to review and set aside the Premier's two aforesaid decisions. It has been brought in terms of Rule 53 of the Uniform Rules of Court read together with the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").
- [3] The application is opposed by the First, Second and Fourth Respondents. The Third Respondent Mr Maluleke, who is the subject matter in the traditional leadership dispute and claim that served before the Committee did not oppose this application.

Issues

- [4] There are three main issues to be determined in this matter:
- 4.1. First, whether the Committee acted lawfully in recommending that Mr Maluleke' s claim in respect of the First Applicant's senior traditional position be upheld;
 - 4.2. Second, whether the Premier acted lawfully when
 - 4.2.1. deciding to accept the Commttee's recommendation and
 - 4.2.2. dissolving the senior traditional leadership in the lineage of Risimati John Mulamula, and
 - 4.3. Third, in the event the impugned decisions are reviewed and set aside, the nature and extent of the relief to be granted in the circumstances.

The Role of Royal Family

- [5] It is significant to explain, from the onset, the role played by the Royal Family (the Second Applicant in the present case). In terms of section 1 of the Framework Act or section 1 of the Limpopo Traditional Leadership and Institution Act 6 of 2005 ("the Limpopo Traditional Leadership Act") the "Royal Family" means the core customary institution or structure consisting of immediate relatives of the ruling family within a traditional community who have been identified in terms of custom, and includes, where applicable, other family members who are close relatives of the ruling family.
- [6] The appointment of a senior traditional leader is regulated by section 11 of the Framework Act (the equivalent thereof is section 12 of the Limpopo Traditional Leadership Act). It places a duty on the Royal Family to identify a person who qualifies in terms of customary law to assume the position concerned, and to inform the Premier of the particulars of the person so identified. In terms of section 11(1)(b) (or 12(1)(b) of the Limpopo Traditional Leadership Act) the Premier is obliged ("must") to recognise the person so identified and to effect the appointment by notice in a provincial gazette, by issuing a certificate of recognition, and by

informing the relevant house of traditional leaders of the recognition. The only qualification placed on the Premier to recognise the person identified, is when there is evidence that the identification was not done in accordance with customary law, in which event the Premier may either refer the matter to the house of traditional leaders, or refuse to issue the certificate and refer the matter back to the royal family for consideration.

- [7] The aforementioned legal provision will be revisited later in this judgment when I consider whether the current senior traditional leader of the Mulamula Traditional Community who replaced the First Applicant was lawfully installed as such. It is common cause that following the recommendations of the Committee, the Premier dissolved the senior traditional leadership of the First Applicant and purportedly replaced the First Applicant with Mr Maluleke, the Third Respondent.
- [8] In the present application the Royal Family is the Second Applicant, bringing this application as a co-applicant and in support of the First Applicant. It remains to be seen whether the same Royal Family could have played its role in the identification of Mr Maluleke as a senior traditional leader and his subsequent recognition and appointment by the Premier.

Factual Matrix

- [9] It is common cause between the parties that during 1932 to 1947, Hosi Jim "Photani" Mkhancani ("Hosi Jim") was duly appointed senior traditional leader of the Mulamula Traditional Community. The dispute between the parties is only in relation to the person who took over as traditional leader for the Mulamula Traditional Community after the death of Hosi Jim.
- [10] Hosi Jim died in 1947. Following Hosi Jim's death, the Royal Family designated Risimati John Mulamula as Hosi Jim's successor and he was duly appointed. Risimati John Mulamula is the First Applicant's father. Risimati John Mulamula's mother, Xalati, was Hosi Jim's first wife. The first born son of Xalati was Gezani Johannes Maluleke. The latter is the father

of the Third Respondent herein, Mdungazi Joseph Maluleke ("Mr Maluleke").

- [11] In simple terms the First Applicant's father, Risimati John Mulamula and the Third Respondent's father, Gezani Johannes Maluleke were born of the same mother, being Xalati, the first wife of Hosi Jim.
- [12] The version of the First Applicant as confirmed in an affidavit by Mzamani Maxwell Mingagimani, a member of the Second Applicant (Royal Family) is that the main reason why the First Applicant's father (Risimati) and not Mr Maluleke's father, (Gezani), was designated by the Royal Family as Hosi Jim's successor was that Mr Maluleke's father, Gezani, was not Hosi Jim's biological son and was only accepted within the Royal Family as an "accommodation" due to the fact that his mother, Xalati, married Hosi Jim. That meant that Mr Maluleke's father had no birth right to inherit the traditional leadership position from Hosi Jim.
- [13] The illegitimacy of Mr Maluleke's father was a well-kept family secret for many years and was not disclosed to younger members of the Royal Family. It was known only to the elders. However, at a Royal Family meeting held on 17 October 1996 the eldest person at that meeting, Hahani Nwa Photani Tsatsawani Vukeya (better known as Aunt Hahani) disclosed this family secret. Minutes of the said meeting were scribed by Mzamani Maxwell Mingayimani, whose confirmatory affidavit is attached to the First Applicant's founding affidavit and marked "AnnexureHT10". According to First Applicant's version Mr Maluleke's father, Gezani, (being the first born son of Xalati) was conceived by Xalati before the latter got married to Hosi Jim.
- Aunt Hahani witnessed the First Applicant's father's (Risimati) designation as senior traditional leader by the Royal Family in 1948. Aunt Hahani is the sister to both Risimati and Gezani and the three are born of the same mother, Xalati.
- [14] Another narrative which featured at the hearing of the Committee (Second

Respondent) was that Mr Maluleke's father (Gezani) was disinherited from Chieftaincy because he stood accused of foul play in the mysterious death of his father. This narrative counters the well-kept family secret that Mr Maluleke's father was not a biological son of Hosi Jim. Even if either of the two narratives is the real reason for disinheriting Mr Maluleke's father, Mr Maluleke himself, being the claimant in this matter, has not advanced any facts or argument as to why his father was disinherited. As stated earlier in the judgment this application is not being opposed by Mr Maluleke as the Third Respondent.

- [15] I am inclined to accept it as a fact that the Royal Family took a firm and unanimous decision in 1948 that Mr Maluleke's father had no birth-right to inherit the senior traditional leadership position from Hosi Jim, and that the First Applicant's father, (Risimati) was instead the rightful heir. There is no evidence before me that Mr Malulekes' father objected to the Royal Family decision to designate the First Applicant's father as the rightful senior traditional leader. It is only now after his death that his son, Mr Maluleke emerges and contests the senior traditional leadership position.
- [16] Upon death of the First Applicant's father (Risimati) the Royal Family held a meeting on 13 September 1977 and decided to designate the First Applicant as a successor to his father. This was on the basis that the First Applicant is Risimati's first-born son. When this happened, Xalati, the grandmother of both First Applicant and Mr Maluleke was still alive and never objected to the designation of the First Applicant. The First Applicant was duly appointed as a senior traditional leader. His certificate of appointment was issued on 11 April 1978 with effect from 13 September 1977, being the date on which the Royal Family decided on his designation.
- [17] It was only during 1996, approximately 18 years after the First Applicant's appointment, that Mr Maluleke, who was then 36 years old started to question the traditional leadership position of the First Applicant. The dispute was referred to the then Ralushai Commission which was

established during February 1996 to investigate disputes relating to irregularities and malpractices in the appointment of certain traditional leaders in the Limpopo Province. It would appear that this Commission could not resolve the dispute as it declined to entertain the claim and advised that the parties should go and resolve the issue within the royal family.

[18] It was close to 16 years later, and when the First Applicant had been a senior traditional leader for the Mulamula Traditional Community for over 30 years, that Mr Maluleke referred the dispute to the Committee (Second Respondent). The matter dragged on for over 4 years in the Committee until 11 April 2017 when the First Applicant received a notification of a public hearing to be held on 17 May 2017. The First Applicant attended the hearing and stated his case. The Royal Family in support of the First Applicant submitted their written representations to the Committee.

[19] A year later the First Applicant received a written decision of the Premier which reads as follows:

"Ref" U12104

To: Khosi Maluleke Hasani Thomas

Mulamula Traditional Council

P.O. BOX 1201

MALANULELE

0982

Dear Khosi Maluleke Hasani Thomas

**RE: CLAIM I DISPUTE FOR RESTORATION AND I OR RECOGNITION
OF SENIOR TRADITIONAL LEADERSHIP OF MULAMULA
TRADITIONAL AUTHORITY BY MR. MALULEKE MDUNGAZI JOSEPH
(ID. NO. [...])**

1. *The above-mentioned matter refers.*
2. *I hereby inform you that the Limpopo Provincial Committee on*

Traditional Leadership Disputes and Claims has considered your claim/dispute. I have considered the findings and recommendations of the said Committee in terms of provisions of the Traditional Leadership and Governance Framework Act No. 41 of 2003 as amended.

3. *Kindly be informed that the claim I dispute for restoration and I or recognition of the Mulamula senior traditional leadership by Maluleke Mdungazi Joseph is accepted.*
4. *The senior traditional leadership in the lineage of Risimati John is dissolved with immediate effect.*
5. *In case you disagree with the recommendations, you are advised to approach the Court of Law for review.*

Yours faithfully

11/06/2018

PREMIER: LIMPOPO PROVINCE

Date "

[20] The Committee made the following findings and recommendations which are the subjects of review in the present case:

Findings:

1. The senior traditional leadership is not in the rightful house as the rightful house is that of Gezani Johannes Maluleke.
2. The senior traditional leadership should go to George Maluleke who is the son of Samuel who is the first born son of Gezani Maluleke.

Recommendations

1. It is recommended that the claim by Maluleke Mdungazi Joseph be upheld.
2. That the Premier call both the claimant and the present senior traditional leader Hasani Thomas Maluleke to agree on a roadmap to correct the anomaly.

[21] It is against this factual background that the Applicants are seeking an order for the review and setting aside of the findings and recommendations of the Committee as well as the decisions of the Premier. Our Courts have recognised that if the Committee's role in the decision making process was flawed, the entire process will be tainted. Accordingly, if this Court were to hold that the Committee's decision to recommend that Mr Maluleke's claim be upheld is reviewed and set aside, the Premier's decision to uphold Mr Maluleke's claim must similarly be reviewed and set aside.

[22] The above legal principle was authoritatively set out by the Full Court in the case of **Premier of the Eastern Cape and Others v Hebe and Others [2017) ZAECBHC 14; [2018) 1 ALL SA 194 (ECB) at para 63 & 64** wherein D Van Zyl DJP said the following:

"[63] The Premier similarly derives the power to make a decision on the recommendation from the Framework Act. He or she cannot take a binding decision without the recommendation of the Committee. The Premier can only act upon receiving the Committees' recommendation. The recommendation is accordingly a jurisdictional fact and a prerequisite for the exercise by the Premier of his authority as contemplated in section 26 of the Framework Act. The function of the Committee is accordingly an inherent feature of the process contemplated in chapter 6.

[64] The purpose of the actions of the Committee is the determination of a claim or the resolution of a dispute, the outcome of which is likely to affect rights and to have a direct external effect. Although the Premier is empowered to make a decision that differs from the recommendation of the Committee, he or she is obliged to act on the recommendation. Section 26(3) of the Framework Act dictates that a decision regarding the recommendation must be taken within 60 days. That decision is informed and limited by the nature of the claim made or the dispute raised, and the investigation and recommendation of the Committee. While the actions of

the Committee may be said to only have the "capacity to affect legal rights" during the course of the investigation, they impact directly on the rights of a person where the Premier, as in the present matter, decides to accept the recommendation of the Committee. If the Committee's role in the decision making process was flawed, the entire process -will be tainted. The recommendation and the decision accordingly constitute administrative action within the meaning of PAJA".

- [23] In this case the facts of the case are such that even if this Court were to dismiss the application in so far as it applies to the Committee's impugned decision, there is still good reason why the Court ought to review and set aside the Premier's impugned decisions. This will appear clearer later in this judgment when I deal with the grounds of review.

The Nature of Mr Maluleke's Claim

- [24] It is important for the purposes of review of the administrators' decisions to analyse the nature of Mr Maluleke's claim as presented before the Committee. Did Mr Maluleke lodge the claim for himself or for own benefit or did he act on behalf of anybody in his father's house, that is the house of Gezani Johannes Maluleke? Counsel for the Applicants argued that Mr Maluleke's claim was understood to be one in which he sought for himself a senior traditional leadership position.

- [25] I agree and for the following reasons:

25.1. The Premier's letters to Mr Maluleke and the First Applicant, informing them of the decisions he had taken, make it clear that what was being accepted by the Premier was Mr Maluleke's claim. So too does the Committee's report which recommended expressly that" **the claim by Maluleke Mdungazi Joseph be upheld**".

25.2. In a letter from the Committee dated 10 June 2008 Mr Maluleke was advised:

"The Commission has looked at **your claim to the position of Senior Traditional Leadership** and has discovered.....)

Furthermore in a letter dated 25 May 2012 the Commission's chairperson advised Mr Maluleke as follows:

"The Commission hereby confirms that it will attend and finalise **your claim** before expiry of the term of office mentioned above".

25.3. In filling out a questionnaire dealing with the nature of his claim, Mr Maluleke clarified that it was in respect of a senior traditional leadership position that he sought for himself. No claim was advanced on behalf of any particular house.

25.4. It is common cause that Mr Maluleke is the son of Gezani Johannes Maluleke's second wife, meaning he is from the second house. This much is admitted in the answering affidavit on behalf of the Premier where it was stated:

"Mr Gezani Johannes Maluleke married two wives and Mr Mdungazi Joseph Maluleke is the fourth child from the second wife, i.e the second house of Mr Gezani Johannes Maluleke"

The other children born to Gezani Johannes Maluleke's first wife are Samuel and Elias. Both have passed away but as at the time the claim was lodged, George, the son of Samuel was alive. Despite that state of affairs, Mr Maluleke's claim had, as its goal, to have himself replace the First Applicant as the senior traditional leader.

[26] For the reasons stated above, Mr Maluleke had no capacity to lodge the claim for himself. George could have been the person to lodge the claim for himself if he believed that he was the rightful heir to the throne. In my view the Committee erred in making a recommendaiton that Mr Maluleke lodged the claim on behalf of the other house of Gezani Johannes Maluleke.

The Grounds of Review: The Committee's Decision

[27] The Committee was required to investigate and make recommendation on the claim as submitted by Mr Maluleke. The Committee had no mandate to go any further. Once it had established that Mr Maluleke is not the rightful heir to Gezani Johannes Maluleke, given the existence of male heirs to the latter's first born son of his first wife, the claim ought simply to have been dismissed. The Committee thus erred in making a finding that Mr Maluleke had lodged a claim on behalf of the first house of Gezani.

In the result, the Committee's recommendations fall to be reviewed and set aside in terms of the following provisions of PAJA:

- (1) Section 6(2)(a)(i), in that the Committee was not authorised by the empowering provision to make the recommendation it did, and
- (2) Section 6(2)(d), in that the Committee's recommendations were materially influenced by an error of law regarding the nature and extent of its powers to investigate and make recommendations.

[28] The claim by Mr Maluleke was a personal one. He sought the removal of the First Applicant from his traditional leadership position so as to make way for himself to be appointed to that position. But as the evidence shows, he is not eligible for appointment regard being had to the history relating to the appointment of the First Applicant's father as the senior traditional leader.

[29] In my view Mr Maluleke had no standing to lodge the type of claim that he did. The Committee had no lawful basis to uphold Mr Maluleke's claim. Before the amendment of the Framework Act the Committee was authorized to also investigate of its own accord disputes and claims concerning traditional leadership. The present position is that the Committee now derives its authority to investigate and recommend from the lodgment of a dispute or a claim. See: **Premier of the Eastern Cape v Hebe, supra, at para 32.**

[30] The Committee failed to consider customary law. Evidence was placed

before the Committee that Mr Maluleke's father was not the biological son of Hosi Jim and therefore did not qualify to take over the position of senior traditional leader from Hosi Jim. No contrary evidence was placed by Mr Maluleke. Even up to this stage this allegation has not been denied as Mr Maluleke does not oppose the present application. Section 25(3)(a) of the Framework Act provides that:

"When considering a dispute or claim, the Commission must consider and apply customary law and the customs of the relevant traditional community as they applied when the events occurred that gave rise to the dispute or claim".

In the circumstances Mr Maluleke's claim had to be rejected because he did not, and still does not, qualify for the position of a senior traditional leader in terms of customary law.

The Committee's decision therefore falls to be reviewed and set aside in terms of section 6(2)(d) in that their action was materially influenced by an error of law.

The Grounds of Review: The Premier's Decisions

- [31] The Premier's decisions were made after the Premier had considered the recommendation of the Committee that Mr Maluleke's claim be accepted. It follows accordingly that once the recommendations of the Committee are reviewed and set aside, the Premier's decisions must also fall as a result.

Our Courts have recognised that if the Committee's role in the decision making process was flawed, the entire process will be tainted - **Premier of the Eastern Cape v Hebe at para 63.**

Accordingly, the Premier's decision to accept Mr Maluleke's claim, being based on the Committee's recommendation that his claim be upheld, must similarly be reviewed and set aside.

- [32] The Premier failed to provide reasons for his impugned decisions despite

being requested by the Applicants and / or Applicants' attorneys to do so over two months. He has adopted the attitude that if the Applicants do not agree with his decisions and / or the recommendations of the Committee, they should approach the Court of law. Accordingly , in terms of section 5(3) of PAJA it must be presumed that the Premier took the impugned decisions for no good reason.

- [33] In **JH v Health Professions Council of South Africa and Others 2016 (2) SA 93 (WCC)** Rogers J said at para 15:

"Generally speaking, action taken 'without good reason' would infringe the constitutional requirement of rationality (cf s 6(2)(i)), would be arbitrary and capricious (s 6(2)(e)(vi) and would be so unreasonable that no reasonable administrator could have so acted (s 6(2)(h)). There may be overlap with other grounds of review as well but the onus does not automatically shift in respect of all grounds of review".

In the circumstances the Premier's impugned decisions fall to be reviewed and set aside in terms of section 6(2)(c), 6(2)(e), 6(2)f)(ii) and 6(2)(i) of PAJA, alternatively, the principle of legality.

- [34] Arising from the findings and recommendations of the Committee and the subsequent acceptance and implementation of such recommendations by the Premier, Mr Maluleke has been appointed and presently occupies the position of an acting senior traditional leader of Mulamula Traditional Community. with effect from 13 January 2019. Such approval and / or appointment of Mr Maluleke as acting senior traditional leader has been made without the consultation and approval of the Royal Family, the Second Applicant herein. It is quite clear that the claim lodged by Mr Maluleke was indeed for his personal benefit and not for the first house of Gezani as recommended by the Committee.
- [35] The recognition and removal of a senior traditional leader is regulated by sections 11 and 12 respectively of the Framework Act or sections 12 and 13 respectively of the Limpopo Traditional Leadership Act. In both

instances the Royal Family plays a pivotal role and, subject to the relevant laws, has the prerogative to appoint and remove senior traditional leaders. In this case the Royal Family (Second Applicant) has not been consulted and an acting leader whose appointment flouts customary law has been imposed on it after the dissolution of the First Applicant's senior traditional leadership.

There is no basis for the Committee and the Premier to usurp the functions and prerogatives of the Royal Family and to themselves recommend and appoint Mr Maluleke against the wishes of the Royal Family and the dictates of customary law.

Appropriate Relief

- [36] Having reviewed and set aside the decisions of both the Committee and the Premier, what remains is to determine an appropriate remedy. In terms of section 172(1)(a) of the Constitution, when a Court considers remedy, the starting point, as a matter of constitutional principles, is that invalid administrative decisions must be declared unlawful.

Following a declaration of invalidity, the consequences must be dealt with in a just and equitable order under section 172(1)(b) of the Constitution. The default position in this regard is that the just and equitable relief granted must be aimed at correcting or reversing the consequences of an invalid administrative action.

- [37] In **AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2) 2014 (4) SA 179 (CC)** at para 30 it was held that *"Logic, general legal principle, the Constitution, and the binding authority of this Court all point to a default position that requires the consequences of invalidity to be corrected or reversed where they can no longer be prevented. It is an approach that accords with the rule of law and principle of legality"*.

Having found that the administrative actions of the Committee and the Premier are constitutionally invalid, I am constrained to grant appropriate relief that is corrective of the consequences of the unlawfulness found.

Order

[38] The following order is accordingly granted:

1. The findings and recommendations of the Committee (Second Respondent) are reviewed and set aside.
 - 1.1. The recommendations of the Committee are substituted with the following recommendation:
"It is recommended that the claim by Maluleke Mdungazi Joseph be rejected."
2. The Premier's decisions to accept Mr Maluleke's claim and to dissolve the senior traditional leadership in the lineage of Risimati John Mulamula is reviewed and set aside.
 - 2.1. By operation of law the First Applicant reverts to his position as senior traditional leader of the Mulamula Traditional Community.
3. The matter is remitted to the Premier to make a decision in line with paragraph 2.1 above in terms of section 26(3) of the Framework Act within 30 days from date of this order.
4. The Premier and all those who opposed the application are ordered to pay the costs of this application.

EM MAKGOBA
JUDGE PRESIDENT OF THE
HIGH COURT, LIMPOPO
DIVISION, POLOKWANE

APPEARANCES

Heard on	26 August 2019
Judgment delivered on	6 September 2019
For the Applicants	Adv. J M Berger
Instructed	Niland & Pretorius Inc
For the 1 st , 2 nd & 4 th Respondents	Adv. T L Mahasha
Instructed by	: State Attorney