



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CASE NO: 2263/2022

In the matter between:

ELLIOT MHLABUNZIMA MBOLEKWA

First Applicant

MBOLEKWA ROYAL FAMILY

Second Applicant

and

THE PREMIER OF THE EASTERN CAPE

First Respondent

THE MEC FOR CO-OPERATIVE GOVERNANCE

Second Respondent

& TRADITIONAL AFFAIRS: EASTERN CAPE

THE CHAIRPERSON OF THE EASTERN CAPE

Third Respondent

HOUSE OF TRADITIONAL LEADERS

AMAHLUBI TRADITIONAL COUNCIL

Fourth Respondent

JUDGMENT

PAKATI J

Introduction

[1] The first and second applicants, Mr Elliot Mhlabunzima Mbolekwa and the Mbolekwa Royal Family (“the Royal Family”), seek to review and set aside the decision of the first respondent, the Premier of the Eastern Cape and/or the second respondent, MEC for Co-operative Governance and Traditional Affairs, Eastern Cape (“the respondents”), who refuse to recognise the first applicant as the Chief/Senior Traditional Leader of Governors Drift Administrative Area (“the impugned decision”). They further seek an order directing the respondents to appoint the first applicant as the Senior Traditional Leader alternatively that the matter be remitted to the Royal Family for reconsideration and recommendation. Further relief sought is an extension of time within which to bring the review application in terms of s 9(2) of the Promotion of Administrative Justice Act (“PAJA”).¹ The respondents oppose the application.

The applicant's case

[2] The first applicant is the son of the late Chief Mhlayifani Mbolekwa (“the deceased”) who was, during his lifetime, the Chief of Governors Drift Administrative Area (“Governors Drift A/A”), a traditional community of the AmaZizi Tribe. This area is made up of six locations. They are, Walaza, Ntilini, Mbihli, Komkhulu, Matolweni and Fihlani. When the deceased died, the first applicant was still a minor. His uncle, Mr Mxhamli Mbolekwa, was appointed as the acting Chief and regent until the applicant was able to take over. After the passing of Acting Chief Mxhamli Mbolekwa, the members of the Royal Family held a meeting on 12 April 2011, with due regard to the

¹ Section 9(2) of PAJA provides that the court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require.

applicable customary law and identified the first applicant as the person who qualifies in terms of customary law to succeed the deceased and his uncle as the Chief of Governors Drift A/A. In 2015, the Premier of the Eastern Cape and the Traditional Council were informed of the person identified by the Royal Family as well as his particulars and the reasons for his identification, in compliance with s 11(1) of the Traditional Leadership and Governance Framework Act 41 of 2003 (“the TLGF Act”) read with s 23 of the Eastern Cape Traditional Leadership and Governance Act 1 of 2017 (“the EC-TLG Act”). The recommendation was also forwarded to the Sterkspruit Regional Authority for Traditional Affairs, Chairperson of the House of Traditional Leaders and the MEC, in 2016, for consideration and decision. The letters and documents from the office of the Magistrate and Native Commissioner, Sterkspruit (“the *Native Commissioner*”) were also attached to the papers to confirm that the deceased was the Chief of Governors Drift A/A. The first applicant contended that he met the criteria to be recommended as Chief of Governors Drift A/A.

[3] It is important to note that the national legislation is the now repealed Traditional Leadership and Governance Framework Act 41 of 2003 and was the applicable Act when the Mbolekwa Royal Family made its recommendation. Currently, the provincial legislation applicable in this matter is the Eastern Cape Traditional Leadership and Governance Act 1 of 2017.

[4] The first applicant asserts that initially, Chief Ayanda Mehlomakhulu of Ntsimekweni Village in Sterkspruit disputed the scope of the chieftainship of the first applicant over certain areas of Governors Drift, alleging that they fell under his

chieftainship. The dispute was investigated, and a report was compiled. Then Chief Mehlomakhulu was informed of the Mbolekwa Royal Family Chieftainship. In a letter dated 01 September 2016 (Annexure “EMM12”), signed by Chief Ayanda Mehlomakhulu, he confirmed that his chieftainship was aware of the applicants’ chieftainship. This letter is written in IsiXhosa and translated into English by a court interpreter, Mr V Vas. The letter and the translated version read:

IsiXhosa version

“UBANGO LOBUKHOSI LUSAPHO LUKA MBOLEKWA

Thina Mehlomakhulu Royal Family sisifumene isicelo se Mbolekwa Family sobango lobukhosi. Siyaluxhasa olu bango kuba sinolwazi ngalo. Ngexesha ukhokho wethu UNkosi Joel Senzangakhona Mehlomakhulu eyi Nkosi ngo June 1903, ukhokho wale family uNkosi Hans Macacuma Mbolekwa ebe yiNkosi yase Governors Drift.

Eli bango silidlulisela e Bhisho ukuze isicebise.”

Translated version

The claim to the chieftainship by the Mbolekwa Family

We, the Mehlomakhulu Royal Family have received the request from the Mbolekwa Family relating to the chieftainship. We support this claim because we bear knowledge of it. When our great-grandfather, Chief Joel Senzangakhona Mehlomakhulu was a Chief during June 1903, the great-grandfather of this family, Chief Hans Macacuma Mbolekwa, was the Chief of Governors Drift. We are forwarding this claim to Bhisho for them to advise us.

[5] In 2016, Chief Mehlomakhulu withdrew his objection to the Mbolekwa chieftainship and endorsed the first applicant's claim. The respondents have been apprised of this development. The Royal Family re-submitted their recommendation to the Premier and MEC, on 13 June 2017.

[6] After the respondents received the recommendation from the Royal Family to comply with s 11 of the TLGF Act read with s 23 of the EC-TLG Act. The respondents failed to recognise the first applicant and consequently refused to issue the certificate of recognition. That is despite various correspondence that was addressed to respondents by Mr Notyesi, the first applicant's attorney of record. The respondents also failed to refer the matter to the Royal Family in terms of s 23(5) (d) of the EC-TLG Act. The applicants allege that they acted in contravention of the mentioned provisions.

[7] As a consequence of the respondent's failure to recognise him, the first applicant launched a review application under case number 257/2018 against such failure. The application sought an order directing the respondents to consider and decide on the recommendations of the Royal Family for his appointment within 30 days of the order and advise him of its decision. On 13 June 2019, the Court ordered the respondents to consider the appointment of the first applicant as the Chief of the Governors Drift A/A. The respondents failed to comply with this order.

[8] On 22 October 2019, the first applicant launched an application to compel the respondents to comply with the Court order dated 13 June 2019. Prior to hearing the said application, the first applicant received a letter dated 07 October 2019 (Annexure "EM2"), wherein the MEC refused to implement the recommendation of the Mbolekwa Royal Family. Paragraph 3 of the letter contains the reason for the refusal to implement the Royal Family's identification, which is the bone of contention in this review application. It reads:

“3 The department has considered the recommendations of Mbolekwa Royal Family and a decision that has been taken is that such recommendations cannot be implemented due to the following reason:

4. In terms of [EC-] Traditional Leadership and Governance Act, 2017 (Act No. 1 of 2017), Administrative Area[s] are headed by headmen and not by Chiefs/Senior Traditional Leaders.”

[9] On 04 November 2020, Mr Notyesi escalated the matter to the office of the respondents and informed the Premier that the MEC’s refusal to recognise the first applicant was unlawful and not based on any permissible grounds for rejection. That is because the MEC and Mr Fani, the Provincial Head of the Co-operative Governance and Traditional Affairs Department, were not authorised to reject the Royal Family’s recommendation and refused to recognise the first applicant in terms of s 6 (2) (a) (i) of PAJA and therefore had no delegated power to do so. Moreover, there was no assertion that the identification lacked conformity with established customary legal frameworks, traditions, or procedural norms. The Premier was requested to either recognise the first applicant as Chief of Governors Drift A/A or refer the matter back to the Royal Family for reconsideration and resolution in the event he refuses to recognise the first applicant within 30 days. No response was forthcoming from the Premier’s office.

[10] On 09 November 2020, Mr Notyesi addressed another letter to the respondents. Paragraph 5 of the letter remarked thus:

“5. We respond to the letter aforesaid and advise that your decision is ill-founded and is tainted with material misunderstanding of the law, is irrational and unreasonable in that:-

5.1 Nowhere in the Act you referred to a Senior Traditional leader is prohibited from being appointed in the Administrative Area. The Act says the administrative Area falls under the jurisdictional area of the Senior Leader. Thus means, in an Administrative Area there has to be a Senior Traditional Leader.

5.2 Even yourself, you failed to identify which section prohibits the appointment of the Chief in the Administrative Area.

5.3 It is obvious, if one [has] regard to the provisions, section 1 (1) (a) of the Traditional Leadership and Governance Framework Act, 41 of 2003, it is clearly contemplated that the headman is a traditional leader who is under the authority of, or exercise authority within the area of jurisdiction of a senior traditional leader in accordance with the customary law.

In view of the above, your decision to reject the recommendations of the Mbolekwa Royal Family on the appointment of our client as the Chief of Governors Drift is misguided and misconceived. Our instructions are to demand you to reconsider the decision aforesaid within 14 (fourteen) days of receipt of this letter hereof, failing which we shall launch review application to set aside your decision and seek costs on a punitive scale.”

[11] In reply, Mr A Fani forwarded a letter dated 24 November 2020, to Mr Notyesi which *inter alia*, records:

“Section 1 of the Eastern Cape Traditional Leadership Act, 2017 (Act 1 of 2017), defines an administrative area as an area of jurisdiction under the authority of **headmanship or headwomanship** and within the jurisdictional area of a senior traditional leader in accordance with customary law.

Section 23(12) of the aforementioned Act further provides that headmen or headwomen may only be appointed for an **administrative area** of a traditional community with not less than 200 household.

The aforementioned provisions, especially section 1, are clear and unambiguous that administrative areas are under the authority of headmen and headwomen and not chiefs...

The decision cannot be reconsidered in the circumstances, and we hope we have placed sufficient reasons for your client to understand that the intended review application is unnecessary and will find it convincing not to bring a hopeless case in court.” (Mr Fani’s emphasis)

[12] The reading of the letter *supra* shows that Mr Fani relies on sections 1 and 23 (12) of the EC-TLG Act to support his assertion. The first applicant maintains that the respondents’ understanding of these sections remains misguided.

[13] The first applicant contends further that the respondents’ failure to recognise him is unlawful and should be reviewed and set aside because:

- 13.1 it is materially influenced by an error of law in terms of s 6(2) (d) of PAJA.
- 13.2 the respondents failed to consider the relevant considerations in terms of s 6(2) (e) (iii). eg the attached documents from the Native Commissioner and Magistrate (annexures “EMM3”- “EMM9”) confirming that the first applicant’s father was the Chief of Governors Drift which is made up of six locations, as alluded. These documents were not disputed.
- 13.3 the respondents’ decision is irrational (s 6 (2) (f) (ii)).
- 13.4 the exercise of the respondents’ power is unreasonable and did not adhere to the prescribed procedure (s 6 (2) (h)).
- 13.5 the respondents failed to follow the mandatory and material procedure (s 6 (2) (b)).

[14] It is trite that s 23 of the EC-TLG Act empowers the Premier to recognise traditional leaders thereby following the processes provided for in that section. Initially, the applicants submitted that the MEC was not empowered to make the decision and that it did not appear that when he made the decision, he had been delegated to do so. However, proof that the Premier delegated such authority to the MEC is attached to the answering affidavit as annexure “ZB7”. The applicant did not pursue this argument when the matter was heard.

Extension of time

[15] The first applicant also applies for an extension of time within which the review should be brought in terms of s 9 (2) of PAJA because it is in the interests of justice to do so.² The reasons advanced by the applicants to support this application are *inter alia*, that the respondents have been reluctant in complying with their statutory obligations to decide on the recommendations submitted by the Royal Family. They are primarily responsible for the substantial portion of the delay in this matter, the argument goes. Mr Notyesi had to address letters to the respondents in an attempt to secure a decision from the respondents as they were not cooperative. The first applicant had to approach the court with an application to compel the respondents to decide. The court granted the order. Even then, they still refused to decide, which order was successful. On 22 October 2019, the applicants had to again compel the respondents to comply with the court order. It was at that stage that the court ordered

² Section 9(2) of PAJA provides: (2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require.”

the respondents to pay costs jointly and severally the one paying the other to be absolved. The first applicant submits that some delay that could be attributable to him was at the time the applicants tried to engage the respondents, instead of litigating against them. Refusing the application would be unjust and deprive him of an opportunity to apply for the review, the argument continues. That is because he would suffer prejudice as he would remain unrecognised as the chief. The first applicant contends that the respondents would not suffer any prejudice if the application were granted in his favour.

The respondent's version

[16] The allege that the relief sought by the applicants is an order that falls outside their powers. The respondents allege further that the resolution by the second applicant was not that of a chief but an acting chief/acting traditional leader. The respondents allege further that after the passing of the deceased, his uncle was appointed as acting chief because he was still a minor, but strangely, the first applicant never ascended to the throne when he attained majority.

[17] The applicants approached the court citing the letters dated 07 October 2019 and 24 November 2020, which informed them that administrative areas are headed by headmen and not chiefs as per the EC-TLG Act. However, the respondents argue that the relief sought by the applicants is incompetent and would amount to countenancing an illegality. In their view, the applicants have failed to establish a case for the relief sought, and therefore, the application should be dismissed with costs.

[18] The respondents have not contested Chief Mehlomakhulu's acknowledgment of the Mbolekwas' chieftainship in annexure "EMM 12". However, their response was that the contents of the letter were immaterial, and that the applicants had not adhered to the proper procedures.

[19] The Premier denies that he has an obligation/duty under s 11 of the TLGF Act and EC-TLG Act to implement the resolution of the second applicant. He also disputed that he failed to refer that matter to the Royal Family. He asserts that it is in certain circumstances that a premier has such a duty, and this is not such an instance. He referred to no provision that supports this assertion. He refutes the claim that they filed a review application against the Premier for not acknowledging the first applicant. Rather, they filed it against the Premier for not making a decision on the application for recognition. The Premier has since issued a response to the applicants' letter. The respondents are claiming that the Premier did not outright refuse to comply with a court order. Instead, there was a delay in making the decision, which was communicated in a letter dated 07 October 2019. The Premier is also denying that the decision was made by an unauthorized person. The respondents argue that the decision is both lawful and not subject to review.

[20] The respondents deny further that they were unreasonable, and irrational and did not consider relevant information when deciding the issue. They insist that they follow the statutory prescripts.

[21] Regarding the extension of time, the respondents allege that the review proceedings have been brought in bad faith, which is denied by the applicants. They contend that the applicants have no prospects of success and have failed to make a case for the extension of time. The application should be dismissed.

Legal authorities

[22] Chapter 12 of the Constitution deals with the recognition of traditional leaders. Sections 211(1) and 212(1) of the Constitution provide:

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

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

[23] The recognition of senior traditional leaders, headmen or headwomen is regulated by section 23 of Eastern Cape Traditional Leadership and Governance Act 1 of 2017 which provides:

“23 (1) Whenever a position of a traditional leader is to be filled-

- (a) the relevant royal family must, within 14 days after the position becomes vacant-
 - (i) identify a person who qualifies in terms of customs of the relevant traditional community, to assume the position in question after taking into account whether any grounds referred to in section 24 (1) apply to that person; and

- (ii) through the relevant customary structure, inform the Premier of the particulars of the person identified to fill the position and of the reasons for the identification of that person; and
- (b)
 - (i) the Premier must, subject to subsection (5) by notice in the Provincial Gazette, invite comments on the intended recognition of the person identified by the royal family as a traditional leader; and
 - (ii) comments contemplated in subsection (b)(i), must be submitted within 21 days of the date of the publication of the notice.
- (2) The Premier must within 60 days of the publication in the notice, consider and decide on the comments contemplated in subsection (1) (b) (ii) and, should circumstances permit, recognise a person identified by the royal family as a traditional leader.
- (3) Before the notice referred to in subsection (1) (b) is published, the Premier must inform the Provincial House in writing of the particulars of a person identified.
- (4) The premier must, within 30 days after the date of recognition, issue to the person who has been identified in terms of subsection (1) (a), a certificate of recognition.
- (5) Where the Premier has received evidence or an allegation that the identification of a person referred to in subsection (1) was not done in accordance with provisions of this Act, the Premier may refer the matter to
 - (a) the King or Queen;
 - (b) Provincial House for its recommendation; or
 - (c) may refuse to issue a certificate of recognition; and
 - (d) must refer the matter back to the royal family for reconsideration and resolution where the certificate of recognition has been refused.

- (6) Where the matter which has been referred back to the royal family for reconsideration and resolution in terms of subsection (5) (c) has been reconsidered and resolved, the Premier must recognise the person identified by the royal family if he or she is satisfied that the reconsideration and resolution has been done in accordance with law.
- (7) Where the matter which has been referred back to the royal family for reconsideration and resolution in terms of section (5) (d) cannot be resolved, such matter must be referred to the King or Queen and the Provincial House of Traditional Leaders, which seek to resolve the matter in accordance with its internal rules and procedures.
- (8) (a) A traditional leader is deemed to retire from office upon his or her written request for retirement to the Premier.
- (b) On retirement, a traditional leader ceases to be recognised in terms of this Act.
- (10) A traditional leader assumes office on the date on which he or she is recognised by the Premier.
- (11) In case of a newly recognised traditional community, a person may only be recognised as a senior traditional leader: Provided that such a traditional community has at least five or more administrative areas.
- (12) Headmen or headwomen may only be appointed for an administrative area of a traditional community with not less than 200 households."

[24] Mothle AJA (Maya P, Swain, Mathopo and Mocumie JJA concurring), in *Mphephu v Mphephu-Ramabulana and Others*³ held:

"[18] A decision of the President or the Premier is thus reviewable in terms of the Framework Act. Section 6(1) of PAJA provides that such review proceedings may be instituted in a court or tribunal. Section 1 of PAJA define 'court' as including the Constitutional Court in certain circumstances, the High Court or to a limited extent, the Magistrate's Court as courts of first instance where the proceedings may be instituted. PAJA therefore grants the courts jurisdiction

³*Mphephu v Mphephu-Ramabulana and Others* (948/17) [2019] ZASCA 58; [2019] 3 All SA 51 (SCA); 2019 (7) BCLR 862 (SCA) (12 April 2019) at para 18.

to adjudicate the review of an administrative action taken in terms of the Framework Act. In terms of s 8 of PAJA, the court may, after review, grant any order that is just and equitable as an appropriate relief.”

[25] The Constitutional Court confirmed that the Premier’s action constituted administrative action.⁴ *In casu*, the respondents’ decision constitutes an administrative action which is reviewable under PAJA. That is because the respondents took a decision and refused to recognise the first applicant as a chief.

[26] I now turn to deal with the grounds of review raised by the applicants.

Error in law

[27] The first applicant submits that the decision not to recognise him based on an assertion that Governors Drift A/A is an area headed by headmen and not chief is an error of law which is reviewable under section 6(2) (d) of PAJA. For this assertion, the first applicant relies on s 94(6) of the EC-TLG Act which provides that a traditional community that was recognised as such prior to the promulgation of the EC-TLG Act would continue to formally enjoy such recognition as if formally recognised under s 4 of the EC-TLG Act. The first applicant argues that this error is material in that the respondents would not have made it if they had appreciated that the first applicant is entitled, as a matter of law, to be recognised as a chief of Governors Drift. That is so because a senior traditional leader is defined as a traditional leader of a specific

⁴ See *Tshivhulana Royal Family v Netshivhulana* (CCT48/16- [2016] ZACC 47; 2017 (6) BCLR 800 (CC) (14 December 2016) at para 19.

traditional community who exercises authority over several headmen or in accordance with customary law, or within whose area of jurisdiction a few headmen exercise authority.

[28] In response, the respondents in paragraph 76 of the answering affidavit, deny that Governors Drift is a traditional community that was recognised prior to the promulgation of the EC-TLG Act. The deponent to the answering affidavit, Mr Zingisa Bokwe, added:

“On available evidence, prior to the Framework Act and the EC-TLG Act there was no Chieftainship or Senior traditional Leadership in Governance Drift, let alone one headed by the applicants. In fact, the definition of a traditional community in the EC-TLG Act does not apply retrospectively.”

[29] Section 94(6) of the EC-TLG Act states:

“(6) Any traditional community established in terms of applicable legislations and was still recognised as such before the commencement of this Act, is deemed to be a traditional community contemplated in section 4 of this Act, subject to-

- (a) The withdrawal of its recognition in accordance with the provision of section 5 of this Act; or
 - (b) A decision or recommendations of the Commission or Committee of the Commission on Disputes and Claims in terms of section 26 of the Framework Act as amended.”
- Emphasis added.

[30] Section 94(6) *supra*, needs no clarification or restatement. However, it is unclear what available evidence referred to by the respondents shows that prior to the

Framework Act, there was no chieftainship in Governors Drift A/A, '*let alone one headed by the applicants.*' They did not dispute the letters and documents from the '*Native Commissioner*' issued under the Black Authorities Act 68 of 1951, which confirm that Governors Drift A/A was a traditional community made up of six locations, which at the time, was led by the deceased, the father of the first applicant. In fact, the respondents made no reference to those letters. They either did not apply their minds to the documents, or they simply ignored them despite the fact that they were relevant and should have been considered when the decision was made. The respondents produced no evidence to disprove them.

[31] Moreover, the respondents have not advanced any evidence of withdrawal of recognition in accordance with s 5 of the EC-TLG Act or a decision or recommendation of the Commission or Committee of the Commission on Disputes and Claims in terms of section 26 of the Framework as amended. The reading of s 94(6) does not exclude the traditional community that was established when the first applicant's father was a Chief as can be gleaned in the documents from the '*Native Commissioner*'.

[32] In terms of s 1 of the EC-TLG Act, a traditional leader means any person who, in terms of the customary law of the relevant traditional community, holds a traditional leadership position, and is recognised in terms of the Framework Act and the EC-TLG Act. The respondents have not refuted the fact that the deceased individual was the Chief of Governors Drift A/A. Following his demise, Chief Mxhamli Mbolekwa, who is the deceased's uncle, acted as a regent as the first applicant was still a minor. No

evidence was proffered to counter that and refusal to recognise him has no factual basis.

[33] I am satisfied that the MEC's decision not to recognise Governors Drift as a traditional community in the face of the documents from the '*Native Commissioner*' that the deceased was the Chief of Governors Drift A/A which could have been considered when the decision was made, is an error of law which is reviewable in terms of s 6(2) (d) of PAJA. It could have been avoided. The MEC's denial that Governors Drift A/A is a traditional community established before the commencement of the EC-TLG Act is a bare denial and has no basis. The respondents failed to have regard to s 94(6) of the EC-TLGA because a traditional community that was recognised before the commencement of the TLG Act will continue to be recognised unless its recognition has been withdrawn. No withdrawal has been advanced.

Unreasonableness

[34] S 6(2) (h) of PAJA provides:

"A court or tribunal has the power to judicially review an administrative action if-

(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function."

[35] O'Reagan J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*⁵ remarked that the Chief Director took all the identified considerations into account. The equilibrium achieved cannot be said to be unreasonable. The same cannot be said about the instant case. The respondents did not consider relevant considerations, as alluded. Had they considered the documents from the 'Native Commissioner' a different decision could have been reached because a reasonable equilibrium could have been achieved.

Failure to take into account relevant considerations

[36] Without repetition, it is obvious that the documentation for the 'Native Commissioner' that could prove that the deceased was a Chief in Governors Drift A/A, a traditional community, is not part of the respondents' papers which clearly shows that the MEC failed to consider relevant considerations to make an informed decision. This is a matter that he was required to consider relevant considerations which renders his decision flawed. It must therefore be reviewed and set aside.

Irrationality

[37] In *Democratic Alliance v President of South Africa and Others*⁶ Yacoob ADCJ, as he then was, held:

"[74] This evidence too, reflected in the Report of the Public Service Commission, must have been known to the Minister and was ignored. The decision to ignore and the advice to the President to ignore relevant indications of dishonesty that could detract from the credibility,

⁵ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* (CCT 27/03) [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (12 March 2004) at para 54.

⁶ [2012] ZACC 24 para 74 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC).

integrity and conscientiousness of Mr Simelane would, in the circumstances, be irrational unless there was a proper reason for ignoring it.”

[38] *In casu*, the respondents did not take this court into their confidence and advance any reasons why they ignored the documents referred to above. Instead, the MEC refused to recognise the first applicant without considering this vital information. This renders the impugned decision irrational and must be reviewed and set aside.

Failure to follow the prescribed legislative procedure.

[39] It is uncontroverted that the Premier and/or the MEC refused to issue a certificate of recognition to the first applicant after he was identified by the Royal Family. The respondents also failed to remit the matter to the Royal Family for reconsideration. This conduct is in contravention of 23(5) of the EC-TLG Act which obliges the Premier and/or MEC to refer the matter to the royal family for reconsideration and resolution where the certificate of recognition has been refused (see para 19 *supra*). The word ‘*must*’ in s 23(5) (d) is mandatory. The only reasonable conclusion that can be reached in this regard is that the Premier and/or the MEC failed to comply with a prescribed legislative procedure which renders the impugned decision reviewable.

[40] Ms Haskins, for the applicants, submitted that the respondents advanced, for the first time in the answering affidavit, different reasons from the one originally advanced. She urged the court to reject them in *toto* as they were not the basis for

which the original decision was taken. Their different reasons proffered *ex post facto* are:

- 40.1 that the first applicant should have submitted a claim to the Commission known as the Commission on Traditional Leadership Disputes and Claims.
- 40.2 The reliance on case number 1171/2012 where the applicant sought an order that the Mbolekwa Royal Family be recognised as the only royal family in Governors Drift.
- 40.3 That the applicants failed to follow the law in seeking to restore their alleged lost senior traditional leadership position.
- 40.4 The Mbolekwas are not a Royal Family and are not recognised as a ruling family in any community.

[41] In *National Lotteries Board v South African Education and Environment Project*⁷ Cachalia JA (Brand JA, Van Heerden JA, Shongwe JA and Seriti JA concurring) remarked:

“[27] The duty to give reasons for an administrative decision is a central element of the constitutional duty to act fairly. And the failure to give reasons, which includes proper or adequate reasons, should ordinarily render the disputed decision reviewable. In England the courts have said that such a decision would ordinarily be void and cannot be validated by different reasons given afterwards — even if they show that the original decision may have been justified. For in truth the later reasons are not the true reasons for the decision, but rather

⁷ *National Lotteries Board v South African Education and Environment Project* 2012 (4) SA 504 (SCA) at para 27.

an ex post facto rationalisation of a bad decision. Whether or not our law also demands the same approach as the English courts do is not a matter I need strictly decide.”

[42] The rule *supra* originates from the English courts. It will later be clear that it has become part of our law. *In casu*, the respondents did not initially give the reasons contained in their answering affidavit and heads of argument. My understanding of *National Lotteries* is that failure to give reasons, which include proper and adequate reasons should ordinarily render the disputed decision reviewable because the challenge is directed to the reason given by the Premier and/or MEC at the time. Failure to consider relevant considerations, is, on its own, reviewable and that cannot be remedied by giving different reasons after the fact.

[43] In *Zuma v Democratic Alliance and Others*⁸ Navsa ADP (Cachalia JA, Bosielo JA, Leach JA and Tshiqi JA concurring), had this to say:

“[24] On 6 April 2009 Mr Mpshe announced publicly that he had made the decision to discontinue the prosecution of Mr Zuma and issued a detailed media statement providing the reasons for the decision. It is against those reasons, and those reasons alone, that the legality of Mr Mpshe's decision to terminate the prosecution is to be determined.

[44] From the above, it is clear that the challenged decision to be evaluated is against the reason that influenced the decision. In the instant case, the only reason advanced was that administrative areas were under the authority of headmen and not

⁸ *Zuma v Democratic Alliance and Others* 2018 (1) SA 200 (SCA) at para 24.

chiefs. Importantly, the duty to give reasons for an administrative decision is a central element of the constitutional duty to act fairly. The latter reasons are not the true reasons for the decision. The original decision cannot be validated by different reasons given *ex post facto*. In my view, the different reasons proffered in the answering affidavit, are an attempt to justify the impugned decision. I therefore reject them and will not deal with them in this judgment.

[45] Reverting to the application for extension of time, s 9(2) provides that the court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require. Subsection (1) states that the period of 90 days or 180 days referred to in subsections 5 and 7 may be extended for a fixed period, by agreement, failing which by a court or tribunal on application by the person or administrator concerned. In *Van Wyk v Unitas Hospital and Another*⁹ the Constitutional Court held:

“[20] Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.”

⁹ *Van Wyk v Unitas Hospital and Another* 2008 (2) SA 472 (CC) at para 20; See also *City of Cape Town v Aurecon South Africa (Pty) Ltd* (CCT21/16) [2017] (6) BCLR 730 (CC); 2017 (4) SA 223 (CC) (28 February 2017) at para 47 where the Constitutional Court remarked: “[47] In considering whether condonation should be granted to the City, the following principle enunciated in the majority decision of *Kirland* should be borne in mind:

“(T)here is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly.”

[46] In this regard, the respondents are primarily responsible for the delay in this matter. The first applicant has made several attempts to secure a decision from the Premier and/or MEC since 2015. On 13 June 2019, the respondents were ordered to decide after the first applicant had launched an application to compel them to make a decision. He had to approach the court to compel them to recognise and decide on the recommendation of the Mbolekwa Royal Family, which order was granted. Although the court granted the order in favour of the applicant, the Premier and the MEC still did not comply with the Court order. The applicant had to bring another application to compel the Premier and MEC which was brought on 22 October 2019, and before this matter could be heard it is then that the MEC forwarded a letter dated 07 October 2019, refusing to recognise the first applicant. Various correspondence had been exchanged between the applicant and the respondents, but the respondents still failed and/or refused to comply, thereby displaying disregard for the court orders.

[47] In considering the factors mentioned in Van Wyk's *supra*, I am satisfied that the interests of justice require the extension of time when taking into account that the respondent has also contributed to delaying this matter as alluded to above.

Exceptional circumstances

[48] The first applicant contends that this case is exceptional and justifies an order that the Premier and MEC consider and recognize him as the Chief of Governors Drift A/A within 7 days of the order. The relief sought is *inter alia*, an order directing the Premier and/or the MEC to recognise the first applicant as a Chief/Senior traditional leader of Governors Drift A/A, as stated. The applicants submit that the Premier has,

in the past, delayed extensively in considering his recognition; has relied on errors of law and/or fact to reject the Royal Family's recommendation, and has not recognised him as Chief despite the applications as well as the application to compel, calling him to do so. He submits further that an effective relief would be an order directing the Premier to consider and recognise him as Chief. The applicants acknowledge that this amounts to correcting a defect resulting from an administrative action in terms of s 8(1)(c) (aa) of PAJA which provides:

"8(1) The Court or tribunal, in proceedings for judicial review in terms of section 6 (1), may grant any order that is just and equitable, including orders-

(c) Setting aside the administrative action and-

(i)...

(ii) in exceptional cases-

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action."

[49] The respondents submit that the applicants have failed to make out a case for the relief sought. They argue that the order sought is incompetent and granting same would be tantamount to countenancing an illegality. They argue further that it would not be just and equitable for the court to order them to recognise the first applicant as a senior traditional leader/chief as this would constitute a breach of the doctrine of separation of powers. That is because the first applicant failed to claim restoration of the applicant's status through the commission. Therefore, the court has no power to restore any traditional leadership status in terms of the law. Moreover, the applicants are not entitled to any leadership position, the argument continues.

[50] In *Littlewood and Others v Minister of Home Affairs and Another*¹⁰ Nugent JA held:

“[18] It is well established that only exceptionally will a court substitute its own decision for that of an official to whom the decision has been entrusted. It cannot be said in the present case that the proper decision is a foregone conclusion, nor that the Minister has disabled himself from properly making it, nor are there any other grounds for substituting our decision for his. The proper course is to remit the matter for re-consideration by the Minister.”

[51] In the *University of The Western Cape and Others v Member of Executive Committee for Health and Social Services and Others*:¹¹

“It is a well-known principle of our administrative law that where a public authority has a discretion in the matter, *mandamus* will only extend to directing the authority to comply with its duty of deciding the matter properly. Our Courts have repeatedly laid down that they do not want to usurp the powers of the authorities to whom the legislation has vested the powers to decide one way or the other. To do otherwise would constitute an unwarranted usurpation of the powers entrusted to the public authorities by the relevant statute. Therefore, in the ordinary course the Courts will refer the matter back because the Court is slow to assume a discretion which has by statute been entrusted to another functionary or repository of power. It is only in exceptional cases that this principle will be departed from.”

[52] The learned Judge continued at 131D-J:

¹⁰ *Littlewood and Others v Minister of Home Affairs and Another* 2006 (3) SA 474 (SCA) at para 18.

¹¹ 1998 (3) SA 124 (C) at 130I-131A.

“Where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter, the Courts have not hesitated to substitute their own decision for that of the functionary...The Courts have also not hesitated to substitute their own decision for that of a functionary where further delay would cause unjustifiable prejudice to the applicant...Our Courts have further recognised that they will substitute a decision of a functionary where the functionary or tribunal has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again. It would also seem that our Courts are willing to interfere, thereby substituting their own decision for that of a functionary, where the Court is in as good a position to make the decision itself. Of course, the mere fact that a Court considers itself as qualified to take the decision as the administrator does not *per se* justify usurping the administrator's powers or functions. In some cases, however, fairness to the applicant may demand that the Court should take such a view...the categories where the Court would be prepared to substitute its own decision for that of an administrative body are not closed. Depending on the circumstances of each particular case, it may be fair for the Court to take the decision itself rather than refer it back to the appropriate functionary.”

[53] *In casu*, the Royal Family held a meeting on 12 April 2011 and the first applicant was identified in terms of customary law to assume the position of a Chief after his father's death. That was done in compliance with s 11 of the TLGF Act. The Premier and/or MEC were informed of the Royal Family's recommendation during 2015 in terms of s 11(1) of the TLGF Act read with s 23 of the EC-TLGA. The respondents failed to recognise the first respondent after the Mehlomakhulu issue had been resolved on 13 June 2017. On 22 January 2018, the applicants had to launch a review application under case number 257/2018 against the respondents' failure to recognise the first applicant. A period of almost six months had expired. On 13 June 2019, the first applicant's application succeeded and the respondents' failure to take a decision

and implement the recommendations of the Royal Family on the appointment of the applicant as Chief of Governors Drift A/A was declared unlawful, illegal, and unconstitutional and accordingly reviewed and set aside. Paragraph 2 of Jolwana J's order reads:

"2. The respondents are hereby directed to consider and decide on the recommendations of the Mbolekwa Royal Family in terms of which the applicant has been identified and recommended for appointment as a Chief of Governors Drift Administrative Area, Strekspruit within 30 (thirty) days of the order of this court and thereafter advise the applicant of its decision regarding the recommendations of the Royal Family."

[54] The respondents failed to comply with the court's order, which cannot be countenanced. On 22 October 2019, the first applicant brought an application to compel the respondents to comply with the court order dated 13 June 2019. It was then that the first applicant became aware that the MEC had refused to recognise him in a letter dated 07 October 2019. From the above, it cannot be disputed that the respondents have shown a tendency to not comply with the court order of 13 June 2019 to delay the process. They have also failed to comply with s 23 of the EC-TLG Act.

[55] However, in the circumstances of this case, I consider the well-known principle of our administrative law that where a public authority has discretion in the matter, the *mandamus* will only extend to directing the authority to comply with its duty of deciding the matter properly.

Costs

[56] Ms Haskins submitted that the MEC should be ordered to pay the costs of this application and that the other respondents pay only if they oppose the application. Although the Premier has opposed the application, the applicants have not sought a costs order against him. No response was proffered by the respondents regarding costs in the answering affidavit.

Order

- 1. The Premier is directed to refer the matter to the Mbolekwa Royal Family for reconsideration and resolution in terms of s 23(5) of the Eastern Cape Traditional Leadership and Governance Act 1 of 2017.**
- 2. The period of 180 days is extended in terms of section 9(2) of the Promotion of Administrative Justice Act 3 of 2000.**
- 3. The MEC for Co-operative Governance and Traditional Affairs, Eastern Cape, is ordered to pay costs of the application.**

BM PAKATI

JUDGE OF THE HIGH COURT, EASTERN CAPE DIVISION, GQEBERHA

APPEARANCES:

Council for applicant : Advocate L Haskins

Instructed by : Mvuzo Notyesi Inc

Counsel for respondent : Advocate Z.Z Matebese SC

Instructed by : State Attorneys
Mthatha

Date Heard : 27 July 2023

Date delivered : 19 January 2024