

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

Case No: 878/2017

In the matter between:

SEBENZILE HINANA

Applicant

and

**THE COMMISSION ON TRADITIONAL
LEADERSHIP DISPUTES AND CLAIMS**

First respondent

**THE EASTERN CAPE COMMITTEE OF
THE COMMISSION ON TRADITIONAL
LEADERSHIP DISPUTES AND CLAIMS**

Second respondent

**THE PREMIER: EASTERN CAPE
PROVINCE**

Third respondent

MKHONTWANA THUKANI

Fourth respondent

**THE EASTERN CAPE DEPARTMENT
COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS**

Fifth respondent

**THE MINISTER OF CO-OPERATIVE
GOVERNANCE AND TRADITIONAL AFFAIRS**

Sixth respondent

**THE NATIONAL DEPARTMENTS OF
CO-OPERATIVE GOVERNANCE AND**

TRADITIONAL AFFAIRS

Seventh respondent

**THE NATIONAL HOUSE OF TRADITIONAL
AFFAIRS**

Eight respondent

**THE EASTERN CAPE HOUSE OF
TRADITIONAL LEADERS**

Ninth respondent

**THE AMAQWATHI LOCAL HOUSE
OF TRADITIONAL LEADERS**

Tenth respondent

**CONGRESS OF TRADITIONAL LEADERS
OF SOUTH AFRICA**

Eleventh respondent

**ROYAL HOUSE OF AMAQWATHI IN
ENGCOBO**

Twelfth respondent

JUDGMENT

Cubungu AJ

Introduction

[1] This is a review application initially brought against the first to the eleventh respondents. On 15 January 2019 Madam Justice Dawood issued an order granting leave that the twelfth respondent be joined to these proceedings. The relief is sought against the first, second and third respondents.

[2] First to seventh and the eleventh respondent filed their notice of intention to oppose, however, only the third respondent filed an answering affidavit, therefore the facts of this matter are materially common cause what remains to be determined is what legal conclusions are to be drawn from the undisputed facts.

[3] On 31 March 2017 and complying with provisions of rule 53 of the Rules of Court the third respondent filed the record which resulted in the applicant

supplementing his founding papers and filed a confirmatory affidavit by Professor Jeffrey Brian Peires.

[4] It is undisputed that Chief Henry Hinana, Pawula Hinana and Mxhamli Hinana are the sons of Mapolo having been born by the same mother. Pawula Hinana's son is Vanveki Hinana and Vanveki's son is Vuyisile Hinana. Vuyisile Hinana is the applicant's father. Chief Henry Hinana, the first born, was the Chief until 1976 just before the Independence of the Transkei. As a result of the problems, he had with the Matanzima regime, and fearing for his life at the time he fled with his family and some members of the community to Ntabethemba in the Ciskei. At the Ntabethemba he was allocated a site to settle.

[5] When Chief Henry Hinana left the family decided to nominate Pawula Hinana as the Chief of amaQwathi in Sterkspruit. However, the fourth respondent was installed as Chief of the community. It is the applicant's contention that Pawula should have been appointed as Chief, as the surviving and younger brother of Chief Henry in terms of Customary law.

[6] The fourth respondent is the second born son of Dlangamandla. The fourth respondent's father was never a Chief of Hinana Community. The first-born son is Malolo a member of the community who is not a Chief. The fourth respondent is not of Royal blood or the direct lineage of the chieftainship of the Hinana Family. This is an undisputed fact.

[7] During July 2010, the Hinana Royal Family initiated a process of restoring their chieftainship by referring a complaint to the MEC for Local Government and Traditional Affairs. This was necessitated by a dispute between the Hinana and the fourth respondent's family over the chieftainship.

[8] On 6 September 2016, the Hinana Royal Family were notified by the office of the third respondent of a decision dated 4 July 2016, dismissing the applicant's claim for Senior Traditional Leadership. They were not satisfied with this decision and directed correspondence to the third respondent requesting that he review his decision as grounds upon which it was reached as well as the procedure followed to come to such decision was incorrect.

[9] On 16 November 2016 the Hinana Royal Family received a response from the Director General in the office of the third respondent which stated the following:

“the applicable legislation makes no provision for an appeal process of the matter... but you are best advised to approach the court for a judicial review of the Premier’s decision.”

[10] The third respondent’s contention in resisting the order sought by the applicant necessitated the contents of such correspondence to be quoted as done above. In that the third respondent’s contention is that the dispute was resolved by the ninth respondent, and it ought not to have been referred to the second and the third respondent and subsequently to him.

[11] Further, what the third respondent did, even in taking the so-called decision, such decision lacked the required adverse and external legal element that would qualify it for judicial review. Thus, it is not reviewable in terms of the Promotion of Administrative Justice Act No 3 of 2000 (‘PAJA’).

[12] That brings me to the issues that I am required to determine, before doing so, I pause to mention that the applicant’s first prayer is to ‘review, set aside and declare invalid the decision of the first and second respondents that the Senior Traditional Leadership of the amaQwathi at Sterkspruit resides in the fourth respondent.’ The first and second respondents are not opposing the granting of this prayer. The fourth respondent who will be directly affected by the order sought does not oppose the granting of this order.

[13] In a nutshell the issues to be determined are whether a proper procedure was followed in arriving at the decision to dismiss the applicant’s claim and whether the third respondent took a reviewable decision within the prescripts of PAJA in dismissing the applicant’s claim and appointing the fourth respondent as Senior Traditional Leader of amaQwathi.

The Background Facts

[14] A synopsis of the background facts to this matter are contained in the applicant's founding affidavit and supplementary replying affidavit filed in terms of rule 6 (4) (a) (b) and (c) of the Uniform Rules of Court. They are largely common cause as they are mostly objective facts from the filed records, and they are in summary as follows.

[15] On 7 July 2010, the Hinana Royal Family addressed a letter to the MEC: Local Government and Traditional Affairs in which they sought to restore the chieftainship of the Royal House of Hinana. On 2 August 2010, the chief of staff of the office of the MEC acknowledged receipt of the letter and advised that the matter has been referred to the office of the Traditional Affairs who had been instructed to attend to the matter. A period of two years lapsed without attending the dispute and only in 2012 with the assistance of the MEC for Rural Development and Agricultural Reform, Mlibo Qoboshiyane an ad-hoc committee was appointed from the Eastern Cape House of Traditional Leaders to deal with this dispute.

[16] On 15 October 2012, the ad-hoc committee convened a meeting and at that meeting the applicant's claim for traditional leadership was supported by the community of Sterkspruit and they opposed the appointment of the fourth respondent. I pause to mention that the minutes of the meeting held on 15 October 2012, were never retrieved as the applicant was informed that they could not be located. Another long period lapsed without any outcome or action to the recommendations made to the ad-hoc committee to recognise the applicant as the legitimate traditional leader as claimed.

[17] On 23 February 2014, the Hinana Royal Family addressed another correspondence to the office of the MEC for Local Government and Traditional Affairs requesting the decision to the claim. In response to this correspondence, on 30 June 2015 the second respondent invited the applicant to attend an interview which was scheduled for 28 July 2015 at Queenstown. According to the applicant, because the interview was held about 200 kilometres away from Sterkspruit, the community was unable to attend, and he was supported by a few members of the Hinana Royal Family who managed to attend the interview.

[18] At this interview the applicant was given an opportunity to make submissions in support of his claim, he submitted to the second respondent that he originates from the Hinana Royal Family of Henry Hinana and as a great grandson of Pawula Hinana he is lawfully entitled to the chieftainship in terms of the customs of amaQwathi.

[19] The fourth respondent was not party to these proceedings, and only a delegation from his family arrived. According to the applicant, a fact which is not challenged, this interview was not a public hearing and as such no public hearing was convened in dealing with this dispute. To confirm the applicant's contention, I noted the following recorded on page 2 of the Hinana Public Hearing Record¹ the report by Peter Garikayi "*she went on further to explain that this case was not going to go through the normal public hearing procedure where all parties to the claim are invited to make presentations. The reason she submitted was that this case was a referral from the Member of the Executive Council and not in terms of section 25 of the Act as amended. As such the case would rather be approached as an interview, wherein only the claimant alone is interviewed. She also highlighted the fact that the case had gone to the house of provincial traditional leadership where a decision was made, and as required by legislation had been escalated to the MEC for finalisation. For the reason not disclosed to the public, the case was then referred to the commission.*" (My underlining).

[20] On 28 October 2015, the applicant addressed a letter on behalf of the Hinana Royal Family to the Premier requesting the outcome of the interview held in Queenstown on 28 July 2015. No response was forthcoming, another letter was addressed to the third respondent on 18 January 2016, also requesting the outcome. Only on 16 March 2016, the applicant received correspondence from the office of the third respondent to the effect that, the decision was taken on 4 November 2015 to remit the matter to the second respondent for further investigation. The third respondent's decision of 4 November 2015, remitting the matter to the second respondent requested a further investigation of the further circumstances of the claim which must include the following issues:

¹ Page 89 of the Record Bundle: Garikayi Report.

“1. The reasons why the fourth respondent did not participate in the public hearings.

2. What was the basis for the fourth respondent’s appointment as Chief in the subject area?

3. Was the appointment made in accordance with the prevailing customary law and customs applicable in that area?

4. What constituted the customary law or practices which entitled the fourth respondent to ascend the chieftainship in Kroonspruit at the time when Inkosi Manzolwandle Henry Hinana left Kroonspruit.

5. On what basis can it be said that the claimant has, upon Inkosi Manzolwandle Henry Hinana’s departure from Kroonspruit, lost any entitlement to chieftaincy in the subject area?”

[21] On 5 April 2016, the second respondent responded to the above questions in a memorandum which recorded the following:

“1. The claim by Hinana was not one of the delegated claims by the Commission to the Eastern Cape Committee in respect of which as a general rule, we would hold a public hearing at which all parties to the claim including members of the public, would have to be heard. It is also not a claim that would be adjudicated by the Committee because the House of Traditional Leaders had resolved it in accordance with section 21 of the enabling legislation. It is a fact that the HoTL had investigated it fully and resolved it. The claim as well as the resolution of the HoTL has been referred to the Committee for guidance and ultimately to the Premier for decision.”

[22] Whilst on this memorandum which is referring to the matter being referred for guidance and ultimately to the Premier for decision, a referral letter addressed to the second respondent by the fifth respondent dated 22 April 2015 stated categorically that the matter is being referred to the Provincial Committee of the Commission on Traditional Leadership Disputes for further investigation. The mandate was to investigate.

[23] Continuing with the background facts of the matter, on 6 September 2016, the Hinana Royal Family received information from the office of the third respondent that a decision to applicant's claim had been issued.

[24] The decision is dated 4 July 2016, and in that the third respondent dismissed the applicant's claim for Senior Traditional Leadership on the following grounds:

"1. Chief Henry Manzolwandle Hinana migrated during 1970's with members of the ruling family from Sterkspruit to Ntabethemba (Whittlesea) in the Ciskei where he accepted the appointment and recognition of chieftainship.

2. Chief Henry Hinana's migration from Sterkspruit to Ntabethemba made no provision for a sustained Hinana rulership at Sterkspruit. The respondent party, Mkhontwana Tukani was subsequently appointed as the Chief of amaQwathi in Sterkspruit.

3. Further and in any event, Chief Henry Hinana succeeds from the right-hand house of Pawula. The claimant would in this instance not be entitled to succeed Chief Henry Hinana as Chief."

[25] On 3 November 2016, the chairperson of the Hinana Royal Family, Monwabisi Hinana, addressed correspondence to the third respondent to the effect that the amaQwathi great house from Ngcobob, the amaQwathi Traditional Council from Ntabethemba and the Hinana Royal Family have met and resolved to request the third respondent to review his decision, as they were dissatisfied with the decision taken.

[26] On 16 November 2016, the Hinana Royal Family received a response from the Director General that they should approach court for a judicial review and this was followed by another correspondence from the third respondent's chief of staff stating that the third respondent was bound by his decision refusing the applicant's claim which is in accordance with section 26 (3) of the Traditional Leadership Governance Framework Act, 41 of 2003 and that to the extent that the family was aggrieved they should approach court for an appropriate relief. That gave rise to these proceedings.

The applicable principles

[27] The role of traditional leadership, its institution, status, and role are guided and dealt with in accordance with customary law and are subject to the Constitution. Section 211 (3) of the Constitution state that the courts must apply customary law when that law is applicable, in line with the Constitution and any other applicable legislation that specifically deals with customary law.

[28] Section 212 of the Constitution provides for roles of traditional leaders and state that the—

“Role of traditional leaders.

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

To properly attend to the matters relating to traditional leadership, the roles bestowed upon traditional leaders, customary law, and the customs of communities observing a system of customary law.

[29] The Traditional Leadership and Governance Framework Act, 41 of 2003, as amended (“the Framework Act”) is the National Legislation referred to in section 212 (1) of the Constitution. The primary purpose of the Framework Act is to restore the integrity and legitimacy of the institution of traditional leadership in line with customary law and practices. It was promulgated to provide a statutory framework for leadership positions within the institution of traditional leadership and for recognition of traditional leaders. It also provides for the procedure in resolving the dispute.

[30] The provisions that are applicable and relevant to these proceedings are contained in section 21 of the Framework Act which provides as follows:

“21 Dispute and claim resolution

- (1) (a) Whenever a dispute or claim concerning customary law or customs arises between or within traditional communities or other customary institutions on a matter

arising from the implementation of this Act, members of such a community and traditional leaders within the traditional community or customary institution concerned must seek to resolve the dispute or claim internally and in accordance with customs before such dispute or claim may be referred to the Commission.

b) If a dispute or claim cannot be resolved in terms of paragraph (a), subsection (2) applies.

(2) (a) A dispute or claim referred to in subsection (1) that cannot be resolved as provided for in that subsection must be referred to the relevant provincial house of traditional leaders, which house must seek to resolve the dispute or claim in accordance with its internal rules and procedures.

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

- (i) the parties to the dispute or claim; and
- (ii) the provincial house of traditional leaders concerned.

(c) A dispute or claim that cannot be resolved as provided for in paragraphs (a) and (b) must be referred to the Commission.

(3) Where a dispute or claim contemplated in subsection (1) has not been resolved as provided for in this section, the dispute or claim must be referred to the Commission.”

[31] When a dispute arises like in this matter the Framework Act prescribes that at first the community members and the concerned traditional leaders must attempt to resolve same internally and in accordance with the customs applicable within that community. Should the dispute not be resolved the relevant provincial house of traditional leaders is next in line and should attempt to resolve the dispute in accordance with its internal rules and procedures. Should the provincial house not succeed in resolving the dispute it must then be referred to the Premier of the province who must attempt to resolve it after a consultation with the relevant parties and the provincial house of traditional leaders. It is only after this process can the matter then be referred to the Commission.

[32] Section 22 of the Framework Act governs the establishment of the Commission and section 25 provides for the duties and powers of the Commission, in simpler terms the Commission's purpose is to investigate and make recommendations on any traditional leadership dispute or claim. Most importantly the Commission when performing its duties do so within the prescripts of section 25 (3) (a) which provides for the application of the customary law and the customs and criteria of the relevant traditional community as they were applicable when the cause of complaint occurred.

[33] Section 25 of the Framework Act also provides for recommendations of Commission, time frames and the constituency. In *Yende and Another v Yende and Another*² the court held that—

“Section 25 (3) of the Framework Act delineates the scope of the investigations undertaken by the Commission. It enjoins the Commission apply only the customary law and customs of the relevant traditional community when considering a dispute or a claim.”

[34] It is the applicant's contention that the amaQwathi custom was never considered because if it indeed was considered and applied the fourth respondent ought not have been installed as the Chief of amaQwathi in Sterkspruit. This is not disputed. Section 6 (2) (b) of PAJA finds application in this matter if one considers the provisions of section 25 (3) of the Framework Act and as correctly submitted on behalf of the applicant.

[35] Whilst on the provisions of section 6 of PAJA I pause to mention the third respondent's contention that there was no decision taken by him which qualifies to be reviewed within the prescripts of section 6 of PAJA. For purposes of PAJA a decision is defined as any decision of an administrative nature, made, or proposed to be made or required to be made under an empowering provision. Such includes a decision relating to imposing a condition or restriction, making a declaration, demand, or requirement.

[36] The applicant listed grounds upon which it relied in seeking the orders prayed for in his amended notice of motion, it is not necessary to deal with each ground, I

² (SCA) unreported case no 1128/19 of 18 December 2020 at para 23.

intend on dealing with only a few. I have dealt with the failure to consider the relevant and applicable customary law as envisaged in section 25 (3) of the Framework Act.

[37] It is contended that the second and third respondent failed to apply the *audi alteram partem* rule, this is in respect of the interview held on 28 July 2015 in the absence of the fourth respondent.

“[I]t is trite that the denying a party who has an interest in the matter the right of meaningful participation in a hearing renders the proceedings in question procedurally unfair. The respondent’s exclusion from meaningful participation in the process of the Commission clearly violated the provisions of S 22 (2) of the Framework Act. Thus, the full court correctly found that the *audi alteram partem* principle was not observed and that this rendered the claim hearing procedurally unfair.” (Footnotes omitted.)

Conclusion

[38] As discussed above and as submitted on behalf of the applicant the way the applicant’s claim was handled and decided is procedurally unfair and the decisions taken as a result thereof cannot be sustained and falls to be reviewed and set aside.

[39] The visible failure to comply with sections 21, 22 and 25 of the Framework Act in as far as doing the investigation is concerned cannot be ignored. The ignorance and failure to consider the customary law applicable at the relevant time more specifically Chief Henry Hinana’s circumstances surrounding his migration is similar to that of Bebeza as per Garikayi report. The Constitution is about restoring traditional leadership. The amaQwathi custom which was followed in Bebeza claim should have been followed.

[40] The third respondent did indeed make a decision which falls within the ambits of section 6 of PAJA, the contention that the third respondent did not make any decision worthy to be reviewed cannot be sustained and falls to be rejected.

[41] The record shows that the third respondent took the decision on 14 June 2016 to dismiss the applicant’s claim. The procedure followed by the third respondent in arriving at this decision was unlawful, unreasonable, and procedurally unfair.

[42] The second respondent who made recommendations to the third respondent acted unlawfully in that the second respondent was not properly constituted at all relevant times as required in terms of the Framework Act.

[43] Finally, the decision of the third respondent claiming to base its decision on recommendations of the second respondent from investigations made in terms of sections 21 and 25 is wrong in law and in fact.

The Order

[44] In the result I make the following order:

- a) The first and second respondents' decision that the Senior Traditional Leadership of the amaQwathi at Sterkspruit resides in the fourth respondent is declared invalid and is therefore reviewed and set aside.
- b) The third respondent's decision of 4 July 2016 appointing the fourth respondent as the Senior Traditional Leader of the amaQwathi at Sterkspruit is declared invalid and is therefore reviewed and set aside.
- c) The third respondent is directed to give effect to the Hinana Royal Family in terms of which the applicant was identified to be Senior Traditional Leader of the amaQwathi at Sterkspruit, and in doing so must act within the provisions of the relevant legislation.
- d) The third respondent is ordered to pay the costs.

S. CUBUNGU
ACTING JUDGE OF THE HIGH COURT

Appearances

For the Applicant: Mr Mapoma SC

Instructed by: Makangela Mtungani Inc Attorneys, MTHATHA

For the Respondents: Mr Bodlani SC

Instructed by: The State Attorney, MTHATHA

Heard on: 30 November 2023

Delivered on: 26 March 2024