



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

Case No: 6246/2018

In the matter between:

BAMBELELA MBABAMA

APPLICANT

And

THE PREMIER OF THE EASTERN CAPE

1ST RESPONDENT

**THE MEC FOR CO-OPERATIVE GOVERNANCE
& TRADITIONAL AFFAIRS**

2ND RESPONDENT

HOUSE OF TRADITIONAL LEADERS

EASTERN CAPE

3RD RESPONDENT

**THE AD HOC COMMITTEE ON TRADITIONAL
LEADERSHIP DISPUTES**

4TH RESPONDENT

APHIWE MATSHANDA

5TH RESPONDENT

KHETHANI TRADITIONAL COUNCIL

6TH RESPONDENT

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

.....
SIGNATURE

DATE

JUDGMENT

SMITH J:

[1] The applicant seeks an order reviewing and setting aside the decision of the House of Traditional Leaders, Eastern Cape (the third respondent), which was taken on the advice of the Ad Hoc Committee on Traditional Leadership Disputes (the fourth respondent), to remove him as headman of the Ngcolosi Administrative Area (the Area). He also seeks orders, amongst others, setting aside the appointment of one Aphiwe Matshanda (the fifth respondent) as the headman for that area and reinstating himself as headman. Only the fifth respondent opposed has the application.

[2] The applicant's claim was based on the assertions that he has a hereditary claim to the headmanship of the Area and that he had been headman since 1995.

[3] On 27 June 2017, he was given a notice to attend a meeting arranged by the fourth respondent for 28 June 2017, where the headmanship of the Area would be discussed. He complained that the notice was too short and that he was not allowed to prepare himself properly. His objection was, however, rejected and the meeting proceeded, nevertheless. He asserts that the procedure adopted at the meeting was biased and unfair to him. He was not allowed sufficient to make proper representations and some of the people supporting him were not allowed to speak. He was also not given sufficient opportunity to present supporting documents, which he was unable to collate at such short notice. The fourth respondent thereafter took the decision to remove him as headman, without having proper regard to all the facts and evidence presented at the meeting. He asserts that the fifth respondent's subsequent appointment as headman was null and void, since he has no hereditary claim to the position, but was voted into the position by his supporters. The applicant also provides an extensive historical background in

support of his contention that he has a hereditary claim to the position of headman for the Area.

[4] In addition to disputing the applicant's claim to hereditary entitlement to the position of headman of the Area, the fifth respondent also raised two points *in limine*, namely that of *res judicata* and that the review was brought outside the 180-day period prescribed by the Promotion of Administrative Justice Act, No 3 of 2000 (PAJA). The applicant did not apply for an order condoning his non-compliance with PAJA.

[5] The fifth respondent's point of *res judicata* is based on the fact that the applicant brought another application under case number 1698/2018 (the first application), wherein he cited the fifth respondent, the Khethani Traditional Council, the third respondent in this matter, and the MEC for Cooperative Governance and Traditional Affairs (the second respondent in this matter).

[6] In that application, in addition to seeking an interim order staying the fifth respondent's installation as headman pending final determination of an administrative appeal, he also sought an order reviewing the decision of the third respondent. That application, including a related application which the applicant had brought under case number 2242/2018, was dismissed with costs by Griffiths J on 2 August 2018. It appears from Griffiths J's order that he had delivered an *ex tempore* judgment. However, the transcript of that judgment was not included in the record.

[7] Mr Mantyi, who appeared for the applicant, submitted that the first application sought to assail a different decision and that different parties were involved. He submitted that the matter is therefore not *res judicata*.

[8] I disagree with this submission. Apart from the fact that additional respondents were cited in the current application, the first application sought to assail the same decision that is being impugned in this application. The main relief sought by the applicant in this application is for an order 'that the decision of the 3rd and 4th respondents, endorsed

by the 1st and 2nd respondents, to remove the Applicant as headman of Ngcolosi be reviewed and set aside'. In the notice of motion filed in the first application, under paragraph 2.4, the applicant sought an order, 'that the decision of the 3rd respondent and endorsed by the 4th respondent be reviewed and set aside'. The notices of motion therefore referred to the same decision, namely the one taken by the House of Traditional Leaders, and which was subsequently endorsed by the MEC for Cooperative Governance and Traditional Affairs or the Premier of the Province, terminating his headmanship of the Area. It was an application for review in respect of that order that Griffiths J dismissed on 2 August 2018.

[9] Mr Mantyi also submitted that the first application was not dismissed on the merits, but on technicalities. However, he was unable to provide any basis for this submission since Griffiths J's *ex tempore* judgment had apparently not been transcribed and did not form part of the record.

[10] The requirements for the defence of *res judicata* are that there must be: (a) concluded litigation; (b) between the same parties; (c) in relation to the same thing; and (d) based on the same cause of action.

[11] In my view there can be little doubt that the litigation instituted by virtue of the first application involved the same parties who are involved in this application. The parties with substantial interests in the outcome of the matter, namely the applicant, the fifth respondent, the entity that took decision, namely the House of Traditional Leaders, were all cited in that application. The fact that the applicant had seen it fit to add additional parties who may have some interest in the matter in this application, is unimportant.

[12] The applicant sought an order reviewing and setting aside the decision of the House of Traditional Leaders removing him as headman of the Area in both applications. Griffiths J dismissed the first application in terms of his *ex tempore* judgment, which rendered that issue *res judicata*. I am accordingly of the view that the point *in limine* must be upheld and that the application can be dismissed on this basis alone.

[13] Although it is strictly speaking not necessary for me to decide the other *in limine* point raised by the fifth respondent, namely that the applicant failed to bring the application within the 180-day period prescribed by PAJA, I am of the view that that point was also a good one. It is clear from the averments contained in the applicant's founding papers that the application was launched outside of the 180-day period. After this point was taken in the fifth respondent's answering affidavit, the applicant belatedly attempted to cure this defect by alleging that he had received the notification that the law did not provide for an appeal against the House of Traditional Leader's decision only during October 2018, although the letter was dated 3 March 2018. He did not bother to explain how it came about that he did not receive the letter during March 2018, despite the fact that it was common cause that the letter had been despatched to him. Instead of explaining the cause for the delay and seeking condonation, he has obstinately persisted with his assertion that he had complied with the PAJA prescripts. As mentioned earlier, the applicant had realised as early as April 2018 that he was required to institute review proceedings, hence the launching of the first application. It is trite that condonation for failure to comply with the time period prescribed by PAJA is not simply there for the asking. An applicant seeking condonation must provide a proper explanation for his or her failure to comply with the Act. The applicant has failed to do so and the case therefore falls to be dismissed on this basis also.

[14] For these reasons it is not necessary for me to traverse the merits of the application.

[15] In the result the application is dismissed and the applicant is ordered to pay the fifth respondent's costs of opposition.

J.E. SMITH

Judge of the High Court

APPEARANCES

Date of hearing : 18 August 2022

Date of delivery : 1 September 2022

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