

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

Reportable

Case no: 4902/2021

Date heard: 20/10/2022

Date delivered: 13/12/2022

In the matter between:

DISEBO VIRGINIA LEPHEANA

APPLICANT

and

PREMIER OF THE EASTERN CAPE PROVINCE

FIRST RESPONDENT

**MEMBER OF THE EXECUTIVE COUNCIL
FOR CO-OPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS
(EASTERN CAPE PROVINCE)**

SECOND RESPONDENT

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

THIRD RESPONDENT

JUDGMENT

Notyesi AJ

Introduction

[1] Ms Lepheana has launched these proceedings seeking an order in terms of which the Premier of the Eastern Cape must be compelled to appoint an investigation team to investigate her claim for traditional leadership in terms of section 59(2) of the

Traditional and Khoi-San Leadership Act 3 of 2019 ('the Khoi-San Act')¹ within a period of 30 days and to give effect to the Court's order dated 11 August 2020 ('the Order').²

[2] In terms of the Order, the Court referred Ms Lepheana's claim for traditional leadership to the Commission on Traditional Leadership for investigation in terms of section 25(2) of the Traditional Leadership and Governance Framework Act 41 of 2003 ('the Framework Act').

[3] Ms Lepheana contends that on 11 August 2020 the Court issued an order in the following terms:

- '(a) The decision of the First Respondent dated 16 July 2019 is reviewed, declared invalid and is hereby set aside;
- (b) The decision of the First Respondent is substituted with the order, directing that the Applicant's claim is referred to the Commission for investigation in terms of Section 25(2) of the Traditional Leadership and Governance Framework Act of 2003.'³

[4] The Framework Act was repealed before Ms Lepheana's claim for traditional leadership was investigated by the Commission. Ms Lepheana contends that the Khoi-San Act only makes provision in section 51 for establishment of a Commission that is limited on Khoi-San matters to the exclusion of other traditional leadership matters. Ms Lepheana submitted that in order to give effect to the Order, this Court should invoke the corresponding provisions of section 59(2) of the Khoi-San Act to the repealed section 25(2) of the Framework Act.

[5] The Premier contends otherwise. The Premier submitted that the relief sought by Ms Lepheana cannot be granted for the reasons that this Court has already made a pronouncement and referred the matter to the Commission and that such Order is valid and remains extant. The Premier contended that the appropriate remedy for Ms Lepheana would be the variation of the order of 11 August 2020 in circumstances where the implementation of that order presented some difficulties. The Premier

¹ The Act came into effect on 1 April 2021.

² Court order dated 11 August 2020 issued by Stretch J.

³ The Traditional Leadership and Framework Act of 2003.

further contended that the relief sought by Ms Lepheana is inappropriate and not legally competent.

[6] On the pleadings, the question for determination is:

6.1 The interpretation of the Order; and

6.2 Whether or not the relief sought by Ms Lepheana is legally permissible in view of the Order.

The parties

[7] For the sake of convenience, I will simply refer to the applicant as 'Ms Lepheana', the first respondent as 'the Premier', the second respondent as 'MEC' and third respondent as the 'Minister'.

Background

[8] The common cause facts are:

8.1 Ms Lepheana has lodged a claim for traditional leadership during November 2014 with the House of Traditional Leaders.

8.2 There were competing claims for the traditional leadership position.

8.3 The House of Traditional Leaders directed the parties to resolve their competing claims and disputes internally.

8.4 The parties to the competing claims could not resolve their dispute internally and it was referred for investigation by the House of Traditional Leaders.

8.5 Pursuant to such investigations by the House, the claims were dismissed.

[9] Ms Lepheana, unhappy with the decision of the House, launched review proceedings under case no 1100/2020. The review proceedings culminated in the Order by Stretch J. On delivering the Order, Stretch J exercised her judicial discretion in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA)⁴ and granted a substitution order in the following terms:

⁴ The Promotion of Administrative Justice Act 3 of 2000 ('PAJA').

‘(b) The decision of the First Respondent is substituted with the order, directing that the Applicant’s claim is referred to the Commission for investigation in terms of Section 25(2) of the Traditional Leadership and Governance Framework Act of 2003.’

[10] On 22 January 2021, Ms Lepheana’s attorneys wrote a letter to the Premier and the MEC advising them about the Order and its implications. In the letter, Ms Lepheana’s attorneys, *inter alia*, alleged:

‘The Order further ordered that the claim be referred to the Commission on Traditional Leadership Disputes and Claims investigation in terms of Section 25(2) of the Act. It is upon this order that the client now instructs that we refer, as we hereby do, the claim in terms of S21(3). We note that unfortunately the Act does not provide a clear procedure to be followed for such referrals, hence we resorted to this manner. We have enclosed herewith our client’s affidavit in the High Court Review Application. We trust that this matter will receive your urgent attention and look forward to hearing from you.’

[11] The Premier did not respond to the letter and Ms Lepheana’s legal representatives approached the Minister by way of a letter dated 3 March 2021. For the reasons that will become apparent, I quote from the letter:

‘In the circumstances, it is evidently clear from the Court Order that the claim has already been referred to the Commission by the Court, in terms, therefore, we hereby submit our client’s claim in terms of the Court Order. We have enclosed herewith our client affidavit in High Court Review. We trust that this matter will receive your urgent attention and looking forward to hearing from you. We request that you advise us with regards to progress of this matter within 14 days of receipt of this letter.’

[12] The Minister responded on 25 March 2021 to Ms Lepheana’s legal representatives. In the response, the Minister made the following assertions:

‘It is noted that the court, on 11 August 2020, ordered that the dispute “ . . . is referred to the Commission for investigation in terms of section 25(2) of the Traditional Leadership and Governance Framework Act of 2003.” The term of the Commission on Traditional Leadership Disputes and Claims (CTLDC) however already ended on 31 December 2017, long before the judgment. The

CTLDC therefore no longer exists and cannot deal with this matter. Furthermore, the Traditional Leadership and Governance Framework Act, 2003, in terms of which the CTLDC was established, will be repealed on 1 April 2021 when the Traditional and Khoi-San Leadership Act, 2019 comes into operation.'

[13] On 22 June 2021, the Minister again wrote a letter to Ms Lepheana's legal representatives. In the letter, the Minister asserted the following:

'In our letter of 25 March 2021, we indicated that since the Commission on Traditional Leadership Disputes and Claims no longer exists and its term of office ended on 31 December 2017, we are seeking legal opinion on the matter and will revert to you. We have since received the legal opinion and regret to inform Poswa Attorneys that it is unfortunately practically impossible to refer the matter to the Commission on Traditional Leadership Disputes and Claims, which has ceased to exist.'

[14] I must point out that the letter by Ms Lepheana's legal representatives of 3 March 2021, is also addressed to the Commission of Traditional Dispute and Claims.

Ms Lepheana's case

[15] Ms Lepheana's case is that an order was granted by this court on 11 August 2020 in terms whereof the dispute was referred for investigation to the Commission in terms of section 25(2) of the Framework Act. Ms Lepheana contended that the Premier, MEC and the Minister refused to put into effect the obligations under the Order and instead, pleaded impracticability. Secondly, in view of the fact that the Commission had ceased to exist, the Premier must refer the dispute to an investigation team in accordance with the Khoi-San Act and that would give effect to the Court Order of 11 August 2020.

The respondent's case

[16] The Premier submitted that the court order relied upon by Ms Lepheana contains internal contradictions in that; first, paragraph 1 of the Order, states that the decision of 16 July 2019 is reviewed, declared invalid and set aside; and second, paragraph 2 of the Order substitutes the decision that had been set aside. The Premier

further submitted that the Order is unenforceable, especially against him. The Premier was not a party to the proceedings that culminated in the Order relied upon, nor was the Commission a party to the aforesaid proceedings. The Premier therefore contended that, whilst the term of office for the Commissioners may terminate, the same cannot be the position in respect of the Commission as a legal body. Under these circumstances, the Premier submitted that the Order remains binding and that the matter has been determined by the Court when the substitution order was granted. Finally, the Premier pointed out that he has no role in the implementation of the Order and on that basis, the case against the Premier should be dismissed.

[17] The MEC has not opposed the application nor filed an affidavit. On the other hand, the Minister indicated that only the Premier is empowered by the provisions of section 59(2) to establish an investigation akin to that sought by Ms Lepheana and envisaged by the Order.

[18] The Minister pleaded that the term of the Commission ended on 31 December 2017 and that, at the time of the Order, the Commission was no longer in existence and that the Khoi-San Act, which repealed the Framework Act, had no provision for the implementation of the Order. The Minister, however, decided to abide by this Court's decision. In the explanatory affidavit, the Minister states that the Premier is the person who is seized with powers to refer the matter for investigation in terms of the Khoi-San Act, although when considering the Order, the Court had done so.

The interpretation of the Order

[19] In *Mtolo and Another v Lombard and Others*⁵ the Constitutional Court held: 'Before grappling with the factual question whether there was compliance with the order of Antonie AJ, we must first determine what the order means; what I earlier referred to as the legal component. The order must be read in the context of what was before Antonie AJ and must, therefore, have informed the decision.⁶ Insofar as the applicants are concerned, throughout the focus of the proceedings was that the

⁵ *Mtolo and Another v Lombard and Others* [2021] ZACC 39; 2022 (9) BCLR 1148 (CC) para 34.

⁶ *Democratic Alliance in re Electoral Commission of South Africa v Minister of Cooperative Governance* [2021] ZACC 30 2022; (1) BCLR 1 (CC) para 13.

respondents rendered the home uninhabitable by removing the roof and windows. For their part, the respondents also focused on the roof and windows, although they said it was the first applicant – assisted by his brother-in-law – who removed these items. That explains the specific mention of the roof and windows by Antonie AJ. Nothing was ever mentioned to him about anything else that had rendered the home unfit for habitation by human beings. It is unlikely, therefore, that his mind could have strayed beyond what had been brought to his attention. After all, context is key in the interpretation of documents, court orders included. Wallis JA explained why this is so in *Endumeni*:⁷

“Most words can bear several different meanings or shades of meaning and to try to ascertain their meaning in the abstract, divorced from the broad context of their use, is an unhelpful exercise. The expression can mean no more than that, when the provision is read in context, that is the appropriate meaning to give to the language used.” (Emphasis added.)

[20] The order of Stretch J is simple and must be read in the context of the case that was presented by Ms Lepheana. I disagree with Mr Kunju that the Order is contradictory. The Order of Stretch J has done two things; (a) set aside the decision of the House of Traditional Leaders; and (b) referred the dispute to the Commission on Traditional Leadership for investigation. I say this for the reason that the Order of Stretch J is plain and straightforward.

[21] In terms of the Order, on a simple, grammatical and literal meaning, the claim of Ms Lepheana has been referred to the Commission for investigation and should be dealt with by that Commission.

[22] The Premier or MEC or even the Minister for that matter, have no further involvement. The matter has been finalised by the Court’s direct referral of the dispute to the Commission. This was the relief sought by Ms Lepheana at the time. The court can only grant the relief sought by the parties. The rights of Ms Lepheana are against the Commission and not the parties cited in these proceedings. In addition, the order

⁷ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 25.

of substitution was granted against the Commission which clearly was not a party to the proceedings. These are all the difficulties which have been self-created by Ms Lepheana. Another problem for Ms Lepheana is that, whilst the Order of Stretch J was granted on 11 August 2020, there is no evidence that the aforesaid Order was even served upon the Commission. It seems to me that even the review proceedings were launched without proper investigation of the facts and hence relief was sought against a Commission, which had ceased to exist. This is undesirable.

[23] Ms Lepheana's legal representatives were content with writing of letters to the Premier and the Minister who were not interested parties to the Order. There is only one correspondence addressed to the Commission and that is the letter of 3 March 2021. In my view, Ms Lepheana has been the author of her own misfortunes.

[24] Moreover, the Khoi-San Act only came into operation on 1 April 2021. There is no explanation for the delay of enforcing the Order before 1 April 2021. This is a delay of approximately seven months. I have found no explanation. The Commission has not been joined in these proceedings and that too is a shortcoming in Ms Lepheana's case.

[25] The fact that the Commission ceased to exist or the term of office of the Commissioners came to an end, is material only insofar as the implementation thereof is concerned under the Khoi-San Act. I agree with Mr *Kunju*, counsel for the Premier, that the only way to resolve this difficulty is by applying for a variation or amendment of the Order should that be necessary.

[26] It is therefore not competent for Ms Lepheana to seek relief against the Premier in circumstances where the Order has not placed any obligations on the Premier.

[27] In my view, the rights of Ms Lepheana which arise from the Order, are against the Commission and not the respondents in these proceedings. Ms Lepheana has failed to make out a case for the enforcement of the Order against the Premier, the MEC and the Minister. I find no basis for the relief sought against these parties.

Whether or not the relief sought by Ms Lepheana is legally permissible in view of the Order

[28] Mr *Cele*, counsel for Ms Lepheana, has urged this Court to order the Premier to act in terms of section 59(2) and establish a Commission or investigation team for purposes of processing the claim of traditional leadership by Ms Lepheana. Mr Cele had contended that section 59(2) of the Khoi-San Act is a corresponding provision to the repealed section 25(2) of the Traditional Framework Act. In advancing the submission, Mr *Cele* relies on the provisions of section 65 of the Khoi-San Act. Section 65 of the Khoi-San Act deals with the repeal of legislation and reads:

‘(1) The legislation specified in Schedule 4 to this Act, is repealed to the extent indicated in the third column of that Schedule.

(2) Anything done or deemed to have been done under any provision of a law repealed by subsection (1) and which may or must be done in terms of this Act, is regarded as having been done in terms of the corresponding provision of this Act.’

[29] In terms of Schedule 4, the Traditional Leadership and Governance Framework Act is repealed as a whole. The effect of section 65(2) is that anything that has been done or deemed to have been done in terms of the Framework Act is regarded to have been done under the Khoi-San Act. This is a saving provision for acts performed under the Framework Act. In relation to this provision, Mr *Cele* had submitted that the court should invoke the provisions of section 59(2) which is a corresponding provision to section 25(2) of the Framework Act. Section 59(2) reads:

‘(2) Any traditional leadership dispute relating to a king, queen, principal traditional leader, senior traditional leader, headman, headwoman, kingship, queenship, principal traditional community, traditional community, headmanship or headwomanship, must be dealt with by the President in the case of a king, queen, kingship or queenship and by the Premier concerned in the case of any other dispute and the President or Premier, as the case may be, must—

(a) cause an investigation to be conducted by an investigative committee designated by him or her which committee must, in the case of a dispute concerning a king, queen, kingship or queenship include at least one member of the relevant provincial house, to provide a report as well as recommendations

on the matter in dispute within 60 days from the date of designation of the investigative committee; and

(b) refer the report to the relevant royal family or, where applicable, relevant traditional council for its written comments which must be submitted to the President or Premier, as the case may be, within 60 days from the date of such referral.'

[30] In terms of section 25(2) of the Framework Act, the Commission has authority to investigate and make recommendations in respect of such investigations. What is self-evident is that in terms of the repealed legislation, the Commission has its own authority to conduct investigations, whilst in the new Act, the Premier or President is empowered to authorise the investigation. The jurisdictional fact is that there must be a dispute before the Premier or President that may cause an investigation to be conducted by a committee designated by him. In this case, no claim has been submitted to the Premier and there are no conceivable grounds upon which the Premier can exercise his discretion as envisaged in section 59(2) of the Khoi-San Act.

[31] The Order only referred the dispute for investigation by the Commission. On this basis, there are no facts present for this Court to invoke the provisions of section 59(2) and on that ground alone, I cannot agree with the submissions of Mr *Cele*: There must be a dispute, which had been submitted to the Premier and only then can the Premier exercise his discretion and powers under section 59(2) of the Khoi-San Act. This Court cannot usurp the discretionary powers of the Premier. The legislature has granted the Premier a discretion to decide whether or not an investigation team should be established. It is the Premier's own considerations which would persuade him to establish an investigation committee. It would be inappropriate for the Court to make such a determination as that would infringe upon separation of powers unnecessarily.

[32] Ms Lepheana has made no case for the Court to prefer the interpretation that she contended for. On the facts presented, Ms Lepheana is not entitled to any relief and accordingly, has failed to make out a case.

Costs

[33] Ms Lepheana was litigating against public bodies and in the ordinary course of events, would be entitled to benefit in terms of *Harrierlall v University of KwaZulu-Natal*⁸ and *Biowatch* on costs. I have no doubt that this matter had raised important questions of interpretations. My immediate difficulty is the conduct of Ms Lepheana. The Court Order by Stretch J was granted on 11 August 2020. For a period of a full seven months, nothing was done to advance the rights arising from the Court Order. Sequel thereto, litigation was directed against parties who were never involved in the matter. The Premier was dragged to court in circumstances where he ought not to have been caused to incur costs. The litigation against the Premier was ill-conceived as no basis has been set out. I hold the view that the Premier is entitled to his costs of litigation. The other respondents have not opposed the application. On those basis, I will only award the costs of the Premier as a successful party. I have found no reason to depart from the general principle that costs should follow the results.

Conclusion

[34] I am satisfied that Ms Lepheana has failed to make out a case and therefore, the application should fail with costs.

Order

[35] In the results, I make the following order:

- (1) The application is dismissed with costs.

M NOTYESI

ACTING JUDGE OF THE HIGH COURT

Appearances

Counsel for the applicant	:	Adv E S Cele
Attorneys for the applicant	:	Poswa Incorporated

⁸ *Harrierlall v University of KwaZulu-Natal* [2017] ZACC 38; 2018 (1) BCLR 12 (CC); *Biowatch v Registrar Genetic Resources and Others* (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

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