

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

CASE NO 2737/2020

In the matter between:

MNONENELI RANUGA

FIRST APPLICANT

AMAVELELO ROYAL FAMILY

SECOND APPLICANT

And

**THE CHAIRPERSON OF THE HOUSE OF
TRADITIONAL LEADERS, EASTERN CAPE
PROVINCE**

FIRST RESPONDENT

**THE HOUSE OF TRADITIONAL LEADERS
EASTERN CAPE PROVINCE**

SECOND RESPONDENT

**THE MEC FOR CO-OPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS
EASTERN CAPE PROVINCE**

THIRD RESPONDENT

THE PREMIER OF THE EASTERN CAPE

FOURTH RESPONDENT

TAMSANQA SAME

FIFTH RESPONDENT

JUDGMENT

BROOKS J:

[1] The first applicant is the senior traditional leader and Chief of Maqakambeni Traditional Council. He was appointed to that capacity in 2005 by the AmaVelelo Royal Family, the second applicant herein.

[2] The second applicant is the royal family responsible for the chieftainship established in the lineage and line of the late Chief Velelo of AmaMpondomise in the right hand house of King Pahlo. It is constituted by the descendants of Chief Mgabisa

in terms of section 1 of the Traditional Leadership and Governance Framework Act¹. The second applicant is headed by Regent Chieftainess Nopumlani Mditshwa and is based at Mdibanisweni Great Place, Tsolo, in the Eastern Cape Province.

[3] The first respondent is the Chairperson of the House of Traditional Leaders in the Eastern Cape Province. The second respondent is that House of Traditional Leaders.

[4] The third respondent is the Member of the Executive Council responsible for Co-Operative and Local Governance in the Eastern Cape Province. He is responsible for traditional affairs within the province.

[5] The fourth respondent is the Premier of the Eastern Cape Province. The third and the fourth respondents have been cited in this application on the basis that they have a direct and substantial interest therein.

[6] The fifth respondent is an adult male headman of the Lujecweni Administrative Area, one of the four administrative areas that fall under the administrative jurisdiction of the first applicant. No substantive relief is claimed against the fifth respondent.

[7] The purpose of the application is to review and set aside as a nullity a report prepared by the first respondent that is dated 25 March 2020. It embodies resolutions taken by the executive committee of the second respondent on 4 March 2020, apparently prompted by a claim made by the fifth respondent that he, and not the first applicant, is the rightful senior traditional leader of Maqakambeni Traditional Council in Tsolo.

[8] In accordance with established principles and practice, the application invokes the provisions of rule 53 of the Uniform Rules of Court (rule 53). Ancillary interdictory relief is also sought by the applicants.

[9] From the date of its issue to the date of the hearing, the passage of the application has been characterised by non-compliance on the part of the first to the fourth respondents with the provisions of rule 53, with other provisions of the Uniform Rules of Court generally and with the Rules of Practice in the Eastern Cape High Courts. It is convenient at this point to set out the manner in which the application has unfolded, from which that non-compliance becomes evident, and the manner in which that non-compliance has influenced the characteristics demonstrated in the application on the day of the hearing.

[10] The application was launched on 25 August 2020. It was served on the fifth respondent on the same day and upon the first to the fourth respondents on 2 September 2020.

¹ Act 41 of 2003.

[11] In accordance with the provisions of rule 53, the notice of motion called upon the first to the fourth respondents to dispatch within fifteen days after receipt of the notice of motion, to the registrar of this court, the full and complete record of the proceedings behind the impugned report, including minutes, transcripts of investigations, discussions of members of the executive committee of the second respondent and reasons for the resolutions taken that are embodied in that report.

[12] In accordance with the provisions of the Uniform Rules of Court, the notice of motion also directed that should any of the respondents wish to oppose the grant of relief against them, they should notify the applicants' attorneys in writing, within twenty-one days of the service of the application, of their intention to oppose it.

[13] On 21 September 2020 the fifth respondent gave notice of his intention to oppose the matter. On 23 September 2020 the fifth respondent served a second notice. In the body thereof the fifth respondent called upon the applicants "to produce the request required in terms of rule 41A of this Honourable Court." The notice would appear to have been intended to prompt the applicants to comply with rule 41A of the Uniform Rules of Court.²

[14] On 28 September 2020 the applicants issued a notice in terms of rule 30A of the Uniform Rules of Court. Therein the applicants complained that the two notices issued and served by the fifth respondent were irregular because they had been issued before the first to the fourth respondents had filed a complete record with the registrar as contemplated in the provisions of rule 53 and as directed in the notice of motion. The fifth respondent was invited therein to withdraw the two notices accordingly and to do so within ten days of the applicants' notice being filed.

[15] The applicants also included in their notice in terms of rule 30A an injunction calling upon the respondents to furnish the registrar of this court with the full record pertaining to the impugned report and to do so within ten days of the service of the notice in order to rectify their failure to comply with the directive in rule 53.

[16] It is common cause between the parties that on 29 September 2020 the first to the fourth respondents dispatched an incomplete record to the registrar and served a copy thereof on the applicants' attorney of record.

[17] Neither of the two notices issued by the fifth respondent was withdrawn. The applicants were dissatisfied with the incomplete record filed.

[18] In the result, on 16 October 2020 the applicants launched an interlocutory application based upon their notice in terms of rule 30A. The interlocutory application was opposed by the first to the fourth respondents and a full set of affidavits was

² This rule came into effect on 9 March 2020. The rule requires litigants to consider mediation when instituting any new action or application. It requires that new proceedings be accompanied by a notice stating whether each party is amenable to resolving the matter by way of mediation, or not, along with reasons for the stance adopted.

exchanged therein. The interlocutory application was not formally opposed by the fifth respondent and the latter filed no answering affidavit. However, it is apparent that he was represented at the hearing of the interlocutory application and that an argument made on his behalf was considered by the court. On 1 June 2021, Mjali J delivered judgment on the interlocutory application and issued an order in the following terms:

- 14.1 The 1st to the 4th respondents are ordered to dispatch the full and complete rule 53 record in accordance with the applicants' notice of motion within 10 days from the date of this order.
- 14.2 The application to strike out the 5th respondent's notice to oppose fails and is dismissed with costs. The application to strike out the 5th respondent's rule 41A notice as an irregular step succeeds with costs.
- 14.3 The 1st to the 4th respondents are to pay costs of this application jointly and severally the one paying the others to be absolved. The 5th respondent is to pay costs relating to its filing of a rule 41A notice.

[19] The first to the fourth respondents did not comply with the order of Mjali J. On 23 June 2021 the applicant's attorney of record wrote a courtesy letter to the State Attorney, reminding that office of the obligation arising from the issue of that order. No response to the letter was forthcoming.

[20] On 12 August 2021 the applicants' attorney of record wrote another letter to the State Attorney. The letter was also addressed to the fifth respondent. Therein it was made clear that the applicants were intent upon pursuing the relief claimed in the application for review. It is apparent that only the fifth respondent responded to the letter, indicating that he had no record to furnish.

[21] On 18 August 2021 the applicants served and filed a supplementary affidavit. Therein is recorded a short history of the application for review and the interlocutory application. The failure on the part of the first to the fourth respondents to comply with the order of Mjali J is highlighted. So, too, is the prejudice to the applicants caused by that failure.

[22] Importantly, the supplementary affidavit also contains a statement that in pursuing the relief sought the applicants would not be seeking a costs order against the fifth respondent. It is re-stated that no substantive relief is sought against the fifth respondent, that the impugned report is that of the first respondent and that the interdicts are sought against the second to the fourth respondents only. The observation is made that in these circumstances the opposition by the fifth respondent is "frivolous and vexatious". It is stated that "an ill-advised notice to oppose was filed on his behalf". In respect of the fifth respondent the affidavit concludes by explaining that in not seeking costs against the fifth respondent the applicants "take into account that the fifth respondent did not file any substantive opposition papers".

[23] Thereafter, on 1 September 2021 the applicants made application to the registrar, as they were entitled to do, by way of notice, for the allocation of the matter for hearing as an uncontested opposed application in the unopposed motion court.

[24] The registrar immediately allocated the matter to the unopposed motion court roll for 14 September 2021.

[25] Somewhat surprisingly, on 2 September 2021 the fifth respondent served and filed an answering affidavit. It is interesting to note that this answering affidavit deals with the founding affidavits only and was deposed to on 14 October 2020, almost a year earlier.

[26] As an answering affidavit had now been filed by the fifth respondent, the matter no longer qualified for description as an uncontested opposed application and on 14 September 2021 it was removed from the unopposed motion court roll. The issue of liability for the resultant wasted costs was reserved for later determination.

[27] On 15 October 2021 the applicants' replying affidavit, dealing with the allegations made in the fifth respondents answering affidavit, was filed. On the same day the applicants applied on notice to the registrar for the allocation of the matter to an opposed motion court.

[28] On 21 October 2021 the registrar issued a certificate enrolling the matter in the opposed motion court for 18 November 2021. On the same day a notice in terms of rule 15A of the Rules of Practice in the Eastern Cape High Courts and a set of heads of argument were filed on behalf of the applicants.

[29] On 28 October 2021 the first to the fourth respondents filed an indexed set of documents that was identified in a covering notice as "the Respondents' Complete Record in terms of rule 53".

[30] On 12 November 2021 a copy of the first to the fourth respondents' answering affidavit was served on the applicants' attorney of record. The answering affidavit recorded that it was deposed to on 11 November 2021 by Mwelo Nonkonyana (Nonkonyana). Therein the deponent states that he is the first respondent.

[31] On 17 November 2021 the first to the fourth respondents filed an application for condonation for the late filing of both their answering affidavit and the complete record required by the provisions of rule 53. In respect of the application for condonation, the founding affidavit is also deposed to by Nonkonyana, who again states that he is the first respondent.

[32] On the same day, 17 November 2021, the applicants served and filed a replying affidavit in opposition to the application for condonation. Therein, important allegations are made that required the attention of the first to the fourth respondents and, in due course, of this court.

[33] No replying affidavit was filed in the application for condonation.

[34] On 18 November 2021 the first to the fourth respondents filed a substantive application for postponement of the opposed application for review. In the notice of motion they sought a postponement *sine die* and sought an order that the applicants “pay the costs of this application only in the event of them opposing same”. This strangely worded prayer was presumably designed to put the applicants off opposing the application for a postponement. However, one may read it, what is clear is that it does not make any provision for the tender of costs inevitably incurred by the applicants that would be wasted in the event that the postponement sought by the first to the fourth respondents, at such a late stage, were to be granted.

[35] An answering affidavit was filed by the applicants in opposition to the application for a postponement.

[36] After hearing argument, Tokota J issued the following order:

1. The application for postponement of the hearing is granted;
2. The main application, together with the condonation application, if it is pursued, is postponed to the opposed motion court for hearing on 2 December 2021;
3. The respondents shall file their heads of argument on or before Friday 26th November 2021;
4. The respondents shall pay costs of the application for postponement and the wasted costs for the hearing on 18 November 2021 on an attorney and client scale, jointly and severally, the one paying the others to be absolved.

[37] On 22 November 2021 the applicants filed a replying affidavit dealing with the allegations made in the first to the fourth respondents’ answering affidavit.

[38] The matter came before this court on 2 December 2021. At the commencement of the hearing, heads of argument prepared on behalf of the first to fourth respondents and on behalf of the fifth respondent were handed up with accompanying applications for condonation for the respondents’ failure to file both the sets of heads of argument on or before 26 November 2021. The applications for condonation were not opposed by the applicants and, upon granting condonation the court received the heads of argument.

[39] It is against the background of this convoluted and lengthy history of the application for review that the application for condonation for the late filing of the record and the first to the fourth respondent’s answering affidavit falls to be considered.

[40] In considering whether or not to grant condonation, it is appropriate to have regard to both the founding affidavit relied upon by those who seek condonation and the answering affidavit relied upon by those who are opposed to the grant of condonation. The court has a wide discretion. It is entitled to have regard to the nature

of the main application and the prospects of success that may or may not accrue to the parties seeking the indulgence if condonation is granted. In the process, the court is entitled to engage with the content of all the affidavits, both those filed timeously and the one that forms the subject of the application for condonation.

[41] In *Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited*³ the Supreme Court of Appeal set out as follows the factors to be taken into account when considering an application for condonation:

A full, detailed and accurate account of the causes of the delay and their effect must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice.

[42] The Constitutional Court, in a recent unanimous judgment by Khampempe J in *Mphephu Ramabulana and Another v Mphephu and Others*⁴ at para [33], remarked as follows:

It is perspicuous that compliance with this Court's Rules and timelines is not optional, and that condonation for any non-compliance is not at hand merely for the asking. The question in each case is "whether the interests of justice permit" that condonation be granted. Factors such as the extent and cause of the delay, the reasonableness of the explanation for the delay, the effect of the delay on the administration of justice and other litigants and the prospects of success on the merits if condonation is granted, are relevant to determining what the interests of justice dictate in any given case.

[43] In assessing the various factors that emerge from the enquiry in this matter, the following are recorded as being significant:

[43.1] the answering affidavit and the record have been filed by the first to the fourth respondents thirteen months late. This is an excessively long period of time for which a good explanation is required. The founding affidavit concerned does not contain a good explanation. All that is therein set out is an inadequate explanation for the delay in furnishing the applicants with a complete record of the proceedings targeted in accordance with the provisions of rule 53. The explanation is characterised by broad and sweeping statements that fail to address pertinently and chronologically the specific challenges or difficulties that may have been experienced primarily by the first and the second respondents, whose official duty it would have been to compile and furnish the relevant record. Also absent is any chronological detail relating to the specific

³ 2017 (6) SA 90 (SCA) at para [26].

⁴ [2021] ZACC 43.

steps taken by those respondents in an attempt to expedite the provision of the record. A paucity of information concerning the process of drafting the answering affidavit also leaves the true causes for the delay in the filing of it open to speculation;

[43.2] notwithstanding the history of the matter, including the two courtesy letters written by the applicants' attorney of record on the point, absolutely no attempt is made to explain the apparent contempt of the order made by Mjali J and to seek condonation therefor. The first to the fourth respondents participated fully in the interlocutory application that gave rise to the order. Indeed, it was vigorously opposed by them. It is significant to note that at that stage, when the interlocutory application was argued in March 2021, the opposition by the first to the fourth respondents made no mention (as they now do) of an inability to provide the full record. It was contended in the answering affidavit then filed that indeed they had provided the full record. In a contradictory allegation in the same affidavit it was also stated that, in any event, only part of the record needed to be furnished to enable the review of the relevant decision or ruling. Flowing therefrom, the allegation was made that the applicants, if dissatisfied, should have invoked the discovery process provided for by the provisions of rule 35 of the Uniform Rules of Court. It was claimed that it was inappropriate for one or more of these reasons to have invoked the provisions of rule 30A of the Uniform Rules of Court. In an allied approach, the first to the fourth respondents contended that rule 30A was not available to the applicants because there had been a partial compliance with the obligation to furnish the record, the argument being that the remedy provided for in rule 30A is only available to a litigant in circumstances where there has been complete non-compliance with one of the Uniform Rules of Court by the opponent. Lastly, and most opportunistically of all the allegations made in the answering affidavit, the first to the fourth respondents explained their failure to furnish a full record as being because they were still waiting for the applicants to make use of the opportunity afforded them in sub-rule 53(4) of the Uniform Rules of Court to amplify the grounds of review and/or to amend the notice of motion. In advancing this final argument, the first to the fourth respondents were apparently ignorant of two important realities. The first is that the right embodied in sub-rule 53(4) only accrues to an applicant once the complete record has been furnished and the applicant has had an opportunity to consider it with a view to assessing whether or not its content prompts a need to amend or to amplify the grounds for the review. The second reality is that inherent in the argument made was an admission that the complete record had not in fact been furnished and that more of its content might be forthcoming if the applicants' amendment or amplification rendered this necessary.

[43.3] the prospects of the first to the fourth respondents being successful in their opposition to the application for review in the event that condonation is

granted receives only token attention in the relevant founding affidavit. As will become apparent in due course, on an assessment of all the relevant facts placed before the court in the affidavits filed, the court is of the view that the first to the fourth respondents have no prospect of successfully obtaining an order dismissing the application. Their inability to succeed in their opposition to the review would in no way be avoided or lessened were the application for condonation to be granted.

[43.4] allied to the statement made at the end of the previous sub-paragraph, but worthy of being highlighted on its own at this point, is the following fact. In the answering affidavits deposed to in opposition both to the application for a postponement and the application for condonation, the first and the second applicants state unequivocally that the deponent to the relevant founding affidavits, Nonkonyana, is not the first respondent as he claims to be. It is stated under oath by the applicants that in March 2020 Nonkonyana was suspended from that position with a stipulation that he must not perform any of the duties associated with that position. In his place and stead currently, Chief Lang Mavuso (Mavuso) holds an acting position. No replying affidavit was filed in the postponement application to challenge or to displace this allegation. No replying affidavit has been filed in the application for condonation. Indeed, the alteration in the status of Nonkonyana was widely reported in the media and stands as a matter of public record. In addition, no authorisation of Nonkonyana to depose to these affidavits in his current circumstances has been furnished by the first to the fourth respondents. Nonkonyana is the deponent to the first to the fourth respondents' answering affidavit in respect of which condonation for late filing thereof is sought. Therein he alleges that he is the first respondent. The allegation is false. Deposing to the affidavits forms part of the duties accruing to the person appointed to the office of the first respondent. Nonkonyana is prohibited from performing such duties. They are to be performed by Mavuso. The answering affidavit must be regarded as *pro non scripto*.

[43.5] the first to the fourth respondents are all administrative officials who have an obligation to discharge their public duties in an efficient, diligent and professional manner. There is no room for the display of contempt for orders of court, or for the blatant disregard for compliance with the provisions of the Uniform Rules of Court, such as that demonstrated by the history of the present matter. This unacceptable approach towards litigation that concerns a matter of public significance, importance and interest is demonstrably prejudicial to the ability of the court to discharge its own obligations, namely to ensure the efficient administration of justice. The concomitant prejudice caused to the applicants and those whom they represent as traditional leaders is obvious.

[44] Upon due consideration being given to all the relevant factors, the court is not persuaded that the first to the fourth respondents have made out a case that would justify the grant of condonation for their failure to furnish a full and complete record of

proceedings or to file an answering affidavit timeously. Moreover, the court is of the view that the interests of justice do not permit of condonation being granted in the circumstances demonstrated in this matter.

[45] Given the extent of the delays caused by their own non-compliance with the relevant provisions of the Uniform Rules of Court, the nature and the extent of the prejudice to the applicants caused thereby, the failure to give a detailed account of the reasons for their failure to comply with the Uniform Rules of Court, the contempt shown for the orders of this court and the extent of the inconvenience caused to the court in the result, it would be appropriate for the first to the fourth respondents to pay the costs of the opposed application for condonation on the scale as between attorney and client.

[46] It is appropriate to record at this point that the first to the fourth respondents were not prejudiced in the advance of argument on their behalf in the application for review by the possibility, at that stage, that their application for condonation may well not be granted. Reliance was placed exclusively upon an assertion that the review proceedings instituted by the applicants were premature. In order to advance the argument, counsel for the first to the fourth respondents relied upon a point of law that could be raised upon due consideration of the content of the applicants' notice of motion, founding affidavits and the annexures thereto, including the content of the impugned report that embodied a resolution adverse to the applicants and in favour of the fifth respondent. The submission that it is open even to the court to raise the argument *mero motu* is correct.⁵ There need not be any reference made to an answering affidavit. It was so raised and it was argued fully before the court.

[47] In order to determine whether or not there is merit in the application for review, or whether there is merit in the opposition thereto, it is necessary to record something of the history that led to the matter coming before the second respondent and to determine the true character of the matter.

[48] The recommendation and resolutions or decision communicated by the first respondent in the report dated 25 March 2020 emanate from a claim lodged by the fifth respondent with the second respondent. Prior to lodging the claim with the second respondent, the fifth respondent had lodged a claim with the late Inkosi Mandlesizwe Mditshwa. He died before hearing the claim. His widow, Nopumlangi

⁵ *Minister of Justice and Correctional Services v Wallus* [2017] 4 All SA 1 (SCA); 2017 (2) SACR 473 (SCA), where the court held at para [23]: "The duty of an appellate court is to ascertain whether the court a quo came to a correct conclusion on the case before it. Its role is generally limited to deciding issues that are raised in the appeal proceedings and it may not, on its own, raise issues that were not raised by the applicant. However, where a point of law is apparent on the papers (even where it has been expressly abandoned) but the common approach of the parties proceeds on a wrong perception of the law, and its consideration on appeal would involve no unfairness to the party against whom it is directed, the court is not only entitled, but is also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise it would be bound to make a decision that is premised on an incorrect application of the law, despite the accepted facts, merely because a party failed to raise the legal point, as a result of an error of law on his part. That would infringe the principle of legality."

Mditshwa, was appointed as regent for her minor son. The memorandum setting out her recognition and appointment as head of the second applicant was signed by the third respondent on 17 January 2018. The fifth respondent is of the view that he should be the senior traditional leader of Maqakambeni Traditional Council, and not the first applicant. The claim was considered in due course and was dismissed. Accordingly, the claim was resolved decisively by the traditional community that would be affected by the outcome thereof. In his answering affidavit the fifth respondent records the event in the following statement:

Unsurprisingly, sometime in August 2018, AmaVelelo passed their ruling against me and in favour of their leader, the First Applicant, effectively dismissing my claim.

Dissatisfied with the adverse determination of the claim by Chieftainess Nopumlani Mditshwa, the fifth respondent decided to submit his claim to the second respondent.

[49] Upon receipt of the fifth respondent's claim the second respondent appointed an *ad hoc* committee made up of Nkosi Makosonke Diko, Nkosi Bongani Sabatha and Nkosi B Z Ndamase. The first applicant objected to the potential investigations of the *ad hoc* committee on the basis that the second respondent had no jurisdiction to decide on a matter that had already been resolved by the second applicant and the traditional community. The objection was sent by the first applicant in a letter dated 23 December 2019. The objection was ignored by the second respondent and the *ad hoc* committee was apparently dispatched to investigate the claim. Through his attorney of record, the first applicant objected to the proceedings of the *ad hoc* committee and sought a postponement thereof in order to seek a decision on the issue of the second respondent's lack of jurisdiction. This was to no avail. In due course, the document signed by the first respondent on 25 March 2020 was produced purporting *inter alia* to adjudicate favourably upon the claim made by the fifth respondent.

[50] In response, and once again acting through his attorney of record, the first applicant appealed to the third respondent, pointing out the illegality of the report, recommendations and resolutions or decision contained therein. In a letter dated 24 June 2020 the third respondent responded as follows:

The Eastern Cape Provincial House of Traditional Leaders has taken a resolution on the matter. There was a definite decision by the House and Chief Ranuga does not have any further recourse to approach my office because I am neither an appeal nor review authority. I must say I have considered the merits of this matter but I cannot make any pronouncement because of the limitations imposed by legislation and as interpreted by the Constitutional Court.

[51] The applicants then launched this application for review.

[52] Section 21 of the Act provides as follows:

(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) or (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.*

[53] The provisions of section 21 of the Act are clear. In the first instance, members of a traditional community and the traditional leaders of that community must attempt to resolve a dispute or claim. Only if the dispute or claim is not so resolved must it be referred to the second respondent, which must then seek to resolve the dispute or claim in accordance with its internal rules and procedures. If the second respondent is unsuccessful therein, the dispute or claim is then to be referred to the fourth respondent, who must resolve the dispute or claim after due consultation with the affected parties and the second respondent. If the dispute then still cannot be resolved it must be referred to the Commission.

[54] The claim made by the fifth respondent and lodged with the late Inkosi Mandlesizwe Mditshwa was a claim of the nature envisaged in section 21 of the Act. Therefore the provisions of section 21 of the Act are applicable thereto. The claim was resolved by the traditional community leaders in August 2018 in accordance with subsection 21(1)(a) of the Act. No legitimate basis existed for it thereafter to be referred to the second respondent.

[55] There can be little doubt that, however dissatisfied he might have been with the outcome, the fifth respondent accepted that a decision had been made in August 2018.

It is also plain that the fifth respondent sought to revisit that decision by way of an appeal being made against it. In his answering affidavit the fifth respondent identifies this in making the following statements:

Unhappy with the unjust and biased manner in which my claim was handled by AmaVelelo, and the purported decision, in 2018, I appealed to King Luzuko Matiwane, who presides over the Royal Council of the King of AmaMpondomise against the ruling of AmaVelelo. I attach hereto marked “TS2”, a copy of my appeal to King Matiwane.

I stress that according to AmaMpondomise custom and tradition, it is a common practice that when one is not happy with the approach and/or decision of the lower traditional leadership, one must seek recourse to the higher structure, the King of AmaMpondomise in this instance, before one can exhaust external remedies. This is more so regarding a claim for traditional leadership. I must add that the above approach to the King is crucial in the context of AmaMpondomise traditional leadership, because there is an undesirable tendency of some traditional leaders by passing the King when they seek recognition, a tendency that is foreign in AmaMpondomise custom and tradition. I did not want to bypass the King in my case, hence I took up the matter with the King before it was referred to the Eastern Cape House of Traditional Leadership.

[56] In *Tshivhulana Royal Family v Netshivhulana*⁶ the Constitutional Court interpreted the effect of the provisions of section 21 of the Act as follows:

The dispute may be referred from one level to the next only if it is unresolved. When a definitive decision is taken at any level, the aggrieved party does not have any further internal recourse. This is so because none of the levels is a review or appeal level. A decision at any level gives the aggrieved party the right to exit the internal structure and approach a court for appropriate relief.

This interpretation exposes the error in the approach taken by the fifth respondent upon receipt in August 2018 of the adverse decision taken by the relevant traditional leadership. At that stage the right to approach this court for a review of that decision accrued to the fifth respondent. He did not exercise that right and avail himself of the appropriate remedy. Instead, he sought to escalate his claim to a higher level within the internal structure provided for by section 21 of the Act. He did so in an attempt to take the adverse decision on appeal, not understanding that the second respondent is not clothed with appellate jurisdiction. The interpretation also exposes the fundamental error on the part of the second respondent in purporting to handle the fifth respondent's claim as if it had not already been adjudicated upon and finalised at traditional leadership level. Its handling of the claim in purported compliance with the procedure referred to in subsection 21(2)(a) of the Act was unlawful. On this basis alone the review of the recommendation, resolutions and decision set out in the report dated 25 March 2020 must succeed.

⁶ 2017 (6) BCLR 800 (CC) para [20].

[57] The proper interpretation of Section 21 of the Act set out in the preceding paragraph also demonstrates the lack of merit in the legal point relied upon by the first to the fourth respondents in their opposition to the application for review. No basis exists upon which the recommendation, resolutions and decision purportedly taken by the second respondent requires the further attention of the fourth respondent “making a decision” based thereon before the applicants can institute review proceedings. Even the content of the impugned decision demonstrates that the second respondent believed that what it purported to recommend, or resolve or decide, constituted a decision that could be reviewed in this court. The final paragraph of the report reads as follows:

In the event that the claimant or respondent is not satisfied with the outcome, any party is at liberty to challenge this decision by way of a review in a court of law.

It follows that the opposition based upon the point of law to the effect that the application for review is premature falls to be dismissed.

[58] Several other bases upon which the report signed on 25 March 2020 and its content are sought to be reviewed and set aside as unlawful are set out in the founding affidavit. They were not abandoned in argument. They address *inter alia* the following:

[58.1] the lack of authority on the part of the Executive Committee of the second respondent to deal with the fifth respondent’s claim as it appears to have done. It is clear from the content of paragraph 4 of section 2 of the Standing Rules and Orders of the Eastern Cape House of Traditional Leaders that the Executive Committee of the second respondent did not have the power to resolve “on the 4th of March 2020 that the claim for senior traditional leadership of Maqakambeni Traditional Council in Tsolo by Tamsanqa Same against Mnoneleli Ranuga be sustained”, as the introductory portion of the report reveals it purported to do. The power so to resolve, and only in respect of a claim that has not been resolved at community traditional leadership level, is a power that accrues to the second respondent.

[58.2] the first applicant’s application to the effect that the procedure initiated by the second respondent be postponed until such time as the issue about its lack of jurisdiction in the circumstances of this matter was resolved, was not acceded to. There was no ruling on either the application for a postponement or on the objection based upon a lack of jurisdiction. There ought to have been. The resultant procedural unfairness affects adversely the rationality of the process and, concomitantly, the outcome thereof;

[58.3] one of the resolutions purported to have been taken by the second respondent, according to the report, although clearly, and unlawfully, the introductory portion reveals that the resolutions are those taken by the Executive Committee of the second respondent, is couched in the following terms:

1.7. AmaVelelo Royal Family is an illegitimate structure under the chairmanship of Nkosi Mnoneleli Ranuga and it undermines the great house of Mditshwa.

No claim or dispute relating to the legality of the status of the second applicant, or indeed the validity of its functions, processes or decisions, was placed by the fifth respondent, or by any other person, before the second respondent. Moreover, in the memorandum signed by the third respondent on 17 January 2018, appointing Nopumlani Mditshwa as the regent for her minor son within the second applicant, clear recognition of the legal status of the second applicant is evident. Consequently, the resolution purportedly taken in respect of the second applicant is irrational and unlawful.

There is merit in these additional grounds for review. To the important issues that arise therefrom the first to the fourth respondents provided no answer.

[59] The court is satisfied that on all the grounds raised in the application for review the applicants have made out a case. As far as the additional interdictory relief is concerned, the court is of the view that the applicants establish that they have clear rights. The history and nature of the dispute demonstrates that there is a reasonable apprehension that the attempts to undermine and injure those rights may be resumed in the future. That the applicants have no satisfactory alternative remedy, other than an appropriate order of court, by which to protect those rights, is clear and renders appropriate the issue of a final interdict.

[60] What remains is the issue of an appropriate costs order. There is merit in the submission made on behalf of the applicants that the conduct of the first to the fourth respondents has been despicable and cavalier. They demonstrated by their behaviour, including their opposition to the interlocutory application and their contempt for the order of Mjoli J, a refusal to deliver a full and complete record in terms of the provisions of rule 53. Eventually it was forthcoming, but the index thereto reveals that it was still incomplete. They filed an answering affidavit at the same time. Both essential elements of the review proceedings were filed thirteen months late. The application for condonation failed to address with any degree of adequacy the reasons for the delays. It is difficult to avoid the conclusion urged upon the court by the applicants, namely that the first to the fourth respondents have exhibited a disingenuous approach to these proceedings. The applicants seek payment of their costs on the punitive scale as between attorney and client. The court is of the view that such an order would be appropriate. Although it was made clear to the fifth respondent that no substantive relief was sought against him and that his opposition was viewed as being misguided and vexatious, no costs were sought against him before he filed an answering affidavit. Once he did so, and participated in the attempt to dismiss the application for review, he attracted potential liability for the payment of the applicants' costs. No reason exists for his exclusion from the costs order to be made.

[61] The following orders are made:

1. The application for condonation brought by the first to the fourth respondents in respect of the late filing of the record in terms of rule 53 of the Uniform Rules of Court and their answering affidavit is dismissed.
2. The first to the fourth respondents are directed to pay the costs of the application for condonation jointly and severally, the one paying the others to be absolved, on the scale as between attorney and client.
3. The recommendations, resolutions and findings of the Executive Committee of the House of Traditional Leaders, Eastern Cape Province, contained in the report prepared and signed by Chief Mwelo Nonkonyana on 25 March 2020, concerning the claim by the fifth respondent to be the senior traditional leader of Maqakambeni Traditional Council in Tsolo are hereby reviewed and set aside as unlawful and a nullity.
4. The determination and resolution of the Executive Committee of the House of Traditional Leaders, Eastern Cape Province to the effect that AmaVelelo Royal Family is an illegitimate structure, contained in the report referred to in paragraph 3 of this order, is hereby reviewed and set aside as unlawful and a nullity.
5. The AmaVelelo Royal Family is hereby declared to be a legitimate structure that exists in terms of the customs and traditions of AmaMpondomise AseMpumalanga and is to be respected accordingly as a customary institution.
6. The first, second, third and fourth respondents are hereby interdicted and restrained from unlawfully interfering with the functioning of and exercise of powers by the AmaVelelo Traditional Council and the AmaVelelo Royal Family.
7. The second, third and fourth respondents are hereby interdicted and restrained from implementing the recommendations, resolutions and findings contained in the report referred to in paragraph 3 of this order.
8. The first, second, third, fourth and fifth respondents are hereby directed to pay the costs of this application jointly and severally, the one paying the others to be absolved, on the scale as between attorney and client.

R W N BROOKS

Judge of the High Court

Appearances

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Date heard :

2 December 2021

Date delivered:

14 December 2021