IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, BHISHO)

Case No. 415/2016

Date heard: 24 October 2019

Date delivered: 15 November 2019

In the matter between:

PENROSE NTAMO	First Applicant
NOVUSO NOPOTE	Second Applicant
GAGILE CUBA	Third Applicant
ZOYISILE TYANDELA	Fourth Applicant
THE LOCAL PLANNING COMMITTEE,	
CALA RESERVE	Fifth Applicant
GIDEON SITWAYI	Sixth Applicant

and

THE PREMIER OF THE EASTERN CAPE	First Respondent
CHIEF GECELO	Second Respondent
THE GCINA TRADITIONAL COUNCIL	Third Respondent
THE MEC FOR LOCAL GOVERNMENT AND	
TRADITIONAL AFFAIRS	Fourth Respondent

NDODENKULU JACKSON YOLELO Fifth Respondent

EASTERN CAPE HOUSE OF

TRADITIONAL LEADERS Sixth Respondent

JUDGMENT

Gough AJ:

1. This application is the consequence of the recognition in terms of s 18 (5) of *Traditional Leadership and Governance Act*, 2005 (EC) (**the Governance Act**) by the fourth respondent of the fifth respondent as iNkosana (or headman) of the ama-Gcina traditional community, Cala Reserve, Xhalanga District (**the Cala Reserve community**) on 4 December 2015 (**the MEC decision**). The antecedent 'identification' in terms of s 18 (1) (i) of the of the fifth respondent by the ama-Gcina Royal family (**the Royal family**) on 4 November 2015 (**the royal family decision**) is also challenged.

2. I shall hereinafter refer to the royal family decision and the MEC decision collectively as **the impugned decisions**.

3. The impugned decisions were taken after the full bench of this Court in *Ntamo and Others v Premier, Eastern Cape and Others* 2015 (6) 400 (ECD) had already dismissed an appeal against the order of the court below (**the order**) setting aside the recognition given by the fourth respondent and/or the first respondent (the fourth respondent and first respondent in that appeal) to the fifth respondent (the fifth respondent in that appeal) as the iNkosana of the Cala Reserve community, and that:

   "… the first respondent be and is hereby directed to refer the matter back to the Royal family in terms of section 18 (3) and 18 (4) of the [Governance Act]."

4. The present application is only opposed by the third respondent.

5. However, before dealing with the substance of the application, I need to dispose of a the third respondent's preliminary issue of the non-joinder of the Royal family as a party to these proceedings.

6. The non-joinder point was not raised in the answering affidavits nor was it foreshadowed in heads of argument filed on behalf of the third respondent. I afforded the parties an opportunity to supplement their arguments by the delivery of additional heads should they wish to do so. Additional heads of argument were delivered on behalf of the applicant. Mr Bodlani, who appeared for the third respondent, conveyed that he does not wish to do so but stands by the arguments set out in his heads as well as submissions made at the hearing.

7. Brand JA summarised the law regarding the need to join a party in litigation in Judicial Service Commission and Another v Cape Bar Council and Another 2013 (1) SA 170 (SCA) as follows:

> "[12] It has by now become settled law that the joinder of a party is only required as a matter of necessity — as opposed to a matter of convenience — if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned (see eg *Bowring NO v Vrededorp Properties CC and Another* 2007 (5) SA 391 (SCA) para 21). The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one (see eg *Burger v Rand Water Board and Another* 2007 (1) SA 30 (SCA) para 7; and Andries Charl Cilliers, Cheryl Loots and Hendrik Christoffel Nel *Herbstein & Van Winsen The Civil Practice of the High Courts of South Africa* 5 ed vol 1 at 239 and the cases there cited)."

8. Mr Bodlani confined the third respondent's challenge on non-joinder to the royal family decision. He did not argue that the Royal family had a direct or substantial interest in the remainder of the relief claimed by the applicants.

9. Section 18 of the Governance Act reads as follows:

> "**Recognition of an iNkosi or iNkosana**
>
> 18. (1) Whenever the position of an iNkosi or iNkosana is to be filled-

(a) the royal family concerned must subject to such conditions and procedures prescribed, within sixty days after the position becomes vacant, and with due regard to applicable customary law-

(i) identify a person who qualifies in terms of customary law to assume the position in question, after taking into account whether any of the grounds referred to in section (6)(3) to that person; and

(ii) through the relevant customary structure, inform the Premier of the particulars of the person so identified to fill the position and of the reasons for the identification of that person; and

(b) the Premier must, subject to subsection (5), by notice in the *Gazette*, recognise the person so identified by the royal family as an iNkosi or iNkosana, as the case may be.

(2) before a notice recogniszing an iNkosi or iNkosana is published in the *Gazette*, the Premier must inform the Provincial House of Traditional Leaders of such recognition.

(3) the Premier must, within a period of thirty days after the date of publication of the notice recognizing an iNkosi or iNkosana issue to the person who is identified in terms of paragraph (a) (i), a certificate of recognition.

(4) where the Premier has received evidence or an allegation that the identification of a person referred to in subsection (1) was not done in accordance with the provisions of this Act, customary law or custom the Premier-

(a) may refer the matter to the Provincial House of Traditional Leaders for its recommendation; or

(b) may refuse to issue a certificate of recognition; and

(c) must refer the matter back to the royal family for reconsideration and resolution where the certificate of recognition has been refused.

(5) Where a matter, which has been referred back to the royal family for reconsideration and resolution in terms of subsection (4) (a), has been reconsidered and resolved, the Premier must recognise the person identified by the royal family if the Premier is satisfied that the reconsideration and resolution by the royal family has been done in accordance with customary law."

10. Both subsections (3) and (5) provide that the Premier must recognise the person identified by the Royal family. However, under subsection (3) the Premier has no discretion to refuse to recognise the person identified by

the Royal family unless evidence or allegations is produced before publication in the Gazette of the notice recognising the person identified by the Royal family as an iNkosana. That is not the case with subsection (5), which compels the Premier to independently satisfy her or himself that the identification of the person as an iNkosi or iNkosana was in accordance with customary law irrespective of contrary evidence or allegations having been produced.

11. The definition of administrative action in the *Promotion of Administrative Justice Act*, 2000 includes any decision taken by "*… a natural or juristic person… when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect…*".

12. Mogoeng J (as he then was), writing for the full court, in Viking Pony Africa Pumps v Hidro-Tech Systems 2011 (1) SA 327 (CC) found the following at para [37]:

> "PAJA defines administrative action as a decision or failure to take a decision that adversely the rights of any person, which has a direct, external legal effect. This includes 'action that has the capacity to affect legal rights'. Whether or not administrative action, which would make PAJA applicable, has taken cannot be determined in the abstract stop regard must always be had to the facts of each case." (Footnotes excluded.)

13. Thus, it is necessary to determine whether the royal family decision constituted administrative action for the purposes of PAJA.

14. That the royal family decision was not administrative action is supported by both the judgment in the court below and that on appeal in *Ntamo*.

15. The court below included a provision in the order that "*… the decision of the fourth and/or first respondent to recognise the fifth respondent as the headman of the the Cala Reserve, taken on or about 4 July 2013, be and is hereby reviewed and set aside*".

16. Significantly, no order was issued setting aside the decision taken in March 2013 by the Royal family to identify the fifth respondent as the iNkosana of the Cala Reserve community, although it was found by both

courts that the aforesaid identification was not in accordance with customary law.

17. The full bench in *Ntamo* set aside the fourth respondent's recognition (or appointment using the language of the full bench in *Ntamo*) in 2013 of the fifth respondent as the iNkosana . This appears from the following passages in the judgment:

> "[56] Secondly, it was argued that the court below erred in para 2 of its order by directing the Premier to refer the matter back to the royal family. Once the decision to appoint Yolelo was set aside on account of the applicable customary law not having been applied, the only course of action that was available to the Premier (or the MEC acting in terms of delegated authority) was to refer the matter back to the royal family. The order simply gives effect to the inevitable and, in doing so, avoids delay in the process of appointing a headman for the the Cala Reserve.
>
> [57] to the extent that the order amounts to a substitution for purposes section 8(1)(c) (ii) of PAJA, I am of the view that exceptional circumstances, as contemplated by this section, were present. First, the court below was in as good a position as the Premier to decide the issue. Secondly, as indicated above, the course the matter had to take once the decision had been set aside was a foregone conclusion. Thirdly, it contributed to efficient administration in the sense that it avoided further delay in the finalisation of a matter of importance for the the Cala Reserve community and the public interest. In any event, I cannot see what practical effect is setting-aside of this order would have if the decision of the court below to review and set aside the decision to recognise Yoleleo were correct.
>
> [58] It was argued that the order interfered with the Premier's discretion in terms of s 18(4) of the Governance Act to either refer the matter to the Provincial House of Traditional Leaders for a recommendation or refuse to issue a certificate of recognition. Once the court below decided and declared what the applicable customary law was, and that it had not been applied by the royal family, no purpose could be served in referring the matter to the Provincial House of Traditional Leaders for a recommendation because the process of identification and recognition had to commence afresh. The Premier has been ordered to take the only course of action that is open to her. There is, accordingly, no merit in this point.**"**

18. The notice of motion in the present application seeks to have reviewed and set aside "*the decision taken by the Second and/or Third Respondent, acting as the royal family, on an unknown date to identify Mr Yolelo as the appropriate person for the* MEC *to recognise as headman of the Cala Reserve*".

19. The royal family decision, although part of a process leading to the recognition of the fifth respondent as the iNkosana of the Cala Reserve community by the fourth respondent, had no impact upon the rights of the

applicants nor did it have the capacity to do so. It had no direct, external legal effect. It was the MEC decision which had those attributes.

20. The royal family decision was, in my view, not administrative action. Thus, the royal family decision was not subject to judicial review in terms of section 6 of PAJA and an order setting aside the royal family decision is not required by the applicants in order to obtain the remaider of the relief set forth in the notice of motion.

21. In view of the above finding, and the acceptance by the third respondent that the Royal family has no direct or substantial interest in the remainder of the relief claimed by the applicants, the joinder point falls away. The third respondent has no direct and substantial interest which will be prejudicially affected by the outcome of these proceedings (*Judicial Service Commission* (*supra*)).

22. However, and in any event, there is a further ground upon which the joinder point cannot succeed.

23. The essence of the point taken by the third respondent was that the royal family decision was not taken by either the second or the third respondent acting as the Royal family. In reaching this conclusion, the third respondent relies upon the recognition given in the Governance Act of a royal family and a traditional council as discrete institutions. On the one hand, a royal family is the core customary institution or structure consisting of immediate relatives of the ruling family within a traditional community, who have been identified in terms of custom. On the other hand, a traditional çouncil, such as the third respondent, is a council established in terms of section 6 of the Governance Act.

24. The third respondent admitted that the second respondent "*… is the senior traditional leader of the KwaGcina Traditional Council…* [and] *… is cited in his official capacity as the person responsible for introducing the Fifth Respondent as headman to the the Cala Reserve*" (paragraph 23 of

the founding affidavit read together with paragraph 15 of the answering affidavit).

25. The Royal family was not joined in *Ntamo.* It did not seek to intervene in the proceedings before the court below or in the appeal.

26. Throughout the history of the matter the applicants have communicated with either the second respondent or the third respondent when dealing with the Royal family. The applicants' threat of litigation over the impugned decisions was sent in like manner to the second respondent and/or third respondent. Nowhere in any of this communication do those respondents protest against that communication having been incorrectly sent to them or say otherwise that the applicants must communicate directly with the Royal family. The state attorney at one time informed the applicants that it represented all the respondents and requested an extension of time in order to deliver answering affidavits as it needed to take instructions from the Royal family.

27. The second respondent explains in the answering affidavit how the Royal family went about the business of reconsidering and resolving the identification of the fifth respondent as the iNkosana after the import of *Ntamo* had apparently been explained to it. Likewise, he testifies to the manner in which the Royal family reached its decision not to remove the fifth respondent as the iNkosana once it was made aware of the fifth respondent's criminal conviction. The third respondent denies the allegation of bias levelled against the the Royal family.

28. The third respondent relies only upon the following paragraph in the answering affidavit for its point on non-joinder:

> "40. … At some point, the applicants will have to find it in themselves to accept that the judgment Ntamo 1, amongst other orders, directed the Premier to refer the matter back to the royal family and not to myself. My membership of the royal family does not constitute myself as a royal family. Accordingly, I object to decisions of the royal family being ascribed to me. I am in no position to take credit for the work of the Royal family." "

29. The quoted paragraph does not support a conclusion that the Royal family was unaware of the nature of the relief claimed by the applicants in these proceedings.

30. The following passage in the judgment of Mahomed J (as he then was) in *Wholesale Supplies CC v Exim International* CC 1995 (1) SA150 (TPD) at 158 E-H is apposite:

> "These observations clearly show, in my view, that the rule which seeks to avoid orders which might affect third parties in proceedings between other parties is not simply a mechanical or technical rule which must ritualistically be applied, regardless of the circumstances of the case. For this reason the Court in *Smith v Conelect* 1987 (3) SA 689 (W) held that, where the third party has waived his right to be joined, the failure to join him as a third party was no bar when ordering the proceedings which might affect him, because he was not prejudiced in these circumstances.
>
> What are the circumstances in the present case? The party not joined in the present case is B D Neill. He is the party who concluded the restraint agreement with Snell. He is the party who controls the first respondent. On the probabilities he caused the activation of the second respondent as a distributor of the relevant product in the area protected by the restraint. He is the party who effectively represented the Exim Group in the dealings with Snell built before and after the restraint. All the interests in the respondents are held by his company. He has now had the fullest opportunity to be heard in the matter. Not only did he fail to proffer any objection on the basis of formal non-joinder in the answering affidavits, but he grabbed the opportunity to set out his case with great energy and thoroughness. Indeed, as was to be expected in the circumstances, he was the only substantial voice on behalf of the respondents in the proceedings. There was not the slightest suggestion in these affidavits that he had an interest adverse to the interests of the respondents. (See the *Amalgamated Engineering Union* case *supra* at 649.)
>
> To deprive the applicants of relief in these circumstances simply because B D Neill was not formally joined as a party is without any justification in law and would in no way advance the interests of justice." (Underlining added.)

31. The Royal Family has, in my view, substantively participated in the proceedings. It has waived any right to be formally joined as a party therein. Moreover, the controversy regarding the appointment of the iNkosana of the Cala Reserve community has been ongoing since 2013. It requires finality. It is not in the interests of justice to further delay its conclusion through a mechanical or technical application of the rule regarding joinder of parties in litigious proceedings, particularly when the point has been so belatedly raised by the third respondent.

32. Shortly stated, and approaching the matter on the account of the third respondent (but without making a finding as to the correctness of that version), after the full bench decision in *Ntamo* was delivered the Royal

family decided that it would approach the Cala Reserve community and explain that (a) prior to *Ntamo* there was conflict amongst the Cala Reserve community over the selection of a new iNkosana, and as a result, so said the Royal family, "*some people did not participate in the decision-making process that led to the nomination, not election, of* [the sixth applicant] *because they had identified with a particular process which led to a dispute between some residents of Cala Reserve and the royal family*" and (b) that the sixth respondent had not been elected by the Cala Reserve community as the Inkosana in accordance with customary law. The Cala Reserve community, after having had all of the aforegoing explained to them on 8 October 2015 decided to hold an election on 14 October 2015. The fifth respondent was elected as the iNkosana on that date. Thus, and as the Royal family was satisfied the October 2015 election of the fifth respondent was in accordance with customary law, it was obliged to identify him as the iNkosana as was the fourth respondent so to obliged to recognise the fifth respondent as such and issue him with a certificate of recognition. All of the aforegoing was, according to the Royal family, not because of the views it held on a particular candidate but "*… in order that there could be compliance* with *the judgement [Ntamo]*".

33. The following passages in *Ntamo* are material to a consideration of the correctness of the approach adopted by the Royal family:

> "[6] As stated, the dispute between the parties concerns the validity of the decision taken by the MEC to appoint Yolelo as headman of the Cala Reserve. That, in turn, raises whether the MEC and the amaGcina royal family acted in compliance with the Traditional Leadership and Governance Act 4 of 2005 (EC), the legislation that empowers royal families to 'identify' candidates for headmanship, and the Premier to 'recognise' headmen in the province. I shall refer to this Act as the Governance Act.
>
> [7] Mr JH Fani was appointed as headman of the Cala Reserve in 1979. In late 2012 he indicated to the amaGcina Traditional Council that he wished to retire. He later informed the fifth respondent, the local planning committee appointed by him as an advisory body, that the amaGcina Traditional Council had acceded to his request that he be allowed to retire.
>
> [8] The planning committee convened a community meeting to discuss the issue. As residents of the Cala Reserve have always elected their headmen, debate developed as to a suitable successor to Fani. Mr Gideon Sitwayi, a subheadman and Fani's de facto deputy, emerged as the favoured candidate.
>
> [9] <u>On 25 February 2013 a community meeting was held at which Sitwayi was elected as headman by the majority of those present</u>. Fani and Mr Penrose Ntamo, the deponent to

the founding affidavit and a member of the planning committee, were given the task of reporting the result of the election to the amaGcina Traditional Council. When they tried to do so, on 27 February 2013, Chief Gecelo [i.e. the second respondent in the present application] , the head of the Council, was not available, so their report was left with the Council's secretary who informed them that the community had acted unlawfully by conducting an election in the absence of the Council.

[10] When the Council met on 4 March 2013 it was critical of Fani for allowing the community meeting to take place without Council members being present. He was informed that the Council would go to the Cala Reserve on 11 March 2013 to 'introduce' the new headman. He was also told, strangely, that arrangements would be made for the police to be present. It became clear from the Council's meeting that it did not accept the election of Sitwayi because he was not a member of the royal family.

[11] The meeting only took place on 27 March 2013. The Council's representatives included Gecelo. One Mr Jentile, a councillor, informed those present that the delegation had no intention of having a meeting with the community: it was there to introduce the person chosen by the royal family to be the new headman for the Cala Reserve. Gecelo said that the delegation would not answer any questions. He then announced that the new headman was Yolelo.

….

[80] … the way in which a candidate is identified by the royal family concerned is dependent on 'the applicable customary law' and the nominee qualifying for appointment 'in terms of customary law'. That, in turn, makes the applicable customary law, in each case, a relevant consideration (to put it at its lowest) and raises the question of what the customary law is whenever a particular candidate for appointment as a headman is to be identified. From this it is clear that a royal family's power to identify a candidate for headmanship is constrained in at least two respects: first, in identifying a candidate, it must have 'due regard to applicable customary law'; and secondly, its power of identification is limited to persons who qualify for appointment 'in terms of customary law'..

[81] The practical implementation of s 18 may differ across the province, from place to place, according to the customary law that is applicable in each. That may mean that in identifying candidates for headmanship, royal families may enjoy varying degrees of discretion: how much discretion a royal family will have to identify candidates will depend on the applicable customary law and the customary-law requirements for qualification as a headman in each case.

[82] This interpretation of s 18 is in accordance with the plain meaning of the words of the section, read in context. It is, furthermore, an interpretation that is consistent with, and furthers, s 211 of the Constitution as well as the purposes of the Framework Act and Governance Act. It also advances, rather than retards, the promotion of democratic governance and the values of an open and democratic society by recognising the customary law of local communities in the identification of those who will govern them on the local, and most intimate, level. This, in turn, is a recipe for legitimacy of local government.

[83] What this means in the specific case of the the Cala Reserve is that the royal family's discretion is limited in the following way. In identifying a candidate for headmanship, it has to have due regard to the fact that, in terms of the applicable customary law, headmen are elected by the community and do not have to be drawn from any particular family. Then, it has to consider who qualifies in terms of customary law to be identified for appointment. That person is the person who has been elected by the community. It is then obliged to inform the Premier of the particulars of the person so identified and the reason for his or her identification — that he or she was elected by the community in terms of the applicable customary law. When this has been done, the Premier (or, as in

this case, the MEC acting in terms of delegated authority) 'must, subject to subsection (5), by notice in the Gazette, recognise the person so identified by the royal family'.

[84] In my view the decision of the court below that the MEC's decision to recognise Yolelo [i.e. the fifth respondent] was invalid, was correct. If the MEC took a decision to recognise Yolelo [i.e. the fifth respondent], despite the fact that someone else qualified in terms of customary law, the MEC's decision was vitiated by an error of fact. If the MEC took the decision in the belief that the royal family had unfettered power to identify a new headman for the Cala Reserve (which, given what is said in the answering affidavit in the letter of 25 November 2013 is more probable), then his decision is vitiated by a material error of law. In either event, the decision was correctly set aside by Nhlangulela ADJP in the court below,and the appeal must fail". (Underlining added and without footnotes.)

34. Unquestionably, the finding of the full bench (namely, that the sixth respondent had been elected as the iNkosana of the Cala Reserve community in accordance with the customary law of the Cala Reserve community) was essential to the dismissal of the appeal and resultant confirmation of the order.

35. In view of the above finding, and those made in paras [57] – [58] of *Ntamo* (already quoted above), the order compelled the first respondent or the fourth respondent to refer the identification of the iNkosana back to the Royal family for reconsideration and resolution. The Royal family was then obliged to identify the sixth applicant as the INkosana. This, because he had been elected by the Cala Reserve community in accordance with customary law.

36. The matter of the election of the sixth applicant and that election's compliance with customary law has already been adjudicated upon. The applicants and the third respondent were parties in the proceedings in *Ntamo*. On the doctrine of *res judicata* I am precluded from revisiting those findings of fact and law made by both the court below and the full bench in *Ntamo*. (*Mkhize NO v Premier of the Province of KwaZulu Natal and others* 2019 (3) BCLR 383 (CC) at paras [36] and [37]; *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* 2017 (6) BCLR 750 (CC) at para [29]; *Smith v Porrit and Others* 2008 (6) SA 303 (SCA) at para [10]).

37. The entire process followed after Ntamo (viz. firstly, by the Royal family, then 'the election' of the fifth respondent on 15 October 2015 together with

the identification by the Royal family of the fifth respondent as the iNkosana, and the MEC decision) was in conflict with the order and unlawful. To the extent necessary, that process falls to be set aside.

38. In any event, and assuming for the moment that it was permissible to have held valid elections in October 2015, notwithstanding the terms of the order, the third respondent needs to establish that the election of the sixth applicant in 2013 was either set aside in accordance with customary law or falls to be set aside.

39. To the above end, the third respondent avers that the election in February 2013 of the sixth applicant by the Cala Reserve community was not in accordance with customary law. The third respondent has not brought a counter application seeking to declare that election non-compliant with customary law. In the absence of a counter application seeking that relief by the third respondent a challenge on that basis must fail.

40. The third respondent failed to produce expert evidence that the customary law of the Cala Reserve community permitted the implicit setting aside aside of the outcome of the 2013 election of the sixth applicant by holding a second election based, so it would seem, largerly upon an explanation, right or wrong, given by the Royal family that the prior election was flawed and otherwise contrary to customary law.

41. On the papers in the application the election of the sixth applicant in February 2013 is unimpeachable and must stand.

42. The election of the fifth respondent in October 2015 contravened both the order and customary law. It too was unlawful.

43. The fourth respondent deposed to an an affidavit explaining his role and that of his officials in the process of electing the fifth respondent and in taking the MEC decision. He says that he had no discretion in taking the MEC decision once the fourth respondent had been identified by the Royal family. As discussed above, section 18 (5) provides that the fourth

respondent must first satisfy himself that the identification of an iNkosana complies with customary law.

44. Section 6 (2) (d) of PAJA provides that administrative action is reviewable if it was materially influenced by an error of law. The fourth respondent failed to exercise the statutory duty imposed upon him in terms of section 18 (5) of the Governance Act. He also failed to take into account the terms of the order. I agree with Mr Bishop, who appeared for the applicants, that the MEC decision is reviewable under that provision of PAJA.

45. A judicious consideration by the fourth respondent of the order and the findings of fact and law made in relation thereto would have established that the identification of the fifth respondent once again by the Royal family did not accord with customary law and was otherwise contrary to the order. The fourth respondent, accordingly, failed to consider relevant information as was required of him by section 6 (2) (e) (iii) of PAJA. This is a further basis upon which the MEC decision falls to be reviewed.

46. The applicants also contend that exceptional circumstances exist for the substitution of the MEC decision by that of the court declaring the fifth respondent be the iNkosana of the Cala Reserve and directing the first or fourth respondent to recognise him as such. The uncertainty over the identity of the iNkosana of the Cala Reserve has endured for six years and requires finalisation. I can do no better than reiterate what was said by the full bench in par [57] of *Ntamo* relating to the substitution in terms of section 8(1)(c) (ii) of PAJA by the court below of the decision of the first or fourth respondent. Those grounds for substitution apply equally in the instance of these proceedings.

47. It is a requirement of the Governance Act that the Provincial House of Traditional Leaders of the Eastern Cape must be informed of any recognition of an iNkosana prior to publication by the first or fourth respondent of such recognition. It is a peremptory requirement for the lawful recognition of an iNkosana and must necessarily be included in any order I make.

48. Counsel for the applicants and the third respondent argued that costs should follow the result. I agree.

49. The first applicant passed away after the launch of this application. Initially the remaining applicants sought to join his estate in the application but have since abanadoned that application. The second to fourth applicants are all members of the Cala Reserve community and there is no dispute that all the remaining applicants, including the fifth applicant, have standing to bring this application.

The following order will issue:

(a) That the third respondent's preliminary point on the failure to join the ama-Gcina Royal family in this application be and is hereby dismissed.

(b) That the election on 14 October 2015 of the fifth respondent (Mr ND Yolelo) as the iNkosana of the Cala Reserve community be and is hereby declared unlawful and is set aside.

(c) That the decision of the fourth respondent to appoint the fifth respondent as the iNkosana of the Cala Reserve community be and is hereby set aside.

(d) That in terms of section 8(1)(c) (ii) of of the *Promotion of Administrative Justice Act* 2000, the sixth applicant (Mr Gideon Sitwayi) be and is hereby recognised as the iNkosana of the Cala Reserve Community.

(e) That within 7 (seven) days of the issue of this order, the first respondent (or the fourth respondent acting under delegated authority of the first respondent) is directed to both inform the Provincial House of the Traditional Leaders of the Eastern Cape Province (**the house**) of the terms of this order and provide the applicants with proof that he has done so.

(f) That within 14 (fourteen) days of the first respondent (or the fourth respondent acting under delegated authority of the first respondent) having informed the house as required by (b) above, either of the said respondents are directed to publish the recognition of the sixth applicant as the iNkosana of the Cala Reserve community in the Eastern Cape Provincial Gazette.

(g) That within 30 (thirty) days of the publication required under (f) above, the first respondent (or the fourth respondent acting under delegated authority of the first respondent) is directed to issue the sixth applicant with a certificate of recognition in terms of section 18 (3) of the *Traditional Leadership and Governance Act*, 2005 (EC).

(h) That the third respondent pay the applicants costs of suit on the scale as between party and party.

S.K. GOUGH

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Applicant:	Adv. Michael Bishop
Instructed by:	Legal Resources Centre
For Respondent:	Adv. Apla Bodlani
Instructed by:	Dandala Attorneys