

**IN THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE LOCAL DIVISION:MTHATHA**

**CASE NO. 2047/2018**

**LUZUKO MATIWANE**

**Applicant**

**and**

**THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA 1<sup>ST</sup> Respondent**

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

**2<sup>ND</sup> Respondent**

**THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA**

**3<sup>RD</sup> Respondent**

**THE COMMISSION FOR TRADITIONAL LEADERS**

**4<sup>TH</sup> Respondent**

**SIMPIWE SYDWELL MOLOSI**

**5<sup>TH</sup> Respondent**

**DOSINI ROYAL FAMILY**

**6<sup>TH</sup> Respondent**

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**JUDGMENT**

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**BROOKS J**

**Introduction**

[1] At the heart of this application lies a claim for the official recognition and reinstatement of the kingship of AmaMpondomise<sup>1</sup>, a traditional community whose members reside in the main in the Eastern Cape province of South Africa.

[2] The applicant is amongst those AmaMpondomise who hold competing claims for recognition as king. In the founding affidavit he describes himself as “the senior Chief of AmaMpondomise”. The fifth respondent in this application describes himself as “a great grandson of the AmaMpondomise King Dosini Royal Family”, which is the sixth respondent herein.

[3] The first to the fourth respondents, being the President of the Republic of South Africa, the Minister of Co-operative Governance and Traditional Affairs, the Government of the Republic of South Africa and the Commission for Traditional Leaders respectively, were all cited *nomine officio* by the applicant in these proceedings. The fifth and the sixth respondents were not cited as parties. At the hearing of the application they presented themselves at court armed with a substantive application for joinder as parties.

### **Preliminary issues**

[4] The application for joinder was based upon the substantial interest held by the fifth and the sixth respondents in the outcome of the proceedings. They wished initially to seek a postponement of the matter to enable them to file further affidavits. It was apparent that in principle they were supportive of the application but were opposed to the adjudication by this court upon the issue of the applicant’s claim to be the person entitled to be King of AmaMpondomise. The application for joinder was opposed by the applicant. However, the parties and their legal representatives very properly and maturely applied their minds to the issue and agreed that the applicant

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<sup>1</sup> In isiXhosa, an official language of this country which is spoken by AmaMpondomise, “Ama” is a plural noun prefix used in conjunction with the name of such a community. The prefix is often dropped where reference is made in the English language to the community. So too is the definite article imported with frequency and used either in conjunction with the prefix “Ama” or replacing it. In some of the older source material provided in this application, there is reference made to “the Pandomise”. No distinctions of identification are to be drawn from the different occurrences of the terms “AmaMpondomise”, “the AmaMpondomise”, or “the Pandomise”. In this judgment the use of the term “AmaMpondomise” is preferred.

would withdraw his opposition to the joinder application and would seek no relief declaring him to be King of AmaMpondomise. This paved the way for the fifth and the sixth respondents to be joined as parties in the application and to participate therein without first requiring a postponement.

[5] On the issue of the appropriate order to make in respect of the costs of the application for joinder, the court had regard to two main considerations. The first was that the substantial interest of the fifth and the sixth respondents was obvious to the applicant from the outset. They ought to have been cited by the applicant initially when the proceedings were commenced by the issue of the notice of motion in early May 2018. The second consideration was that, given the importance of the claim at the heart of the application and the competing claims held by prominent members of the community to be appointed as King of AmaMpondomise, it was somewhat unreasonable of the fifth and the sixth respondents not to bring their application for joinder much earlier and at a stage before their joinder ran the risk of being the cause of a postponement of the application with substantial wasted costs being incurred. Upon due consideration of all the factors, the following order was made:

- “1. The applicants in the joinder application are hereby joined as the fifth and the sixth respondents.
2. No order is made in respect of the costs occasioned by the joinder application.”

[6] Soon after the application was issued by the applicant it became opposed by the first to the fourth respondents. At the hearing of the matter counsel who appeared on behalf of the first respondent sought the leave of the court to introduce a further affidavit deposed to on behalf of the first respondent in which his opposition to the application was withdrawn. It is apposite to record that this affidavit had been deposed to prior to there being any indication of a resolution of the issues between the applicant and the fifth and the sixth respondents pertaining to the latters' joinder and their opposition to the applicant seeking an order declaring him to be the rightful heir to AmaMpondomise kingship. Whatever form the future conduct of the application was to take was to be without opposition by the first respondent.

[7] There being no opposition by any of the parties to the application, the following order was made:

“The further affidavit deposed to on behalf of the first respondent on 29 April 2019 and effectively withdrawing the opposition by the first respondent, is hereby accepted as part of the main application.”

### **The relief sought by the applicant**

[8] The relief remaining in the applicant’s amended notice of motion was expressed as follows:

- “1. Condoning the late institution of these proceedings and allowing the applicant to proceed accordingly;
2. Reviewing and setting aside the decision of the President of the Republic of South Africa, the substance of which was that AmaMpondomise never had a Kingship and thus refusing to instate or re-instate it (the kingship);
3. Declaring that AmaMpondomise did have a kingship;
4. Instating or reinstating or restoring the said kingship;
5. ...
6. Costs against the 1<sup>st</sup> and the 3<sup>rd</sup> respondents and against the remaining respondents only in the event of them opposing this application; and
7. Granting such further or alternative relief as this court may deem appropriate.” (sic)

### **Condonation**

[9] The decision sought to be reviewed and set aside was taken by the former President of the Republic of South Africa, J.G. Zuma (“the former President”) and

was communicated in a letter dated 21 July 2017 written by the Acting Head: Legal and Executive Services in the Presidency, G Mphaphuli (“Mphaphuli”).

[10] The parties were *ad idem* that in taking the impugned decision the former President was performing an administrative action<sup>2</sup>. Accordingly, the manner in which the applicant should challenge the decision is governed by the provisions of the Promotion of Administrative Justice Act<sup>3</sup> (“PAJA”). In terms of the provisions of s 7 (1) of PAJA, proceedings for judicial review must be instituted without unreasonable delay, but in any event not later than 180 days after the applicant became aware of the decision. In order to comply with these provisions the applicant was obliged to institute these proceedings prior to 21 January 2018. Inasmuch as the applicant instituted proceedings only in early May 2018 it was incumbent upon him to give a full explanation for the delay<sup>4</sup> and to seek condonation therefor. Upon consideration of the explanation and an acceptance thereof as reasonable the court is empowered to grant condonation, thereby permitting the application to proceed<sup>5</sup>.

[11] The explanation offered by the applicant in the founding affidavit can be summarised as follows. As an individual the applicant had no money to fund litigation. Moreover, the effect of the decision taken by the former President was upon AmaMpondomise as a community and it was incumbent upon the applicant to consult broadly with members of the community before taking the decision to institute the proceedings. Central to the consultative process was also the question of funding. The process involved what the applicant describes as “countless local communities located in numerous villages” and lasted until March 2018. According to the applicant “the royal house took the decision to litigate during the first week of April 2018”, once there was a measure of comfort that there was enough financial support. It was only then that the applicant’s attorney of record commenced the process of collecting relevant material and engaging consultations with senior and

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<sup>2</sup> The inquiry is whether the task itself is administrative or not. The focus is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she has exercised. *President of the Republic of South Africa and Others v South African Rugby Football Club and Others* 2000 (1) SA 1 (CC) par [141].

<sup>3</sup> Act 3 of 2000.

<sup>4</sup> *Van Wyk v Unitas Hospital and Another* 2008 (2) SA 472 (CC) par [22].

<sup>5</sup> Section 9 of PAJA permits an extension of the 180 day time period in appropriate circumstances.

junior counsel. This all culminated in the finalisation of a founding affidavit during the second week of May 2018. The application was then launched without further delay.

[12] In explaining the basis for their opposition to the applicant being granted condonation for his failure to commence proceedings within the prescribed 180 day period, counsel for the second, third and fourth respondents submitted that the applicant had not given sufficient details to enable the court to conclude that the explanation for the delay was reasonable. What was required, it was submitted, was an accurate summary of all the dates upon which consultative meetings had been held, and the names of the places where they had been held, coupled with a more detailed summary of the dates upon which the legal team had taken steps to advance the preparation of the application. In the light of the obvious effect of the decision upon the broader community and the applicant's candid disclosure that without community assistance he was impecunious to commence litigation, the criticism holds little merit. Moreover, the period of time between the decision to litigate and the institution of proceedings, in which the legal team was involved, is not one which is suggestive of an unusual delay which calls for a more detailed explanation.

[13] The court has a discretion whether or not to grant condonation. That discretion must be exercised in a judicial manner, with due regard to the nature of the relief sought, the extent of the effect of the cause of the delay upon the administration of justice, the reasonableness of the explanation for the delay, whether or not the delay has caused prejudice to the other parties, the importance of the issue for determination to the parties and the applicant's prospects of success.<sup>6</sup>

[14] The overarching focus in testing whether or not condonation should be granted is a consideration of what outcome would be in the interests of justice. There can be no doubt about the fact that the central issue with which this application is concerned is of considerable importance to AmaMpondomise as a community and the applicant as one of their senior traditional leaders. The applicant has given a satisfactory and reasonable explanation for the delay in commencing the

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<sup>6</sup> For example, see *Mzizi v State* [2009] 3 All SA 246 (SCA) par [9]; *S v Mohlathe* 2000 (2) SACR 530 (SCA).

proceedings, which in itself was not inordinate. Moreover, the applicant enjoys good prospects of success in the application. Accordingly, I am of the view that it is in the interests of justice to grant the applicant condonation for the delay in commencing these proceedings.

### **The Tolo Commission**

[15] The letter written by Mphaphuli on 21 July 2017 in which the decision taken by the former President is communicated<sup>7</sup> raises a number of issues which the applicant relies upon. Attached thereto was copy of the former President's minute, bearing the number 323, which was dated 13 December 2016. Paragraph 4 of Mphahuli's letter states:

“[t]he court set aside the decision of the Commission<sup>8</sup>. After considering the above mentioned judgment, the Commission decided to re-investigate the claim of your client. Having reconsidered the claim of your client, the Commission came to the conclusion that the claim for the restoration of kingship of AmaMpondomise of Qumbu and Tsolo be dismissed. The recommendations of the Commission in this regard were conveyed to me in terms of section 26 of the Traditional Leadership and Governance Framework Act, 2003.”<sup>9</sup>

[16] Paragraph 5 of Mphaphuli's letter continues, stating that:

“[a]fter taking into consideration the recommendations of the Commission, the President declined the kingship claim of Nkosi Loyiso Matiwane<sup>10</sup> and directed the Minister of Co-operative Governance and Traditional Affairs to take the

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<sup>7</sup> It is apparent from the application papers that the decision was actually taken by the former President on 13 December 2016. Notwithstanding the obvious importance thereof and despite a formal application having been made to the former President, no response was forthcoming in respect of the application by AmaMpondomise which lay behind the decision of the former President until a letter from the attorney of AmaMpondomise dated 6 July 2017 appears to have prompted Mphaphuli's letter dated 21 July 2017.

<sup>8</sup> The reference to “the Commission” in the letter is a reference to the Nhlapho Commission, whose decision came under the scrutiny of this court (per Griffiths J) under case number 2062/2011. The reference to “the court” is a reference to these proceedings.

<sup>9</sup> Act 41 of 2003.

<sup>10</sup> The applicant's brother, who passed away prior to the hearing of the Nhlapho Commission. The applicant was substituted for his late brother alongside two other claimants.

necessary steps to implement the decision. Attached is the President's Minute containing the President's decision."

[17] The former President's minute attached to the letter states the following in the first three unnumbered paragraphs:

"WHEREAS the Commission on Traditional Leadership Disputes and Claims<sup>11</sup> has submitted its recommendations in respect of the kingship claim of the AmaMpondomise to the President of the Republic of South Africa and the Minister for Co-operative Governance and Traditional Affairs in terms of section 26 (2) of the Traditional Leadership and Governance Framework Act, 2003, (Act No 41 of 2003) (Framework Act);

AND WHEREAS section 26 (3) of the Framework Act requires the President to take a decision on the recommendations of the said Commission within 60 days from the date the recommendations having been conveyed to the President;

NOW THEREFORE, in terms of section 26 (3) of the Framework Act, I hereby decline the kingship claims of the following claimants:

1. Nkosi Loyiso Matiwane;
2. Mr Vicks Velile Tonjeni; and
3. Mr Masibulele Maseti."

[18] The Traditional Leadership and Governance Framework Act 41 of 2003 first came into operation on 24 September 2004. It was later amended by the enactment of the Traditional Leadership and Governance Framework Amendment Act 23 of 2009. In order to distinguish between the two pieces of legislation in this judgment, Act 41 of 2003 shall be referred to as "the Original Act" and Act 23 of 2009 shall be referred to as "the Amended Act".

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<sup>11</sup> The reference is to the Tolo Commission established as the successor to the Nhlapho Commission upon the amendment of Act 41 of 2003 as referred to hereinafter.

[19] In accordance with the provisions of the Original Act the claim for the kingship of AmaMpondomise was lodged with and investigated by the Nhlapho Commission. As reflected in the former President's minute there were three claimants. The Nhlapho Commission was established in terms of the provisions of s 22 of the Original Act, which conferred upon it powers to decide on any dispute and claims concerning traditional leadership. Accordingly, the Nhlapho Commission had the power and authority to *mero motu* or upon request by way of the lodgement of a claim or the declaration of a dispute for incumbency, conduct an investigation. Its powers were conferred upon it by the provisions of s 25 of the Original Act<sup>12</sup>. In

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<sup>12</sup> Section 25 of Act 41 of 2003 provided as follows: "( 1 ) The Commission operates nationally and has authority to decide on any traditional leadership dispute and claim contemplated in subsection (2) and arising in any province.

(2) (a) The Commission has authority to investigate, either on request or of its own accord-

- (i) a case where there is doubt as to whether a kingship, senior traditional leadership or headmanship was established in accordance with customary law and customs;
- (ii) a traditional leadership position where the title or right of the incumbent is contested;
- (iii) claims by communities to be recognised as traditional communities;
- (iv) the legitimacy of the establishment or disestablishment of "tribes";
- (v) disputes resulting from the determination of traditional authority boundaries and the merging or division of "tribes"; and
- (vi) where good grounds exist, any other matters relevant to the matters listed in this paragraph, including the consideration of events that may have arisen before 1 September 1927.

(b) A dispute or claim may be lodged by any person and must be accompanied by information setting out the nature of the dispute or claim and any other relevant information.

(c) The Commission may refuse to consider a dispute or claim on the ground that-

- (i) the person who lodged the disputer claim has not provided the Commission
- (ii) the dispute is to be dealt with in terms of section 21(l)(a) in a case where

(3) (a) When considering a dispute or claim, the Commission must consider and apply customary law and the custom of the relevant traditional community as they were when the events occurred that gave rise to the dispute or claim with relevant or sufficient information; or section 21(l)(b) does not apply.

(b) The Commission must-

- (i) in respect of a kingship, be guided by the criteria set out in section 9(1)(b) and such other customary norms and criteria relevant to the establishment of a kingship; and
- (ii) in respect of a senior traditional leadership or headman ship, be guided by the customary norms and criteria relevant to the establishment of a senior traditional leadership or headman ship, as the case may be.

(c) Where the Commission investigates disputes resulting from the determination of traditional authority boundaries and the merging or division of "tribes", the Commission must, before taking a decision in terms of section 26, consult with the Municipal Demarcation Board established by section 2 of the Local Government: Municipal Demarcation Act, 1998 (Act No. 27 of 1998).

(4) The Commission has authority to investigate all traditional leadership claims and disputes dating from 1 September 1927, subject to subsection (2)(a)(vi).

(5) The Commission must complete its mandate within a period of 5 years or within such longer period as the President may determine.

(6) Sections 2,3,4,5 and 6 of the Commissions Act, 1947 (Act No. 8 of 1947), apply, with the necessary changes, to the Commission."

terms of the provisions of s 26 of the Original Act, the resultant decision of the Commission had to be conveyed to the President “for immediate implementation”<sup>13</sup>.

[20] In terms of the provisions of s 11 as read with s 22 of the Amended Act the Tolo Commission was established as the successor in law of the Nhlapho Commission.<sup>14</sup>

[21] The powers and authority of the Tolo Commission are prescribed by the provisions of s 25 of the Amended Act.<sup>15</sup> A comparison of the two empowering

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<sup>13</sup> Section 26 of Act 41 of 2003 provided as follows: “(1) A decision of the Commission is taken with the support of at least two thirds

(2) A decision of the Commission must, within two weeks of the decision being taken, 45 of the members of the Commission.

be conveyed to-

(a) the President for immediate implementation in accordance with section 9 or 10 where the position of a king or queen is affected by such a decision; and

(b) the relevant provincial government and any other relevant functionary which must immediately implement the decision of the Commission in accordance 50 with applicable provincial legislation in so far as the implementation of the decision does not relate to the recognition or removal of a king or queen in terms of section 9 or 10.

(3) Any decision taken by the Commission must be conveyed to the President.”

<sup>14</sup> Section 11 and 22 of Act 23 of 2009 provide as follows: “11. Section 9 of the principal Act is hereby amended by—

(a) the substitution in subsection (1)(a)(ii) for subparagraph (bb) of the following subparagraph:

“(bb) provide the President and the Minister with reasons for the identification of that person as king or queen;”

(b) the substitution in subsection (1)(b) for the words preceding subparagraph (i) of the following words: “The President must, on the recommendation of the Minister and subject to subsection (3), recognise a person so identified in terms of paragraph

(a)(i) as king or queen, taking into account”;

(c) the substitution in subsection (1)(b) of subparagraph (ii) of the following subparagraph:

“(ii) whether a kingship or queenship has been recognised in terms of section 2A.”.

(d) the substitution in subsection (3) for the words preceding paragraph (a) of the following words:

“Where there is evidence or an allegation that the identification of a person referred to in subsection (1) was not done in terms of customary law, customs or processes, the President on the recommendation of the Minister—”; and

(e) the substitution for subsection (4) of the following subsection:

“(4) Where the matter that has been referred back to the royal family for recognition and resolution in terms of subsection (3) has been reconsidered and resolved, the President on the recommendation of the Minister must recognise the person identified by the royal family if the President is satisfied that the reconsideration and resolution by the royal family has been done in accordance with customary law.”.

22. (1) There is hereby established, with effect from the date of coming into operation of the Traditional Leadership and Governance Framework Amendment Act, 2009, a commission known as the Commission on

Traditional Leadership Disputes and Claims.

(2) The Commission must carry out its functions in a manner that is fair, objective and impartial.”

<sup>15</sup> Section 25 of Act 23 of 2009 provides as follows: “(1) The Commission operates nationally in plenary and provincially in committees and has authority to investigate and make recommendations on any traditional leadership dispute and claim contemplated in subsection (2).

(2) (a) The Commission has authority to investigate and make recommendations on—

sections reveals that the Tolo Commission enjoys less extensive powers than those enjoyed by the Nhlapho Commission. There are two aspects of the reduction in powers which are of importance in the circumstances of the present application.

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- (i) a case where there is doubt as to whether a kingship or, principal traditional leadership, senior traditional leadership or headmanship was established in accordance with customary law and customs;
  - (ii) a case where there is doubt as to whether a principal traditional leadership, senior traditional leadership or headmanship was established in accordance with customary law and customs;
  - (iii) a traditional leadership position where the title or right of the incumbent is contested;
  - (iv) claims by communities to be recognised as kingships, queenships, principal traditional communities, traditional communities, or headmanships;
  - (v) the legitimacy of the establishment or disestablishment of 'tribes' or headmanships;
  - (vi) disputes resulting from the determination of traditional authority boundaries as a result of merging or division of 'tribes';
  - (viii) all traditional leadership claims and disputes dating from 1 September 1927 to the coming into operation of provincial legislation dealing with traditional leadership and governance matters; and
  - (ix) gender-related disputes relating to traditional leadership positions arising after 27 April 1994.
- (b) A dispute or claim may be lodged by any person and must be accompanied by information setting out the nature of the dispute or claim and any other relevant information.
- (c) The Commission may decide not to consider a dispute or claim on the ground that the person who lodged the dispute or claim has not provided the Commission with relevant or sufficient information or the provisions of section 21 have not been complied with.
- (3) (a) When considering a dispute or claim, the Commission must consider and apply customary law and the customs of the relevant traditional community as they applied when the events occurred that gave rise to the dispute or claim.
- (b) The Commission must—
- (i) in respect of a kingship or queenship, be guided by the criteria set out in section 2A (1) and 9(1); and
  - (ii) in respect of a principal traditional leadership, senior traditional leadership or headmanship, be guided by the customary law and customs and criteria relevant to the establishment of a principal traditional leadership, senior traditional leadership or headmanship, as the case may be.
- (c) Where the Commission investigates disputes resulting from the determination of traditional authority boundaries and the merging or division of 'tribes', the Commission must, before making a recommendation in terms of section 26, consult with the Municipal Demarcation Board established by section 2 of the Local Government: Municipal Demarcation Act, 1998 (Act No. 27 of 1998) where the traditional council boundaries straddle municipal and or provincial boundaries.
- (4) Subject to subsection (5) the Commission—
- (a) may only investigate and make recommendations on those disputes and claims that were before the Commission on the date of coming into operation of this chapter; and
  - (b) must complete the matters contemplated in paragraph (a) within a period of five years, which period commences on the date of appointment of the members of the Commission in terms of section 23, or any such further period as the Minister may determine.
- (5) Any claim or dispute contemplated in this Chapter submitted after six months after the date of coming into operation of this chapter may not be dealt with by the Commission.
- (6) The Commission—
- (a) may delegate any function contemplated in this section excluding a matter related to kingships or queenships to a committee referred to in section 26A; and
  - (b) must coordinate and advise on the work of the committees referred to in section 26A.
- (7) Sections 2, 3, 4, 5 and 6 of the Commissions Act, 1947 (Act No. 8 of 1947), apply, with the necessary changes, to the Commission.
- (8) The Commission may adopt rules for the conduct of the business of the Commission as well as committees referred to in section 26A.
- (9) Provincial legislation must provide for a mechanism to deal with disputes and claims related to traditional leadership: Provided that such a mechanism must not deal with matters to be dealt with by the Commission"

They have been referred to recently by the Supreme Court of Appeal. In a judgment<sup>16</sup> delivered on behalf of the full court Mothle JA stated at paragraph [20]:

“It was the function of the old Commission to *mero motu* or on lodging of a claim or declaring a leadership dispute for incumbency, in terms of s 25 (2) (a) (iii) of the Original Act, to conduct an investigation and take a decision in resolving the leadership dispute. Similarly, it was also the function of the new Commission on lodging of a claim or declaring a leadership dispute to investigate and make a recommendation in terms of s 25 (2) (a) (iii) of the Amended Act. The new Commission did not have the authority to investigate *mero motu* or take a decision after investigation.”

[22] It is common cause between the parties that the Nhlapho Commission performed its functions in terms of the powers conferred upon it by the provisions of the Original Act. On 9 February 2010 it produced its report which contained its decision upon the claim regarding AmaMpondomise kingship. According to the content of the answering affidavits filed on behalf of the fourth respondent, its term of office came to an end on 31 January 2010. Against this factual background there is no room for any contention which suggests that the Nhlapho Commission left behind it the claim regarding AmaMpondomise kingship as an unresolved claim, pending and requiring the attention of its successor in law, the Tolo Commission.

[23] The essence of the Nhlapho Commission’s decision was that AmaMpondomise did not have a kingship and accordingly there was no kingship to be restored. Accordingly it decided that the three claims before it were unsuccessful. In making this decision and communicating it, the Nhlapho Commission became *functus officio*. Moreover, its term of office, characterised by the powers and authority conferred upon it by the provisions of the Original Act, had come to an end by virtue of the enactment and coming into operation of the Amended Act.

[24] As he was entitled to do, the applicant challenged the decision of the Nhlapho Commission. It amounted to administrative action which had an adverse effect upon

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<sup>16</sup> Mphephu v Mphephu – Ramabulana and Others (948/17) [2019] ZASCA 58 (12 April 2019)

the applicant. He held the view that there were good grounds upon which the decision of the Nhlapho Commission should be set aside. Accordingly he instituted review proceedings in accordance with the provisions of PAJA. Those proceedings were brought under case number 2062/2011 in this court and culminated in a judgment of Griffiths J which contained the following order:

“1. The decision of the Commission on Traditional Leadership Disputes and Claims (the sixth respondent), the substance of which was that AmaMpondomise never had a kingship and thus the refusal to instate or re-instate such kingship, is hereby reviewed and set aside.

2. The first, second, third and sixth respondents are ordered to pay the costs of this application, such costs to include the costs of two counsel where such were employed.”

[25] There has been no appeal against the judgment delivered by Griffiths J. That judgment was delivered on 13 December 2013.

[26] Griffiths J did not make an order in terms of the provisions of s 8 (1) (c) of PAJA, remitting the matter back to the decision maker. Nothing in the judgment suggests that the court was requested to make such an order.

[27] The judgment of Griffiths J did not set aside the proceedings of the Nhlapho commission. No such relief was contained in the notice of motion upon which the proceedings were premised. In the circumstances, those proceedings, in their completed form, remain extant. Only the decision taken by the Commission on those proceedings was set aside.

[28] One needs to look no further than the content of paragraph 4 of Mphaphuli's letter dated 21 July 2017 to establish what happened in response to the judgment of Griffiths J which set aside the decision taken by the Nhlapho Commission. It records in explicit terms, unequivocally, that the Commission considered the judgment and decided to re-investigate the claim relating to the kingship of AmaMpondomise. Given that the judgment was delivered on 13 December 2013, the decision taken by

the Commission to reinvestigate was undoubtedly that of the Tolo Commission. The decision was taken *mero motu*. Governed as it is by the provisions of section 25 of the Amended Act, the Tolo Commission had no power to take such a decision and to commence a re-investigation of a claim which, in any event, had been investigated to completion, however unsatisfactorily, by the Nhlapho Commission. Accordingly, there is no justification for the decision of the Tolo Commission to re-investigate the claim to be found in the provisions of s 11 (b) of the Amended Act<sup>17</sup>. Nor was any claim or dispute placed before the Tolo Commission in order to activate its lawful and valid engagement therewith. Nothing in the judgment or orders of Griffiths J is capable of an interpretation which validly places the claim relating to AmaMpondomise kingship before the Commission.

[29] It follows that the re-investigation of the claim relating to AmaMpondomise kingship by the Tolo Commission was unlawful. It acted *ultra vires*, without statutory authority. It sought to respond to the judgment of Griffiths J *mero motu* and as a successor in law to a Commission which was *functus officio*. It acted *ultra vires* when it purported to invoke the provisions of s 11 of the Amended Act. For these reasons alone, the two reports prepared by the Tolo Commission and its recommendations are invalid.

[30] Three answering affidavits were filed on behalf of the fourth respondent. A fourth affidavit of no significance was also filed as a confirmatory affidavit. One affidavit makes no allegation about the method by which the claim relating to AmaMpondomise kingship came to be reconsidered by the Tolo Commission. It concentrates in the main upon the work of the Nhlapho Commission and concludes with a brief summary of the work of the Tolo Commission. The second answering affidavit, deposed to by the Chairperson of the Tolo Commission, denies that the Tolo Commission had no jurisdiction “to entertain the AmaMpondomise kingship claim” and refers to the provisions of the Original Act in support of the contention that the reconsideration was valid. It is, moreover, silent on the method used to place the matter before the Tolo Commission. The third affidavit put up as an answering affidavit deposed to on behalf of the fourth respondent was deposed to by the

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<sup>17</sup> Note 13 *supra*.

Secretary to the National House of Traditional Leaders, who described himself also as the “Chief Director of House Traditional Leaders”, and who was the current secretary of the Tolo Commission. This is the only affidavit which gives any factual information about the mechanism by which the Tolo Commission came to reconsider the claim relating to AmaMpondomise kingship. The explanation is offered on behalf of the Tolo Communication in the following words:

“It resolved to re-investigate the amaMpondomise dispute. The decision was informed in the main by the fact that Griffiths J reviewed and set aside the decision of Nhlapo Commission on a procedural irregularity which can be addressed by simply affording amaMpondomise another opportunity to present their case before the Commission.”

[31] The allegation stating that the decision to re-investigate the claim relating to AmaMpondomise kingship was a decision taken by that Commission is consistent with the allegations made in the applicant’s founding affidavit, the content of paragraph 4 of Mphaphuli’s letter and the content of an internal memorandum prepared by Mphaphuli and furnished to the applicant as part of the record of proceedings after service of the initial notice of motion and founding affidavit had been served upon the respondents<sup>18</sup>. Accordingly, it was filed, properly, along with the applicant’s supplementary founding affidavit. It records that:

“[a]fter Griffiths J’s judgment, the Commission re-commissioned the investigation into the claims of AmaMpondomise Kingship, and prepared a report to the President for consideration.”

In the circumstances, it is established in the application papers as a fact which must be accepted that the Tolo Commission *mero motu* decided to reinvestigate the claim relating to AmaMpondomise kingship.

[32] Even if the court is incorrect in its conclusion that the further investigations and reports by the Tolo Commission were *ultra vires* and should not have been

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<sup>18</sup> These are review proceedings which are governed by rule 53 of the Uniform Rules of Court. In terms thereof, upon receipt of an application for review of a decision the party in whose possession it is, and upon whom service has occurred, is obliged to produce the record of proceedings pertaining to the impugned decision and to make it available to the applicant.

considered by the former President, the applicant has alleged a number of criticisms of the work of the Tolo Commission upon which the submission was made that its recommendations should not have been accepted. The more important of these are dealt with in the following paragraphs.

[33] When dealing with the extent of substantive fairness demonstrated in the work of the Nhlapo Commission in his judgment, Griffiths J stated *inter alia* that:<sup>19</sup>

“...The more objective material which emanated from sources outside the AmaMpondomise, such as writings of local magistrates and missionaries of the time, the report of the Cape Law Commission (of 1893) and material from other writers such as F Brownlee and Stainier Green, which were easily obtainable, appears to have been largely overlooked.

An example of this is the conclusion reached by the commission that no evidence existed of any one of the AmaMpondomise traditional leaders having established a kingship. In the founding affidavit the applicant referred to various sources which, so he claimed, confirmed the fact that the AmaMpondomise was one of the four kingdoms in the Eastern Cape. Some of the sources referred to were...

Based on this and other material, the applicant submitted that these sources proved conclusively that the existence of the AmaMpondomise nation is as ancient as the various other nations whose kingships have been recognized, and that the AmaMpondomise have equal status with the other kingdoms having been one of the four original traditional communities (nations) who settled in the present day Transkei region.

The Commission’s response to this was, in effect, to maintain that these sources do not show that the AmaMpondomise were ever a kingship. Nowhere in the answering affidavit does the Commission state that it took these sources into account, that it analysed them fully and properly and that on a proper understanding of them, it concluded that such authorities do not establish the existence of a kingship.”

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<sup>19</sup> Paragraphs [25] to [28] of the judgment.

[34] Despite an assertion that the Tolo Commission decided to reinvestigate the claim relating to AmaMpondomise kingship in response to an analysis of the judgment of Griffiths J their work and the resultant recommendations contained in their two reports appears to continue to suffer from the same lack of substantive fairness. The Tolo Commission attached to its report lists of references it had used in coming to its recommendations. The following references, identified by the applicant in his founding affidavit, do not appear in those lists. In the answering affidavits, the fourth respondent does not advance any satisfactory factual response to dispel the impression that the Commission had no regard thereto:

- “The Reminiscences of Sir Walter Stanford” *Van Riebeeck Press; Edited by J.W. Macquarrie*;
- Letter from Resident Magistrate Leary, Mt Frere to the Chief Magistrate, dated 22 December 1903;
- Historical Atlas of Southern Africa Map, *E.A. Walker*;
- “Hidden Struggles in Rural South Africa” *Buddy and Beinart*;
- “Blue Book on Native Affairs” *G.M Theal*;
- R v Mhlontlo, Cape Archives, C.A. King Williams Town Cases 1/1/1/J/22;
- Report of the Griqualand East Land Commission;
- Letter from the Chief Magistrate of the Transkeian Authorities to the Secretary for Native Affairs dated 26 March 1930;
- Certificate issued by the Secretary for Native Affairs to the Chief Magistrate Umtata (Mthatha) dated 19 December 1949.”

[35] The allegations made in this regard are met by generalised denials in the answering affidavits, with the caveat that the court is referred to the content of the Tolo Commission’s reports. Such a response is insufficient to deflect what must then be accepted as valid and serious criticism voiced by the applicant in respect of the extent of the work done by the Tolo Commission and the poverty evident in its reports.

[36] Specific mention is made by Griffiths J in his judgment<sup>20</sup> of the fact that the Nhlapo Commission had failed to have any regard to the documentation prepared by Professor Pieres on AmaMpondomise kingship. The judgment records that Professor Pieres is an historian “who is clearly well versed in the very subject matter which the Commission was mandated to decide.” The judgment records that “Professor Pieres was a member of the Commission and, according to his letter, left the Commission for these hearings for the very reason that he had made clear his view that the AmaMpondomise was a kingdom. In the circumstances, one would have thought that the Commission would have turned to him as an expert in this field and taken advantage of his knowledge and obvious expertise. By its own admission it clearly did not.”

[37] In an attempt to meet this valid criticism in its purported reinvestigation of the issue of AmaMpondomise kingship, the Tolo Commission appears to have had some regard to the documents prepared by Professor Pieres. However, it is clear from the record of proceedings, in itself an unsatisfactory record, that no consultation was held with Professor Pieres in order to interrogate the strong views expressed in the documentation which, indeed, were unequivocal in their support of a finding that AmaMpondomise had a kingship. All that is contained in the second report of the Tolo Commission is a recordal of the evidence relied upon by Professor Pieres in a letter dated 23 November 1994 and a brief comparison of that evidence with other contradictory evidence. The conclusion then recorded is that the evidence relied upon by Professor Pieres is inaccurate and cannot be used to support AmaMpondomise kingship. Other evidence relied upon by Professor Pieres is simply described as “selective”. No analysis of the different pieces of evidence is evident in either the record of proceedings or the second report produced by the Tolo Commission to justify its dismissive conclusion at the end of the report that “[t]he evidence brought by Professor Pieres in support of AmaMpondomise kingship is therefore not convincing”. To simply brand evidence chosen to be highlighted because it, more than other evidence, is supportive of a particular finding as “selective” and immediately thereafter dismiss it as “unconvincing” is an attitude not demonstrative of the sort of careful, scholarly analysis that one is entitled to expect

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<sup>20</sup> Paragraph 31.

from a specialist commission. Where such a dismissive attitude is evident it must have an adverse effect upon the integrity of the recommendations made by such a commission.

[38] The lack of evidence of scholarly engagement with available evidence and the frequently glib and dismissive manner in which the Tolo Commission dealt with it is apparent throughout its two reports. A reading of the reports leaves an overwhelming impression that for every piece of evidence identified as being supportive of the existence of AmaMpondomise kingship, the commission selected some feature identified elsewhere which was not in itself completely dispositive of the argument and elevated it to become a clear reason why the supportive evidence must be rejected out of hand. One example of this approach is demonstrated by the Commission's treatment of the submissions made in respect of evidence of AmaMpondomise marriages involving a Royal partner. The second Tolo Commission report contains the following:

"The other argument by AmaMpondomise in their submission to the Commission to justify their claim that because there were some Mpondomise "chiefs" marrying from other Royal houses is a qualifying factor for kingship. This is not always the case as there are kings who had married from royal houses with no kingship." (sic)

This statement is not altogether clear but it is demonstrative of an attitude of almost principalled and dismissive avoidance of a full and meaningful engagement with the submissions actually made by AmaMpondomise based upon the evidence submitted by them. The expression of the term "chiefs" in inverted commas conveys the impression that the Commission was not convinced that AmaMpondomise had such leaders. If this is correct, a negative bias against AmaMpondomise kingship in principle is detectable. Whilst there may be truth in the concluding observation made by the Commission, the observation itself leaves room for a factual finding that is indeed demonstrative of a royal marriage confirming kingship. The question as to whether the history of AmaMpondomise to which the factor may be relevant reveals evidence of kingship is simply not addressed and not answered. It seems that overall the evidence, to the extent that it was identified, was not approached in a

manner which enquired whether it established AmaMpondomise kingship on a balance of probabilities, but whether it was established by the claimants beyond a reasonable doubt. Even if the latter standard were the appropriate one, which in my view is not the case, the lack of intellectual engagement with the material, or academic evaluation of it in all its complexity, that is evident in the reports militates against a conclusion that the Commission had validly excluded grounds which gave rise to a reasonable doubt about the correctness of their findings.

[39] The applicant has alleged that the Tolo Commission failed to afford AmaMpondomise sufficient opportunity to make representations before it. This is disputed in the fourth respondent's response. In the light of the other difficulties evident in the *ultra vires* and insufficient work done by the Tolo Commission it is not necessary for the purposes of this application to resolve this dispute.

[40] A Commission such as the fourth respondent is an organ of state performing public functions in terms of the Amended Act which may adversely affect the rights of persons where those functions have a direct legal effect in the envisaged in PAJA. The proceedings of the Tolo Commission constitute administrative action and its decisions are of an administrative nature. The proceedings and the decisions are therefore reviewable under PAJA<sup>21</sup>.

[41] In the light of the various criticisms directed at the validity and sufficiency of the work done by the Tolo Commission in respect of the claims pertaining to AmaMpondomise kingship which emerged in the applicant's founding affidavits and was developed during argument, counsel for the fourth respondent submitted that the court could not make any decision thereon because the applicant had not sought a review of the proceedings of the Tolo Commission, or its decisions, in the amended notice of motion. In any event, submitted counsel for the fourth respondent, the proceedings and the decisions were demonstrated by the answering affidavits to be above reproach.

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<sup>21</sup> *Mphephu v Mphephu – Ramabulana and Others* (948/17) [2019] ZASCA 58 (12 April 2019) par [16].

[42] In my view, insufficient merit is to be found in the submissions made on behalf of the fourth respondent to allow the matter to rest there. The conclusion reached upon a consideration of the material placed before the court is that the Tolo Commission failed to investigate claims relating to AmaMpondomise kingship in a manner which was sufficiently scholarly, logical and fair to permit the resultant recommendations to be regarded as defensible. Moreover, for the reasons identified, the relevant proceedings were *ultra vires* and its reports and recommendations are invalid and ought to be set aside as well<sup>22</sup>.

[43] Section 172(1) of the Constitution compels every court to declare invalid any conduct inconsistent with the Constitution<sup>23</sup>. Exactly the same issues would have emerged in the founding affidavits as is the case presently were the amended notice of motion also to have sought an order that the proceedings of the Tolo Commission and its recommendations be reviewed and set aside. It was incumbent upon the respondents to furnish the record of the proceedings of the fourth respondent and to respond to the allegations made by the applicant in the founding affidavits. They have done so. No reason exists why an appropriate order upon a review of the relevant proceedings and recommendations cannot be made on the application papers as they stand. The nature of such an order is intimately connected with the enquiry relating to the decision of the former President in response to the Tolo Commission recommendations. In the circumstances of this matter it is in the interests of justice, certainty and finality that the invalidity of the relevant proceedings is not left undisturbed. Of final comfort to the fourth respondent is the fact that the applicant's amended notice of motion, in its final prayer, keeps the door open for "further and/or alternative relief".

### **The decision of the President of the Republic of South Africa.**

[44] It is plain that where a decision was made by the former President which was based upon recommendations made by the Tolo Commission which were invalid, that decision cannot be valid and falls to be set aside upon review. However, in the

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<sup>22</sup> Financial Services Board and Another v De Wet and Others 2002 (3) SA 525 (c) par [270].

<sup>23</sup> Constitution of the Republic of South Africa, 1996.

present matter there are additional features which render the enquiry a more complex one.

[45] Whilst the opposition of the first respondent to the relief claimed by the applicant was withdrawn at the commencement of these proceedings, counsel for the first respondent was clear in the expression of her mandate to be the submission that the court should still have regard to the affidavits filed on behalf of the first respondent was deposed to by the Director – General and Secretary to Cabinet (based in the Presidency). For the sake of convenience it is referred to as the first respondent’s answering affidavit. Confirmatory affidavits were filed, including an affidavit deposed to by Mphaphuli.

[46] It is common cause that subsequent to the production by the fourth respondent of its reports and on 12 December 2016 at Mahlamba Ndlopfu Presidential House, a meeting with the former President and the second respondent was attended by the Secretary of the Tolo Commission. The latter filed an affidavit on behalf of the fourth respondent in which the following allegations are set out:

“23. At the start of the meeting, I as a person who attended both investigations in the AmaMpondomise kingship claim, gave a brief background of the AmaMpondomise kingship investigations and the court proceedings.

24. My report only focussed on the processes followed by the Commission and not on the evidence given and the findings of the Commission.

25. After I had explained all the processes the President then took over and led the discussions. It was clear during the discussions that the President had thoroughly read and researched the history of AmaMpondomise.

26. In fact what was also clear during the discussions with the former President was that he had read the report and the recommendations from the Commission. He raised questions that spoke directly to the contents of the Commission reports and to the recommendations.

27. In particular I recall the former President raising, during the discussions a debate about the breakaway of amaMpondo and the information thereof, the status of the traditional leadership at the time of the breakaway and formation of amaMpondo, the reign of Mhlontlo with particular reference to the status of the traditional leadership at the time and the killing of magistrate Hope and what is commonly known as the Hope War.

28. All the above pointed to a person who had intense knowledge on the subject of the discussion and who had applied his mind to the issues that were being discussed in the meeting.”

The correctness of these allegations was confirmed in the first respondent’s answering affidavit.

[47] In addition, in the first respondent’s answering affidavit the deponent states:

“69. I confirm that the former President did not consider the full record of the Tolo Commission. This was for the following reasons:

69.1 First, the record of the Tolo Commission is extremely voluminous and would have taken days for the former President to consider that record in its entirety. This was neither practical nor possible in light of the various demands on a President’s time.

69.2 Second, the issues presented in disputes of this nature are complex. It is precisely for this reason that the legislative framework has created a Commission and entrusted it with the powers and functions that it has.

69.3 Third, the report of the Tolo Commission fully dealt with the relevant issues; it did so accurately and succinctly. Any issues that the former President considered necessary for discussion or elucidation were addressed at the briefing meeting that was held.

69.4 Fourth, it was apparent at the briefing meeting that there were inconsistent views on whether the AmaMpondomise fell to be recognised as a

kingship. This, the former President was fully appraised of. Notwithstanding these conflicting views, the former President ultimately adopted the recommendations of the Tolo Commission.

70. I emphasise that the former President did not consider the internal memorandum which did not serve before him.”

[48] When read together, the allegations set out in the preceding paragraphs suggest that the former President did not have time to read the record of the Tolo Commission, as this would have taken days and he didn’t have the time to do so. However, far from being merely the recipient of a briefing, at the meeting the former President “took over and led the discussion”, making it clear that he “had thoroughly read and researched the history of AmaMpondomise.” He had apparently also read the reports and recommendations of the Tolo Commission.

[49] What was the nature and the extent of the former President’s research and reading outside the material contained in the recommendations and reports of the Tolo Commission? How and to what extent did this research and reading inform and influence his decision to accept the recommendations made by the Tolo Commission? Crucial though they are to an assessment of whether the former President’s decision was rational and clothed with legality or whether the decision was arbitrary and therefore unlawful, the answers to these questions do not emerge from the application papers because the former President did not file an affidavit dealing with the allegations made by the applicant about the circumstances which gave rise to the impugned decision. Nor did the former President provide any record of the material to which, over and above the reports and recommendations of the Tolo Commission, he had regard in taking his decision.

[50] Given the *lacunae* created by the allegations in the answering affidavits and the lack of an affidavit and record from the former President pertaining to the decision taken by him, it is difficult to avoid reaching a conclusion that he reached his

decision by unjustified, and therefore improper, means and that the decision must be deemed to be arbitrary and therefore unlawful<sup>24</sup>.

[51] Once such a conclusion is reached in respect of administrative action, the court has no discretion. It must make a declaration of invalidity where administrative action is inconsistent with the provisions of the Constitution<sup>25</sup>.

### **Substitution order**

[52] The court is empowered by the provisions of s 8 (1) of PAJA to grant an order which is just and equitable. This power arises whenever administrative action is set aside<sup>26</sup>.

[53] In considering whether it would be appropriate in the circumstances of this matter to grant an order in substitution for the impugned decision of the former President and, if so, what order would be just and equitable in the circumstances, regard must be had to the following factors.

[54] In broad terms the claim for the reinstatement of AmaMpondomise kingship has a long history. Since the return of Mhlontlo to Qumbu in 1906, AmaMpondomise have persistently appealed for the reinstatement of their kingship to the colonial government, the government of the Union of South Africa, the government of the Republic of South Africa and the government of the former “homeland” then known as the Republic of Transkei. On this general history, set out in the applicant’s founding affidavit, there is no dispute. Correspondence was submitted to the government of the day through the former “native representatives” in parliament between 1925 and 1936. Later, a group of AmaMpondomise known as the Mpondomise Progressive Association made similar representations to the chief magistrate in Transkei.

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<sup>24</sup> Democratic Alliance v President of South Africa 2013 (1) SA 248 (CC) par [36].

<sup>25</sup> Merafong City v AngloGold Ashanti Ltd 2017 (2) SA 211 (CC) par 117.

<sup>26</sup> MEC for Health, Eastern Cape and Another v Kirkland Investments (Pty) Ltd t/a Eye and Lazer Institute 2014 (3) SA 481 (CC) par 52 and 54.

[55] In 1977 a motion for the restoration of AmaMpondomise kingship was successfully piloted through the Emboland Regional Authority by Chief Tyali but it was later shelved by the office of the prime minister in the former Republic of Transkei. It is the view of the applicant that this was done for reasons of political expedience. Allegations made by the applicant in this regard are simply “noted” in the fourth respondent’s answering affidavit.

[56] In 2002, subsequent to the installation of a government which was representative of all the inhabitants of South Africa in 1994, the house of Traditional Leaders in the Eastern Cape recommended the restoration of kingship. In 2003 the Provincial Standing Committee on Traditional Affairs recommended to the provincial legislative assembly in the Eastern Cape that the President should restore government recognition of the kingship of AmaMpondomise. This was approved by the legislative. Again, these allegations in the applicants founding affidavit are merely “noted” in the answering affidavits filed on behalf of the fourth respondent.

[57] Supported by twenty five chiefs of AmaMpondomise, each of whom has his traditional council, the claim for reinstatement of AmaMpondomise kingship was submitted to the President of the Republic of South Africa in April 2006. It was also supported by Mhlontlo Municipality, a local municipality which has oversight in the districts of Qumbu, Tsolo, Ntabankulu and portions of Libode. This claim was referred to the Nhlapho Commission. Inasmuch as the findings of the Nhlapho Commission were tainted by numerous errors and omissions, they were challenged successfully by the applicant in this court before Griffiths J under case number 2062/2011. Subsequent events form the more proximate premise for the present court proceedings and have been described earlier in this judgment.

[58] In his founding affidavit the applicant sets out a summary of AmaMpondomise history. The only challenge it receives in the answering affidavits is a general denial in which the court is then referred to the content of the Tolo Commission reports. Given their relative brevity and the deficiencies therein which have been identified elsewhere in this judgment, such a response from the fourth respondent is insufficient to displace the allegations made by the applicant. Accordingly, the court

has regard to the applicant's summary of relevant AmaMpondomise history. The relevant portions of the founding affidavit are quoted as follows:

### **"JURISDICTION**

21.I and the vast majority<sup>27</sup> of AmaMpondomise are ordinarily resident in the Qumbu / Tsolo area, within the area of jurisdiction of this Court. The adverse effect of the commission's decision that is the subject of these proceedings is being experienced, in the main, in the Qumbu / Tsolo area.

22.Accordingly, I submit that, based on the definition of "court" in the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), this Court does have jurisdiction to entertain this matter.

### **AMAMPONDOMISE AS A NATION**

23.AmaMpondomise are a people who reside presently in the districts of Qumbu, Tsolo as well as the neighbouring districts of Mount Frere, Mount Fletcher, Maclear and Elliot. Nowadays in the main they are to be found in the first two districts (Qumbu and Tsolo). They were dispossessed of and/or displaced from the latter four by previous colonial governments.

24.AmaMpondomise were one of the four kingdoms of the Eastern Cape. This is confirmed by the following sources:

(a) Stavenisse survivors: During 1688, the Dutch ship Stavenisse, was wrecked off the Transkei coast. The survivors recorded the names of the nations through which they passed: "theSemboes (abaMbo), Mapontemousse (amaMpondomise), the Maponte (AmaMpondo), the Matimbès (abaThembu), the Magryghas

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<sup>27</sup> The operative phrase is "vast majority". AmaMpondomise are to be found in other areas of South Africa as well.

(Griquas) and Magosse (amaXhosa).” R Vigne, Guillaume Chenu de Chalezac (Cape Town: Van Riebeeck Society), 1993, p. 108.<sup>28</sup>

(b) Vete, the son of Mziziba, recounted to the Cape Law Commission in 1883 as follows: “Four of the chiefs living at the Dedesi (ancestral river) were Togu, the ancestor of what are now called Gcalekas, Hala, the ancestor of what are now called the Abatembu, and Malangana and Rudula, the fathers of the Amampondomise. The Amampondo separated from us before this time, and crossed the Umzimvubu river lower down than we did.”<sup>29</sup>

(c) Dennis Pennington of Flagstaff, a white person who is reported to have been a fluent isiXhosa speaker, recorded the following in the *Umthunywa* newspaper of 31 January 1953:

“Yazala amawele amabini uMpondomise noMpondo. Bakhulile ke aabo bantwana uMpondomise omdala noMpondo omncinane.”<sup>30</sup> They divided the land between them, ‘Mpondomise yiya kulaa nqhayi (part of land), nawe Mpondo yiya kuleya.’”<sup>31</sup>

25. These sources prove conclusively that:

25.1 the existence of AmaMpondomise is as ancient in the Eastern Cape as that of AmaXhosa, AbaThembu and AmaMpondo, all (i.e. the latter three) of whose kingships have been recognized;

25.2 AmaMpondomise have equal status with the other kingdoms and Amampondomise are one of the four original traditional communities (nations) who settled in the present day Transkei region.

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<sup>28</sup> It is quoted by Professor Pieres from the book by D Moodies.

<sup>29</sup> F Brownlee, *Transkeian Native Territories : Historical Records* (Lovedale, 1923), page 111

<sup>30</sup> “He was blessed with twins, Mpondomise and Mpondo. The two children, Mpondomise the older one and Mpondo the younger one, grew up.” (The applicant’s translation)

<sup>31</sup> “Mpondomise, settle on that portion of land, and you Mpondo on that one.” (The applicant’s translation)

26. The kingship of AmaMpondomise was destroyed by European colonialists in the so-called Mpondomise rebellion of 1880-1881. King Mhlontlo of AmaMpondomise was present when Hamilton Hope, the white Magistrate of Qumbu, was killed. He was supported in the war by his brother, who was a chief under him, Mditshwa, whose direct descendants (the Mditshwas) are the royal family of present place Tsolo. The current chief or senior traditional leader of Tsolo is Mandlesizwe Mditshwa.

27. After the war was over, Mhlontlo went into exile in Lesotho and Mditshwa, his brother, was imprisoned on Robben Island. Much of the land of the AmaMpondomise was confiscated, leaving them with the small portions which they have today. Source: W Beinart and C Bundy, *Hidden Struggles*.<sup>32</sup>

28. After Mhlontlo's return from exile, the colonial rulers never restored the kingship. The European authorities forever bore a grudge on account of the murder of one of their own, Hope. Charles, the son of Mhlontlo, even abandoned his father's name, and adopted as his surname the name of Matiwane, his grandfather. The colonial authorities demoted the kingship of AmaMpondomise and only restored chieftainship on 26 March 1930. This chieftainship was restored to Sigidi, son of Charles, who was a minor at the time. His uncle, Isaac Matiwane, assumed the position of regent. The colonialists divided the AmaMpondomise nation into two, namely, Tsolo and Qumbu. They installed Lutshotho Mditshwa as the chief of Tsolo and Sigidi as the chief of Qumbu, thereby destroying the united kingdom of AmaMpondomise under one king, a descendent of King Mhlontlo.

29. It can be seen from this brief history that the kingship of AmaMpondomise never died a natural death but was destroyed by colonialism. I attach hereto a research document prepared by Professor Jeff Peires and marked "F" which this Court is referred to. I also attach hereto marked "G" and "H" a letter issued by the Chief Magistrate of the Transkeian Territories dated 26<sup>th</sup> March 1930.

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<sup>32</sup> Quoted by J H Soga, *South Eastern Bantu* page 346 – 347  
J W Macquarrie – *The Reminiscences of Sir Walter Stanford* page 158

30. Based on the above historical evidence and what is detailed hereunder,<sup>33</sup> the former the existence of the AmaMpondomise monarchy over an independent, ethnological group under an unbroken genealogical line of a succession of kings cannot be gainsaid.

31. The roots of AmaMpondomise date back to the pre-colonial era of King Sibiside, the progenitor of the AbaMbo tribes which include the AmaNgwane of Nomafo, the Kabazela of Mavovo, AmaMpondomise, AmaMpondo and AmaXesibe of Njanya. The first two groups remained in what is now known as Kwazulu-Natal and were absorbed into the Zulu Nation. Njanya moved South and crossed the Drakensberg into the Umzikhulu area about 1620. This history is reflected in the following books:

J H Soga, *South Eastern Bantu* pp 49-51, 249-301, 336;

F Brownlee, *Transkei Historical Records* pp 111-118;

W D Hammond – Tooke, *Command or Consensus* pp 43 – 44;

E A Walker, *Historical Atlas of Southern Africa Map 2* p. 6

#### **THE ESTABLISHMENT OF THE AMAMPONDOMISE KINGDOM AND THE SUCCESSIVE KINGS OF THAT KINGDOM**

32. Historians concur that one of the most notable kings of AbaMbo (this being the group of people from which AmaMpondomise originate), was King Sibiside. King Sibiside had three sons, namely, Mavovo, Nomafo and Njanya. The first two sons, Mavovo and Nomafo remained in Kwazulu-Natal and their descendants were later absorbed into the Zulu nation.

33. Njanya, had three sons, namely, the twins Mpondomise and Mpondo and their *imfusi*,<sup>34</sup> Xesibe. Njanya crossed the Drakensberg and settled in the Umzimkhulu area around 1620. He established thereat his own community and

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<sup>33</sup> See under the heading: THE ESTABLISHMENT OF THE AMAMPONDOMISE KINGDOM AND THE SUCCESSIVE KINGS OF THAT KINGDOM. (below)

<sup>34</sup> A child born after twins.

became its chief. The community expanded as there were some other tribes that came to join in.

34. The elder twin according to the oral and written history was Mpondomise. Upon the death of Chief Njanya, Mpondomise took the reigns from his father and he became the chief. The other twin, Mpondo, migrated with his followers to settle along the Umzimvubu River on the eastern side. The reason for the separation, according to history, was as a result of Mpondo's rebellious refusal to hand over to Chief Mpondomise the skin of a lion which he had killed during a hunting party.<sup>35</sup> This then was the beginning of the nations of AmaMpondomise (named after Mpondomise) and AmaMpondo (named after Mpondo). It must be recorded that at this juncture, it is not clear whether the kingdom (of AmaMpondomise) itself had already been established. It was during Mpondomise's time that the nation grew big and spread southwards, occupying the land between Mzimkhulu and Mthatha rivers. The great places were Mzimkhulu, Mzimvubu, Kinira, Tsitsa and Mthatha.<sup>36</sup>

35.

35.1 Mpondomise was succeeded by Ntose, his son and the great place of Ntose was between Rode (a rural village in present day MountAyliff) and the Ntsizwa Mountain Range and he died near Mzimvubu River and was buried there.

35.2 Ntose was succeeded by his son Ngcwina who migrated southwards (without abandoning the land hitherto occupied by his father and his people) and had great places along the Mzimvubu River in Mt Frere, the Kinira River in Mt Fletcher, the Tina River in Mt Frere, the Tsitsa River in Tsolo and in what are now the Qumbu and Mthatha districts.

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<sup>35</sup> According to custom all subjects (royals included) were required to surrender to the ruler the skins of lions that they had killed.

<sup>36</sup> See Bundy and W Beinart, *Hidden Struggles in Rural South Africa*, page 119  
F Brownlee, *Historical Records* page 54

35.3 Ngcwina ruled over about 28 tribes, each with its own chief. These tribes included AmaNgwane, AbaThembu,<sup>37</sup> AmaMpondo,<sup>38</sup> AmaNgutyana, AmaTolo, AmaNxasana and AbeSotho. I do not profess to know the chiefs who ruled under Ngcwina at that time but the vast majority of their tribes are still part of AmaMpondomise to this day and the present day chiefs of some of them, who I mention just by way of example, are:

35.3.1 Chief Ngudle of the AmaGubevu;

35.3.2 Chief Matyobeni of AmaNgwane;

35.3.3 Chief Mthetho of AmaNgwane;<sup>39</sup>

35.3.4 Chief Njikelana of AmaNxasana;

35.3.5 Chief Bikhwe of AmaTolo;

35.3.6 Chief Saul of AmaHala ;

35.3.7 Chief Moshoeshoe of AbeSotho;

35.3.8 Chief Gcisa of AmaTshatshu;

35.4 During the reign of Ngcwina AmaMpondomise were occupying the land that covers the areas of Umzikhulu, Kokstad, Mt Ayliff, Mt Frere, Mt Fletcher, Qumbu, Tsolo, Mthatha (up to the Mthatha River), Maclear, Elliot and part of Ugie. They were in control of that land with their king Ngcwina having great places as I have mentioned above.

35.5 From this it will be observed that Ngcwina occupied quite a vast expanse of land. Whatever issue may be raised about when exactly the kingdom of AmaMpondomise came into existence, during Ngcwina's reign the kingdom was definitely in existence and well-established in that Ngcwina, the leader of AmaMpondomise, occupied a vast, identifiable expanse of land much larger (in terms of landmass) than some modern day countries and had under him several senior traditional leaders (i.e. chiefs). In the circumstances, in accordance with customary law and customs he could not have been anything other than king.

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<sup>37</sup> This being a breakaway section from the main AbaThembu nation.

<sup>38</sup> This too being a section of AmaMpondo.

<sup>39</sup> There are two areas occupied by AmaNgwane, each with its own chief.

36. King Ngcwina was succeeded by his son Cira, who occupied the same land. Cira was succeeded by his son, Mte and Mte was succeeded by Sabe who was later succeeded by Qengeba. I must mention that throughout this period AmaMpondomise and their kings were occupying and owning the land referred to continuously and uninterrupted.

37. King Qengeba was succeeded by his son King Majola who continued to rule AmaMpondomise as the king until he died and upon his death the successive kings were his son, King Ngwanya, thereafter King Phahlo and then King Sontlo who all had their great places along the Tina River in Mt Frere and were buried in the Tina River. King Sontlo was succeeded by his son King Mngcambe who, upon his death, was buried in the present district of Tsolo.

38. The above mentioned kings constitute an unbroken line of kings in the kingdom of the AmaMpondomise nation. This history is recorded in the book by F Brownlee, *Transkei Historical Records* at page 111- 112 and J H Soga, *South Eastern Bantu* at page 336, and if necessary the books shall be produced at the hearing of this matter.

39. AmaMpondomise had various other tribes who were subject to their rule during all this period. I must record that the AbaThembu, AmaMpondo and AmaXesibe that are mentioned as being part of Amampondomise, are those who were naturalised in the land of AmaMpondomise and thereby abandoned their allegiance to the traditional communities that currently constitute AbaThembu, AmaMpondo and so forth.

40. King Mngcambe was succeeded by his son King Myeki, whose daughter married King Ngubengcuka of AbaThembu and became the mother of King Mtirara. It was during the time of King Myeki that the *mfecane* wars broke out. There was destabilisation during this period. King Myeki took refuge at Mgwali (within the Engcobo district) in Tembuland in the area of King Ngubengcuka, his son in law. This is recorded by J H Soga in his book titled, *South Eastern Bantu* at pages 342-343 and also by F Brownlee, *Historical Records* at pages 112 – 114 and 118.

41. King Myeki died at Mgwali and was succeeded by his son, King Matiwane who could not rule as he died in a skirmish with AmaQwati of Chief Fubu within Tembuland. Since King Matiwane's son, Mhlontlo, was still young at the time, his (Matiwane's) brother Mbali acted as regent and ruled AmaMpondomise on behalf of Prince Mhlontlo.

41.1 I must emphasise that when Myeki left for Mgwali and took refuge in his son-in-law's land, the vast majority of AmaMpondomise were left behind in the land traditionally occupied by AmaMpondomise as the *imfecane* wars were going on. The king's councilors and other senior chiefs under Myeki were left behind to continue fighting. When the war was over, a report to that effect was sent to King Myeki who, despite his absence, remained king of AmaMpondomise;

41.2 Since he was sick at the time the war came to an end, King Myeki instructed his son, Matiwane to go back to the land of AmaMpondomise and take over the reins. Matiwane was killed as have stated in the preceding paragraphs on the way. His brother, Mbali, acted as regent in the place of Mhlontlo who was still a minor at the time;

41.3 About 1846 Mbali returned to the land of AmaMpondomise and settled in the Qumbu district in the area known today as Sulenkama. Upon his return Mbali ruled AmaMpondomise in all of the land that they occupied before the *imfecane*; i.e. Qumbu, Tsolo, Maclear, Mt Fletcher, Mt Ayliff, Mt Frere, Kokstad and Mthatha.<sup>40</sup>

41.4 According to available historical records until the time of the war that related to the killing of Hope, there was never a time when AmaMpondomise were without a king, nor were they substantially dispossessed of their land. It is so that the colonial rulers did bring in some tribes to some parts of the land of AmaMpondomise. But in percentage terms the affected pieces of land were miniscule. That notwithstanding the king of AmaMpondomise was not divested of his rule over the land as such.

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<sup>40</sup> Statement by Vete to F P Gladwin of the Commission on Native Laws and Customs, pages 114 – 115; F Brownlee *Historical Records*  
Statement by Mandela regent for Mditshwa, page 118 - F Brownlee *Historical Records*

42. When Mhlontlo came of age he took over from the regent as king and was recognised as such by both government and religious authorities as well as by immigrant and neighbouring tribes as is indicated by the following:

42.1 In the *Blue Book on Native Affairs* 1885, historian G M Theal states that long before 1844 the land between the Mzimvubu and Mthatha rivers was occupied by AmaMpondomise of Paramount<sup>41</sup> Mhlontlo and his brother Chief Mditshwa who was subordinate to him as a Junior Chief accountable to him.

42.2 This is also recorded in the book of F Brownlee, pages 42-46.

42.3 In a memorandum by Magistrate Joseph Orpen to the Select Committee on Native Affairs 1873 on the state of tribes in East Griqualand, he describes Mhlontlo as “paramount chief”.

42.4 Bearing in mind that (unlike the rule of the paramount chief of the so called Emigrant Thembu) the reign of Mhlontlo was by no means a creation of the colonialists, the appellation “paramount chief” could only have been a recognition of his senior status as king, the only issue being that nowhere in the Eastern Cape did the colonialists recognise the status of king amongst the African rulers. To them there was only one king or queen and he or she was in the United Kingdom.

42.5 Also of significance, Mhlontlo was regarded as “paramount chief” as distinct from his brother Mditshwa who was regarded as “chief” when they went into rebellion in Hope’s war of 1880.

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<sup>41</sup> In a rather derogatory sense the colonialists chose to refer to kings as “paramounts” or “paramount chiefs”. Of course, they used the term even for rulers that they themselves had created and who were not kings in accordance with customary law and customs. For example, they divided the AbaThembu into AbaThembu and the Emigrant Thembu, each with its “paramount chief”. In fact, the ruler of all AbaThembu (not Emigrant Thembu) was the true king of AbaThembu. This much has been accepted by the relevant commission in its investigation of the AbaThembu kingship.

42.6 The Anglican Church authorities regarded Mhlontlo as “paramount chief” of so-called no man’s land when they negotiated with the Griquas for the establishment of Clydesdale Mission in Mzimkhulu in 1870.<sup>42</sup>

43. The Griqua Chief, Adam Kok, paid “*busa* cattle”<sup>43</sup> and requested permission from King Mhlontlo when his people settled on land in the Kokstad area in 1862. To prove that Mhlontlo exercised authority over Adam Kok, Mhlontlo fined Adam Kok a yellow mare for levying taxes on AmaBhaca who had settled in AmaMpondomise land between the Tina and Mzimkhulu rivers after their flight from Faku, the king of AmaMpondo.<sup>44</sup>

44. The BaSotho Chief, Lebenya, paid “*busa* cattle” to King Mhlontlo on crossing the Drakensberg into the Mt Fletcher area to settle in Mpondomise land around 1867. Chief Lebenya accepted King Mhlontlo as his senior and was always respecting him and obeying his authority.<sup>45</sup>

45. The AmaHlubi Chief, Ludidi, also paid “*busa* cattle” to Chief Mbali who was regent for Mhlontlo in order to settle at Ntlabeni in the Mount Frere area and AmaHlubi always accepted AmaMpondomise Kings as their seniors.<sup>46</sup>

46. In sum, quite plainly the kingdom of AmaMpondomise was well-established during the reign of King Ngcwina and continued to exist from that time up until the rule of King Mhlontlo whose recognition as the king of his people was withdrawn by colonial rulers under the circumstances which I shall set out below...

## EVENTS LEADING TO THE DEPOSITION OF KING MHLONTLO

48. Prior to Hope’s War of 1880 there are no records of any conflict between AmaMpondomise and the Cape colonial government. The land occupied

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<sup>42</sup> Stainier Green, *The First Hundred Years* pp 59 – 60

<sup>43</sup> The verb “*ukubusa*” means to owe allegiance to. “*Busa* cattle” would thus literally be cattle that symbolise owing allegiance to the person to whom they are paid. But perhaps an appropriate translation would be that these are cattle for naturalisation.

<sup>44</sup> Stainier Green, *The First Hundred Years* pp 59 – 60

<sup>45</sup> W D Hammond – Tooke page 60

<sup>46</sup> J H Soga *South Eastern Bantu* page 423

by AmaMpondomise from the Drakensberg to the Mzimvubu River, and between the Mzimvubu and Mthatha Rivers, which was later known as the East Griqualand, was brought under colonial rule between 1860 and 1877 through diplomacy, negotiation and annexation rather than by military conquest.<sup>47</sup> Such “negotiation” was patently unequal, conducted as it was between parties at different levels of development, sophistication and expertise, and therefore amounted to exploitation.

49. The historian G M Theal describes the Maitland Treaty as “colonial ownership of Griqualand East based nominally on a cession made by the Pondo Chief Faku, in reality rests on the right of a civilized power to enforce order in districts occupied by barbarians. Faku never had authority in it. The Mpondomise living eastwards of the Mthatha, further inland than amaMpondo had always been independent and had occupied nearly the same position as they did in 1844 from as far back as could be traced, namely before 1686.”<sup>48</sup>

50. It was after AmaMpondomise had been subjugated that their kingship was vindictively withdrawn by administrative proclamation and the banishment of King Mhlontlo to King William’s Town, this at the hands of the colonial rulers. This was a sequel to the killing of Mr Hamilton Hope by AmaMpondomise.

51. Oral and written history put the events as follows:

51.1 The colonial government passed the Disarmament Act of 1879 and sought to disarm the BaSotho communities, which then resulted in open revolt in the gun war of 1880. Hamilton Hope, the Magistrate in Qumbu, was instructed to raise a force to assist in disarming the BaSotho rebels and he in turn, requested King Mhlontlo of AmaMpondomise to provide an “*impi*” to join the colonial forces against the BaSotho;

51.2 King Mhlontlo was reluctant to join the government forces against the BaSotho people who had paid “*busa* cattle” to him and whom he regarded as his

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<sup>47</sup> F Brownlee, *Historical Records* page 41 – 42; W D Hammond -Tooke, *Command or Consensus* pages 23-24

<sup>48</sup> Quoted by J H Soga, *South Eastern Bantu*, page 301 – 302

people. He therefore diplomatically advised the magistrate that he and AmaMpondomise were in mourning for the recent death of his mother and according to custom, “to send an army then would invite disaster”.

51.3 It is said that Hope then retorted (possibly in what he thought was suitable idiomatic language) that “it was not acceptable for Queen Victoria’s dog to refuse to go on a hunt with the Queen’s forces”. This was a tactless remark by the magistrate and was regarded by Mhlontlo’s councilors as a gross insult against their king, which could not be ignored. Plans were therefore set afoot for the magistrate to come to the Sulenkama Great Place with suitable arms on the pretext that AmaMpondomise would now participate in the attack against the BaSotho. The true intention was revenge for the insult.

52. On the date arranged, 23 October 1880, the magistrate and two white army officers arrived at Sulenkama and were killed.<sup>49</sup>

53. Historical records indicate that the death of Hamilton Hope and the two white army officers near Sulenkama, Qumbu became the signal for a general uprising by several tribes against colonial rule. The BaSotho in Mount Fletcher and Matatiele as well as some AbaThembu and AmaQwati in the Ngcobo district took part in the rebellion until they were all defeated in 1881 by colonial forces assisted by recruited white burghers and black immigrant tribes. Source: F Brownlee, *Historical Records* at pages 54 – 57.

54. In 1881 Chief Mditshwa, brother to King Mhlontlo, surrendered and was charged with sedition and sentenced to three years imprisonment for which he was detained on Robben Island. King Mhlontlo went into exile in Lesotho from 1883 to 1903 and was arrested in 1903 on a visit to his people in Herschel. King Mhlontlo was charged in King William’s Town with the murder of Hope and the two white army. He was tried under case *Regina vs Mhlontlo*, Cape Archives CA King

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<sup>49</sup> *R v Mhlontlo*, Cape Archives C.A. King William’s Town cases, 1/1/1/221  
J.W. Macquarrie, *The reminiscences of Sir Walter Stanford*, page 107  
J.H. Soga, *South Eastern Bantu*, page 346 – 247  
F. Brownlee, *Historical Records*, page 54, 46, 57

William's Town Criminal Cases 1/1/1/1/221 and was later acquitted of all the charges in May 1904.

55. King Mhlontlo was nevertheless vindictively deposed as the King by administrative proclamation and banished to King William's Town and later to Willowvale until 1906 when he was allowed to return to Qumbu where he lived as a commoner until his death in December 1912.<sup>50</sup>

56. After the deposition of King Mhlontlo there never was another ruler under whose rule all the chiefs of AmaMpondomise fell. The kingship was thus destroyed. Even the chieftainship was only granted to the Mpondomise's as separate between the districts of Qumbu and Tsolo. I refer this Honourable Court to the letter by the Chief Magistrate which is attached as "G" and "H" respectively. The United Kingdom of Amampondomise under one king was thus destroyed by the colonialist.

57. This is the sum total of the establishment and disestablishment of the kingship of AmaMpondomise."

[59] It is apposite to record that in its deliberations, flawed as they were, the Tolo Commission stated:

"1. In 1855 Mhlontlo became the leader of AmaMpondomise and was the first leader of AmaMpondomise to encounter colonialists<sup>51</sup>.

2. In 1861, some six years after Mhlontlo had come to power, the colonialists annexed East Griqualand which formed part of the land of AmaMpondomise<sup>52</sup>;

3. there is no evidence to support the contention that Mhlontlo was regarded as "paramount chief" by the colonialists<sup>53</sup>".

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<sup>50</sup> Report of Griqualand East Land Commission, page 5 – 19; C Bundy and W Beinart, *Hidden Struggles*; F Brownlee, *Historical Records*, page 58 to 59

<sup>51</sup> *Report and Recommendations*, p 29 par 7.3.15

<sup>52</sup> *Report and Recommendations*, p 29 par 7.3.15(a)

[60] On the first two findings set out in the preceding paragraph, the Tolo Commission appears to have been correct. However, on the third finding the Commission was wrong. The contention that the colonialists regarded Mhlontlo as a “permanent chief” is to be found in the letter dated 22 December 1903 written by the resident magistrate in Mount Frere, W. Leary (Leary). On page three thereof the magistrate records:

“Umhlontlo<sup>54</sup> was a strict disciplinarian, none of his tribe disobeyed or dared to disobey him, his word was law to them. He was and still is, the paramount chief of all the Pondomise, he had quarrelled with Mditshwa and they fought, peace only being restored when the country was taken over and Mr Orpen appointed British resident of St John’s Territory, the name under which the five districts of Maclear, Mount Fletcher, Mount Frere, Qumbu and Tsolo were known.” (sic)

[61] A copy of this letter was attached by the applicant to his replying affidavit. This appears to have been done to meet the allegations in the answering affidavit of the fourth respondent which highlights an absence of such proof. Inasmuch as the material in reply was furnished in response to the answering affidavit, does not constitute new material in the sense that it supports the tenor of the whole founding affidavit and there has been no objection thereto or application to strike it out, the court is at liberty to have regard thereto.

[62] Further evidence of this level of regard for Mhlontlo is to be found in the magistrate Joseph Orpen’s memorandum to the Select Committee on Nature Affairs, 1873, which was referred to in the applicant’s founding affidavit.

[63] Properly read the import of the relevant section of the Tolo Commission report suggests that if there was contemporaneous evidence that the colonists had regarded Mhlontlo as a “paramount chief” this would enable support for the finding that AmaMpondomise kingship did exist at the time.

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<sup>53</sup> *Report and Recommendations*, p 32 par 7.3.21

<sup>54</sup> *The context indicates clearly that the reference is to Mhlontlo*

[64] Also unchallenged in the applicant's replying affidavit, and highly relevant to the issues with which this application is concerned, is the following statement:

"In the present government, all paramount chiefs were accepted as the kings, and it would be unjust to treat AmaMpondomise kingship differently."<sup>55</sup>

[65] On a conspectus of all the evidence and the material which supports it, in my view it has been established on a balance of probabilities that AmaMpondomise had a kingship, alongside the three other major kingdoms whose rootedness in the Eastern Cape is indisputable. Factors beyond AmaMpondomise control such as *Mfecane* wars, colonial occupation and colonial administrative acts placed AmaMpondomise under enormous pressure, leading to partial disestablishment and disarray. However, every indication is that since the mid nineteenth century, repeated attempts have been made by AmaMpondomise leaders to restore or reinstate recognition of AmaMpondomise kingship. Those attempts have not failed because of the emergence of strong views from within AmaMpondomise which indicate a groundswell of support for a community without a kingship. Rather, again, those attempts have been thwarted by apparent political expedience, government inefficiency and, most recently, administrative action which is inconsistent with the Constitution.

[66] There is a constitutional imperative to address the wrongs of the past in this country and to restore and respect the dignity of all her citizens. The long struggle of AmaMpondomise for the reinstatement of kingship demonstrates the collective response of a community to the pain and loss of a sense of full identity which flows inevitably from dislocation, suppression and deprivation of land and leadership. The longstanding plea from AmaMpondomise which lies at the heart of this matter has been expressed historically in every appropriate forum, without success but not without merit. It has finally found its way into this court. In all the circumstances it is appropriate that an order which is just, fair and reasonable should now be given.

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<sup>55</sup> *From an early colonial perspective it was not possible to have monarchs reigning over occupied territories in apparent competition with Queen Victoria, the reigning British monarch at the time in whose name the territory of the Eastern Cape was annexed at various stages. Accordingly, all reigning traditional monarchs were referred to officially as "paramount chiefs".*

## Costs

[67] In seeking the award of costs in this matter the applicant targeted the first and the third respondents “and against the remaining respondents only in the event of them opposing this application”. In the face of this prayer, the first, the second, the third and the fourth respondents all opposed the application.

[68] As has been recorded, at the hearing of the application the first respondent was granted leave to file a further affidavit in which the first respondent’s opposition to the relief claimed by the applicant in his amended notice of motion was withdrawn. The withdrawal of the opposition was not accompanied by any tender of costs. Coming as it did only on the morning of the hearing, the effect of the withdrawal of opposition by the first respondent upon the substantial costs already incurred was negligible.

[69] Ordinarily, costs should follow the result. No reason emerges in this matter which would justify a departure from this principle.

[70] The second and the fourth respondents were active in their opposition to the application. Like the first respondent, they filed answering affidavits and were represented at the hearing by counsel. In the nature of its identity, the third respondent was supine but its opposition was never withdrawn.

[71] The fifth and the sixth respondents, after having been joined in the proceedings by order of court, did not oppose the relief contended for on behalf of the applicant at the hearing of the matter. Indeed, the argument advanced on their behalf by their counsel, which was most helpful in its content, was supportive of the relief sought on behalf of the applicant in respect of the principles of AmaMpondomise kingship and the impugned decision. Whilst no order was made in respect of costs occasioned by the application for their joinder, the fifth and the sixth respondents should be embraced by the successful outcome of the application and should not have to be burdened by the payment of their own costs in respect of their eventual participation in the application.

[72] The application papers were voluminous. So too was the record of proceedings provided by the Tolo Commission. Where the parties made use of two counsel the additional costs this occasioned were justified.

## **Relief**

[73] The following order will issue:

1. Condonation is granted in respect of the applicant's failure to commence these proceedings within the 180 day period prescribed by s 7 (1) of the Promotion Administrative Justice Act 3 of 2000 and that time period is extended up to and including the date upon which these proceedings commenced.

2. The proceedings of the Tolo Commission pertaining to the claims relating to AmaMpondomise kingship and the reports and recommendations produced thereon, styled "Tonjeni and Maseti Kingship Report" and "Matiwane Kingship Report" respectively are hereby reviewed and set aside.

3. The decision taken by the former President of the Republic of South Africa on 13 December 2016 in respect of AmaMpondomise kingship is hereby reviewed and set aside.

4. It is declared that AmaMpondomise did have a kingship and that such kingship is hereby reinstated.

5. The first, second, third and fourth respondents are directed to pay the costs of this application, such costs to include the fifth and sixth respondents' costs but to exclude the costs of their application for joinder, and to include the costs occasioned by the employment of two counsel where this occurred.

**JUDGE OF THE HIGH COURT**

**Appearances**

**Counsel for the applicant:** Adv Gwala, Adv Mapoma and Adv Maliwa  
**Instructed by** Mvuzo Notyesi Inc,  
2<sup>nd</sup> Floor  
TH Madala Chambers  
14 Durham Street,  
MTHATHA

**Counsel for the first respondent:** Adv Pillay  
**Instructed by:** The State Attorney  
Broadcast House  
94 Sissons Street  
Fortgale  
Mthatha

**Counsel for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents:** Adv Matebese and Adv Shibe  
**Instructed by:** Bhadrish Daya Attorneys  
c/o AS Zono and Associates  
Suite no 149 - 153  
ECDC Building,  
Cnr York and Elliot Street,  
Mthatha

**Counsel for the 5<sup>th</sup> and 6<sup>th</sup> respondents:** Adv Mathapuna  
**Instructed by:** Mkata Attorneys  
80 3<sup>rd</sup> Avenue  
Norwood  
Mthatha

**Date heard:** 02 May 2019

**Date delivered:**

**16 May 2019**