

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

Case No: 1119/09

In the matter between:

GREGORY KHOMOTSOANE LEBENYA	First Appellant
BAKOENA TRADITIONAL COUNCIL	Second Appellant

and

VUYISILE NELANI	First Respondent
PREMIER OF THE EASTERN CAPE	Second Respondent
M E C FOR LOCAL GOVERNMENT AND TRADITIONLA AFFAIRS E.C.	Third Respondent
THE CHAIRPERSON HOUSE OF TRADITIONAL LEADRES E.C.	Fourth Respondent

JUDGMENT

THE COURT:

[1] This appeal concerns the review of a decision which was taken in 1976 by the then Chief Minister of the then Transkei Government. The court *a quo* dismissed the review application and an interim interdict referred to hereunder, with costs. The review application was dismissed solely on the grounds of unreasonable delay. For a proper understanding of the matter it is necessary to set out the background to the review application.

[2] On 25 June 2008 the appellants launched, on an urgent basis, an application seeking an interim order returnable on 15 January 2009, in the court *a quo*, interdicting and restraining the second respondent from recognising the first respondent as a Chief of any administrative area previously forming part of the Bakoena Traditional Council. On 11 December 2008 the court *a quo* granted the interim order pending the finalisation of that application. The notice of motion was subsequently amended to the effect that the interim order was to exist pending the finalisation of review, of, *inter alia*, a decision by the late Chief Matanzima to disestablish the Bakoena Traditional Authority and established the new Bakoena Traditional Authority and Nguni Traditional Authority in terms of Government Gazette dated 4 June 1976 (the 1976 decision).

[3] On 11 June 2009 the application for an interdict was subsequently referred for oral evidence and the appellants were ordered to institute review application and the interim interdict was extended pending the finalisation of the review.

[4] The appellants duly delivered the application for review of the 1976 decision. After the closure of the pleadings in the review matter the parties decided to narrow the issues by making a stated case for determination by the court.

[5] The agreed facts and contentions are set out hereunder:

“1. The review proceedings forming subject matter of these proceedings were issued on 15 June 2009 under case number 1119/2009;

2. The review proceedings were preceded by an urgent application in which the applicants mainly sought an interdict against the recognition of the 1st respondent as the Chief of any administrative area forming part or previously forming part of the Bakoena Tribal Authority or Bakoena Traditional Council in the district of Mt Fletcher (interdict application was issued under case number 1845/2008) and the applicants requested from the Department the documents that led to the decision to recognise 1st respondent and same were supplied on 3 February 2009.

3. The trigger for the urgent interdict and subsequent review proceedings was a telephone call received by the 1st applicant during September 2008, in which he was advised by a certain Mr Ntlangushe of Maluti Regional Office of the Department of Local Government and Traditional Affairs, asking whether the 1st respondent was a Chief since a cheque of the 1st respondent was at his office.

4. Pursuant to receipt of such telephonic calls during September 2008 advising about the cheque of the 1st respondent as a Chief, the 1st applicant conducted investigations as he was not aware that the 1st respondent was indeed a Chief.

5. The investigations led to a meeting of the 1st applicant and Mr Mateta, who is in the office of the 3rd respondent.

6. In the meeting, Mr Mateta advised that the appointment of the first respondent as a Chief of the Nguni Tribal Authority was approved by the Department and as such he was a Chief of the Nguni Tribal Authority comprising of the following administrative areas.

6.1 Mahlake, Ngodiloe, Mahoabatsane and Emthumase.

6.2 The decision to subsequently appoint the 1st respondent as a Chief of the Nguni Tribal Authority, has its genesis from annexure “GKL2” (review application) and “JSM12” (“the interdict application”), being a Government Gazette notice number 52 dated 4th June 1976, in terms whereof:

6.2.1 It is also recorded that Annexures “GKL1” and “GKL2” were received from 1st respondent’s former attorneys Mr Nokwe & Partners by the Department of Traditional Affairs.

6.3 The former Chief Minister K D Matanzima, took a decision to disestablish Bakoana Tribal Authority as it existed then and in its place new Bakoana Tribal Authority and establish the new Nguni Tribal Authority was taken on 4th June 1976 in terms of section 3(1) of the Transkei Authorities Act No.4 of 1965.

6.4 In terms of the decision communicated in the above Government Gazette Notice, from that moment, the Bakoana Tribal Authority was

no longer constituted in accordance with Government Notice No.5 dated April 1967 as same was withdrawn;

6.5 *On a proper reading or construction of the Government Gazette, since 1976 an administrative decision for the existence of two separate Tribal Authorities, namely Bakoena and Nguni, existed;*

6.6 *It is common cause that in the district of Mt Fletcher there are different tribes who are referred to as the Sothos and the Ngunis;*

6.7 *At a certain stage, the Amagcina Tribe set in motion a process for the recognition of Mr Nelani (the 1st respondent”) as their Chief;*

6.8 *Pursuant to the Government Gazette, the Maluti Regional Authority on 7th October 1981 resolved that a new chieftainship be created and Mr Nelani be designated as Chief of the Amagcina Tribe in terms of Section 66(1) of the Transkeian Authorities (Act 1976 Act No.15 of 1976) as amended;*

6.9 *The Amagcina Royal family identified Mr Nelani as their Chief and submitted the resolution dated 23 February 2008 to the department for processing and first respondent was recommended and subsequently recognised;*

6.10 *The applicants in these proceedings is (sic) impugning the decision of the Chief Minister, K D Matanzima, which was taken in 1976 for the*

disestablishment of the Bakoena Tribal Authority and the creation of two separate Tribal authorities, namely-

6.10.1 The Bakoena Tribal Authority; and

6.10.2 The Nguni Tribal Authority.

7. *The 1st applicant contends that whilst he accepts that there is a delay in launching the review proceedings, he ought to be condoned because he only became aware of the impugned decision in September 2008.*

8. *The respondents on the other hand, maintain that the applicants ought to be non-suited because the delay of 32 years is inordinate and the applicants exercising due and reasonable care ought to have been aware of the decision or those before him knew the decision to disestablish the ABakoena Tribal Authority and the establishment of the Nguni Tribal Authority.*

9. *The respondents contend that in the event of the review being entertained the respondents shall be severely prejudiced because of the following:-*

9.1 Key witnesses have since passed away, namely

9.1.1 Chief Minister K D Matanzima;

9.1.2 Two witnesses in annexure “GKL1”;

9.1.3 Other witnesses who were present during consultations referred to in annexure GKL2” who would have testified, are not available and some have since passed away; and

9.1.4 *The records of the decision in annexure “GKL1” are not found in the Government archives and as such the reasons for the impugned decision are not before court.*

10. *It is in dispute whether Mr Magadla signed or did not sign document “GKL1” and the court is not required to determine this dispute.*

11. *It is accepted that 1st applicant became aware subjectively about the Government Gazette during September 2008.*

12. *The parties agree that the matter should be disposed of on the basis of the undue delay and should the court find in favour of the applicants, the matter be argued on the merits, deciding the question whether the 1st respondent was properly appointed by the 2nd and 3rd respondents.*

13. *The onus is upon the applicants and shall be discharged on a balance of probabilities.*

14. *The issues for adjudication:-*

14.1 *is whether the applicants have unduly delayed the launch of the instant review proceedings and whether such delay should be condoned.*

14.2 *In view of the fact that the impugned decision was passed in 1976 it is accepted that the provisions of PAJA are not applicable, but the common law delay rule applies in light of the following decisions:-*

14.2.1 *Wolgroeiërs Afslaers (Edms) Bpk v Muni van*

Kaapstad 1978 (1) SA 13 (A) at 38H-42D;

14.2.2 *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie 1986 (2) SA 57 (A) at 86A-G;*

14.2.3 *Associated Institutions Pension Fund and Others v Van Zyl and Others 2005 (2) SA 302 (SCA) at paras [46]-[48];*

14.2.4 *Gqwetha v Transkei Development Corporation Ltd and Others 2006 (2) SA 603 (SCA) para [22]-[24].*

The issue was therefore limited to the determination of the delay in instituting the review proceedings as set out in paragraph 14.

Unreasonable delay

[6] In **Associated Institutions Pension Fund and Others v Van Zyl and Others 2005 (2) SA 302 (SCA) ([2004] 4 All SA 133) at 321B (SA)** Brand JA captured the rule against unreasonable delay as follows:

'[46] . . . *It is a longstanding rule that courts have the power, as part of their inherent jurisdiction to regulate their own proceedings, to refuse a review application if the aggrieved party had been guilty of unreasonable delay in*

initiating the proceedings. The effect is that, in a sense, delay would "validate" the invalid administrative action (see eg Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA) ([2004] 3 All SA 1) at para [27]). The raison d'être of the rule is said to be twofold. First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions (see eg Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A) at 41)."

[7] The formulation of the issues to be determined as formulated by the parties accords with a long line of cases. The first enquiry is directed at whether or not there has been unreasonable delay in instituting the review proceedings. This enquiry is a factual enquiry and the court does not exercise any discretion. The second enquiry depends on whether the court finds that there has been an unreasonable delay. If the court finds that there has been an unreasonable delay the enquiry is whether it can be condoned.¹ This enquiry involves the exercise of discretion taking into account all the relevant circumstances. It is now trite that the rationale against unreasonable delay is twofold. First, the public interest element of finality in administrative decisions. Second, the inherent prejudice both to the decision maker and those who rely on such administrative decision.²

¹WolgroeiersAfslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A)at 39C-D; SetsokosaneBusdiens (Edms) Bpk v Voorsitter, NasionaleVervoerkommissie, en 'n Ander 1986 (2) SA 57 (A) at 86C-D:

²Gqwetha v Transkei Dev Corp Ltd 2006 (2) SA 603 (SCA) para.23.

[8] The appellants admit that there has been a delay in the institution of the review proceedings but contend that such delay is not unreasonable in that they only became aware of the decision in September 2008. On the other hand the respondents contend that there has been an unreasonable delay of 32 years and that the appellants or those who were in power before the first appellant exercising due and reasonable care ought to have been aware of the decision to disestablish the ABakoena and establish Nguni Traditional Council. Consequently, so the argument ran, appellants ought to be non-suited.

[9] Prior to the first appellant taking over as a Chief of the Bakoena tribe his mother was an Acting Chieftainess. It is common cause that there were consultations that were held prior to the taking of the 1976 decision. The Acting Chief at the time must have been involved in the consultation processes relating to the disestablishment of Bakoena Traditional Authority and establishment of the Nguni Traditional Authority. There is no explanation as to what she did about the decision. The second appellant also did nothing about it. There is no allegation that it was not aware of the decision.

[10] Both in the narrowed issues and in the papers there is no explanation covering the period of delay. The appellants made no attempt whatsoever to explain the inordinate delay. They simply relied on the subjective knowledge of the first appellant that he only became aware of the decision during September 2008. The previous Chief, members of the Bakoena Traditional Authority and the second appellant, were there and they must have attended consultative processes convened by a magistrate, Mr Mbuli, and a district commissioner, Mr Gabela. They made no

attempts to explain as to whether there was any attempt at any stage to impugn the 1976 decision. The first appellant does not even inform the court as to the period when he took over as a Chief of the Bakoena Traditional Council.

[11] Once the 1976 decision was published in the Government Gazette the presumption is that those affected by it acquired knowledge thereof. The rule in our law is that ignorance of the law is no excuse (*ignorantia juris non excusat*).³ The person claiming ignorance thereof must show that the administrative act only applies to a specialised field in which he cannot be expected to know the rules thereof.

[12] Lack of explanation for the delay during the entire period of more than 30 years leads us to conclude that the delay was unreasonable. Consequently we conclude therefore that there has been an unreasonable delay.

Condonation

[13] Having concluded that the delay was unreasonable the next enquiry whether or not the delay should be condoned. In a case where the delay is lengthy, as in this case, the explanation given must not only be satisfactory but must also cover the entire period of the delay.⁴ In addition the explanation must be reasonable. Relevant factors for consideration for condonation include, but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for

³ C/F S v De Blom 1977 (3) SA 513 (A) at 529 - 30.; R v Coote (1873) 17 ER 587 (PC) ((1873) LR 4 PC 599) at 592).

⁴Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae) 2008 (2) SA 472 (CC) (2008 (4) BCLR 442; para.22; eThekweni Muni v Ingonyama Trust 2014 (3) SA 240 (CC) Para.28;

the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.⁵

[14] Regard being had to the fact in this case there is lack of (i) a full explanation for the delay covering the entire period of delay and (ii) there is no reasonable explanation given at all, condonation cannot be granted. Furthermore, we are not persuaded that it is in the interests of justice to grant condonation especially regard being had to the prejudice that other litigants may suffer.

[15] In the context of statutory limits more than two decades ago Didcott J said the following:

“Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken.”⁶

⁵Brummer v Gorfil Brothers Investments (Pty) Ltd and Others 2000 (2) SA 837 (CC) para [3] Van Wyksipra para.20

⁶Mohlomi v Minister of Defence 1997 (1) SA 124 (CC) Para.11

We therefore conclude that there is no basis upon which the unreasonable delay can be condoned.

[16] Although the above is dispositive of the matter for adjudication lest it be said that there were prospects of success on review we deem it expedient to comment on the merits thereof. We hold a deem view regarding prospects of success of the review.

[17] From the papers it is common cause that there were consultative meetings regarding the division of Bakoena Traditional Authority by the establishment of the Nguni Traditional Authority. However it is not stated in the papers as to when those consultative meetings were held. What is clear is that they culminated in the promulgation of the 1976 decision.

[18] There was an argument that the Chief Minister took a decision in terms of the wrong section. It has been argued that section 3(1) of the Transkei Authorities Act No. 4 of 1965 (the Act) did not authorise the Chief Minister to disestablish the Bakoena Tribal Authority. On the contrary, so the argument ran, section 2(1) of the Act authorises him to disestablish Tribal Authorities. This argument was pursued and accepted in the Court *a quo*. With respect we do not agree.

Section 2(1) of the Act reads:

“Subject to the provisions of sub-section (2) of section forty five and the proviso to sub-section (1) of section fifty-nine of the Constitution Act, the Minister may, after consultation with the tribe concerned-

- (a) *by notice in the Official Gazette declare any land in a region to be an administrative area for the purposes of this Act or define the boundaries of any administrative area or the area of any tribe, and from time to time, in like manner, alter or withdraw the same;*
- (b) *divide any existing tribe into two or more parts, or amalgamate tribes or parts of tribes into one tribe, or constitute a new tribe, as necessary or good government may require”.*

The head note of this section reads: “**constitution of administrative area and of tribes.**”

Section 3(1) reads:

“There shall in every administrative area or within such administrative areas jointly as the Minister, after consultation with the tribes concerned, may from time to time make known by notice in the Official Gazette be a tribal authority consisting of a head and a number of councillors being:..” The head note of this section reads: “**Tribal Authority**”.

Government Gazette No. 22 of 1976 is not clear but the following can be gleaned therefrom:

“...established at present, and to establish two new tribal authorities called Bakoena and Nguni in respect of different administrative areas;

AND whereas the tribes concerned and the Maluti Regional Authority have been consulted and the Regional Authority has agreed to the proposed amended establishment;

Now, therefore, I, Kaizer Daliwonga Matanzima, hereby make known interms of section 3(1) of the Transkei Authorities Act, 1965 (Act No. 4 of 1965) that there shall be two tribal authorities called Bakoena and Nguni in respect of the administrative areas in the Mount Fletcher district indicated under their names in the schedule hereto.

Government Notice No. 5 dated 28 April 1967 is hereby withdrawn in respect of the Bakoena Tribal Authority.

K D Matanzima

Chief Minister”

(our underlining)

[19] It is plain from the above quoted sections that section 2(1) of the Act deals with the establishment of administrative areas and tribes. It does not deal with tribal Authorities whereas section 3(1) deals with the publication (“**make known**”) relating to establishment and disestablishment of Tribal Authorities. All what is required is that the decision must be preceded by consultation of the tribes concerned and an approval by the Regional Authority. It is common cause that consultations were done.

[20] A proper procedure was followed namely, consultations. There is no general principle to be extracted from the case law as to what kind or amount of consultation is required before delegated legislation, of which consultation is a precondition, can validly be made. The fact that there may have been a majority of

people who were against the idea is explained by the number of administrative areas which were occupied by Sotho speaking people and is no bar to the decision maker. It has not been explained as to where that majority came from or whether the four affected administrative areas were against the idea.

In **Maqoma v Sebe NO 1987 (1) SA 483 (Ck) at 490D-E** it was stated:

“The word 'consultation' in itself does not presuppose or suggest a particular forum, procedure or duration for such discussion or debate. Nor does it imply that any particular formalities should be complied with. Nor does it draw any distinction between communications conveyed orally or in writing. What it does suggest is a communication of ideas on a reciprocal basis.”

Consequently, it would seem to us that the decision was lawfully taken as there is no attack on the process followed.

[21] Mr Moerane referred us to annexure GKL8 which records the election of 60% of members of the Maluti Regional Authority elected by the Chief and 40% of members elected by the people. In his argument Mr Moerane submitted that the list of administrative areas contained in this annexure includes those areas which are being claimed to be falling under Nguni Traditional Council under the first respondent. He therefore contended that notwithstanding the decision of the 1976 these areas were never severed from the Bakoena Traditional Council.

[22] The difficulty we have with the annexure referred to above is that first, it is not explained in the affidavit as to when was the list compiled. The only date appearing thereon is a date on which it was faxed which is 26 September 2009. Second,

according to the deponent the annexure is intended to show that the department was aware and recognised the first appellant as the only Chief of the 14 administrative areas of ABakoena. Third, it is not explained where it emanated from. Fourth, it is written in Xhosa and still refers to “Traditional Authority” and not “Traditional Council”. Fifth, it is not explained as to who compiled it and in what capacity. In short it is not an authenticated document. In our view the document does not assist the appellants.

[23] Mr Moerane argued further that whatever was done by the Chief Minister in terms of the 1976 decision such has been overtaken by the implementation of the processes in terms of the Eastern Cape Traditional Leadership and Governance Act No. 4 of 2005 and National Traditional Leadership and Governance Framework Act No. 41 of 2003. He contended that in terms of these statutes the respondents have recognised the first appellant as their senior Traditional Leader. Furthermore, so the argument goes, the fourteen administrative areas which, prior to the 1976 decision, formed part of the Bakoena Traditional Authority were still recognised as forming part of the Bakoena Traditional Council in terms of these statutes. He therefore contended that it would be otiose to review and set aside of the 1976 decision.

[24] The above argument flies in the face of the principle that administrative decision cannot be ignored because it exists in fact and has legal consequences until set aside.⁷

⁷Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA) para 26.
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[25] Furthermore the above argument was not raised in the court *a quo*. In advancing this argument Mr Moerane relied on the decision of **CUSA v Tao Ying Metal Industries 2009 (2) SA 204 (CC)** para.67.

In **Cusa's** decision the following was said:

“[67] Subject to what is stated in the following paragraph, the role of the reviewing court is limited to deciding issues that are raised in the review proceedings. It may not, on its own, raise issues which were not raised by the party who seeks to review an arbitral award. There is much to be said for the submission by the workers that it is not for the reviewing court to tell a litigant what it should complain about. In particular, the LRA specifies the grounds upon which arbitral awards may be reviewed. A party who seeks to review an arbitral award is bound by the grounds contained in the review application. A litigant may not, on appeal, raise a new ground of review. To permit a party to do so may very well undermine the objective of the LRA to have labour disputes resolved as speedily as possible.

[68] These principles are, however, subject to one qualification. Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, mero motu, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality.”

[26] As we understand this decision and others a point raised for the first time on appeal must be fully canvassed in the papers. We did not understand Mr Moerane as arguing that the point is fully canvassed in the papers. In any event even if Mr Moerane was correct in view of our conclusion regarding unreasonable delay it is not necessary to express any view thereon.

Costs

[27] The general rule is that costs must follow the result unless there special circumstances justifying a departure from the rule. In the court *a quo* the interim interdict was dismissed. The argument advanced by Mr Moerane was that the interdict application was not before court and therefore the appeal in that respect should succeed and the order be set aside. In our view it is not necessary to comment on the merits of that argument. The judgment itself does not deal with interim relief and this is not in the stated case by the parties. Accordingly, the order is not justified. However, the order as such has no practical effect. The *rule nisi* was extended until the finalisation of the review. Consequently, once the review is finalised the interim order automatically lapses. There was therefore no need to dismiss it. It would appear therefore that any success that can be claimed in that regard is a far cry.

[28] There was an argument that if the appeal fails there should be no order as to costs regard being to the fact that the matter can be regarded as constitutional in its nature and therefore the principles in **Biowatch Trust v Registrar, Genetic Resources, and Others 2009 (6) SA232 (CC)** apply. Mr Mpofu for the first

respondent argued that the principle does not apply to his client as he is not an organ of State. Mr Hinana for the State organ respondents was constrained to concede that the principle applies to his clients. The question of costs of two Counsel was never made an issue and we regard the matter as important enough to warrant employment of Senior Counsel.

[29] In the result the following order will issue:

1. The appeal is dismissed;
2. The appellants are ordered to pay costs of the first respondent including costs of the application for leave to appeal and any reserved costs jointly and severally the one paying the other to be absolved. Such costs are to include costs of two Counsel.

T MALUSI

JUDGE OF THE HIGH COURT

B R TOKOTA

JUDGE OF THE HIGH COURT

A M DA SILVA

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the appellants: M T K Moerane SC

Instructed by D D M Plaakie & Co

For the first respondent: D C Mpofu SC

S Maliwa

K Siqongana

Instructed by Mvuzo Notyesi Inc;

For the second and third respondents: Mr Hinana

Instructed by Caps Pangwa attorneys.

Date of Hearing : 12 August 2019;

Judgment delivered : 25 September 2019.