

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

CASE NO: CA53/2016

DATE HEARD: 10/11/2016

DATE DELIVERED: 29/11/16

NOT REPORTABLE

In the matter between:

DUMILE DAVIS NKALA

APPELLANT

and

**PREMIER OF THE PROVINCIAL
GOVERNMENT OF THE EASTERN CAPE**

1ST RESPONDENT

**MEMBER OF THE EXECUTIVE COUNCIL
FOR CO-OPERATIVE GOVERNANCE &
TRADITIONAL AFFAIRS, EASTERN CAPE**

2ND RESPONDENT

NKALA ROYAL FAMILY

3RD RESPONDENT

NKOSIYAMNTU NKALA

4TH RESPONDENT

JUDGMENT

PLASKET J

[1] Mr Dumile Nkala, the appellant, applied in the court below for an order to the effect that a decision taken by the first respondent, the Premier of the province, to

remove him from the position of acting headman of the Kambi Administrative Area near Mthatha was 'wrongful and unlawful' and was to be set aside; that he be reinstated in that position; and that the respondents pay the costs of the application. The application was dismissed by Nhlangulela DJP who nonetheless granted leave to appeal. The only party to oppose the appeal is the Nkala Royal Family, the third respondent.

The facts

[2] From the rather cryptic and often confusing papers it emerges that in 1992 Davies J granted an order setting aside the appellant's appointment as headman and appointing him as acting headman of the Kambi Administrative Area. As the respondent in that matter was the chairman of the Military Council that then governed the Transkei homeland it can safely be assumed that the order appointing the appellant was made by the court, rather than remitting the matter, because the decision was a foregone conclusion or some other exceptional circumstance was present to allow for a substitution order.¹ The appellant was appointed in an acting capacity because the fourth respondent, Mr Nkosi Yamntu Nkala, had been identified as the appropriate person to be appointed in terms of customary law but was a minor at the time. In other words, the appellant was appointed to act as regent in the fourth respondent's stead until he attained majority.

[3] By letter dated 29 August 2012, the second respondent, the MEC for Co-Operative Governance and Traditional Affairs in the provincial government, informed the appellant that he had received a request from the third respondent to review the appellant's position as acting headman. The reason for the request was that 'the rightful heir' – the fourth respondent – was 'ready to take his position'.

[4] The letter proceeded to say:

'You are hereby requested in terms of Section 20(3)(a) of Traditional Leadership and Governance Act No 4 of 2005, to make representations as to why the decision to remove you from the position as Acting Inkosana cannot be effected.'

The appellant was afforded 14 days within which to furnish his representations.

¹ See Baxter *Administrative Law* at 681-685.

[5] The appellant duly furnished his representations by way of a letter written by his attorneys dated 18 September 2012. It would appear, however, that no action was taken by the government prompting, in 2014, an application by the third and fourth respondents to compel the Premier, in consultation with the MEC, to consider the appellant's representations, to recognise the fourth respondent as headman in the event of the appellant not having made representations and directing the Premier to issue a certificate of recognition to the fourth respondent. An order in these terms was granted by Malusi AJ on 20 March 2014.

[6] In due course, the appellant's acting appointment was revoked. The fourth respondent was recognised as headman of the Kambi Administrative Area by Notice No. 1 of 2014 published in *Provincial Gazette Extraordinary* No. 3291 of 13 October 2014. His certificate of appointment and recognition, while dated 16 January 2015, stated that the effective date of his appointment was 22 August 2014.

[7] The appellant was initially not informed of the revocation of his acting appointment. It was only when his salary was stopped and after making enquiries that he discovered that he was no longer an acting headman. When he sought reasons, he received a letter dated 27 November 2014 and signed by the MEC. It said:

'Kindly be informed that the Department has received the court order which orders the Department to terminate your services as acting inkosana of Kambi Administrative Area under Kambi Traditional Council in the district of Mthatha.

The Department had no option but to implement the court order and as such you are requested to vacate the office as acting inkosana of Kambi Administrative Area under Kambi Traditional Council.'

[8] On 21 May 2015 Griffiths J rescinded the order of Malusi AJ granted on 20 March 2014.

[9] On 21 April 2015, the head of the Department of Co-operative Governance and Traditional Affairs wrote a letter to the third respondent's attorneys in which he set out fuller – and different – reasons for the revocation of the appellant's acting

headmanship. It would appear that this letter is the report envisaged in paragraph 1 of the order granted by Malusi AJ. The letter said:

'Kindly be advised that the first respondent [the Premier] in consultation with the second respondent [the MEC] complied with the court order of the 20th March 2014 by considering the representations made by the third respondent [the appellant] as it is also the requirement of Traditional Leadership and Governance Act No. 4 of 2004. Section 20(3)(b) of this Act requires that the first respondent to consider the representations submitted to him and withdraw the certificate of recognition with effect from the date of removal if the decision to remove him is in accordance with custom.

In this matter the first respondent not only complied with section 20(3)(b), he also complied with the court order where after considering the representations of the third respondent took a decision to remove him and informed the royal family, the third respondent and the Provincial House of Traditional Leaders in the Eastern Cape in terms of section 20(3)(c).

The first respondent recognised the applicant [the fourth respondent] as a headman of Xhambi Administrative Area, Mthatha. We are now complying with paragraph one of the order by giving the report to the applicant's attorneys of what the first respondent has done after the court order.'

The law

[10] The appointment and removal from office of headmen² and acting headmen is regulated by the Eastern Cape Traditional Leadership and Governance Act 4 of 2005 (EC). In terms of s 18 of the Act, a royal family, acting 'with due regard to applicable customary law' must identify a person who qualifies in terms of customary law to assume the position of headman. The royal family must then inform the Premier of the particulars of that person. The Premier 'must, subject to subsection 5, by notice in the *Gazette* recognise the person so identified by the royal family'. (Subsection 5 is not relevant to this case.)

[11] Section 22 makes provision for the identification of acting headmen in certain instances. The appellant was not appointed as acting headman in terms of this section but in terms of the homeland legislation then in force, the Transkei

² A headman (or headwoman) is referred to in the Act as an iNkosana, the isiXhosa term. A senior traditional leader is referred to as an iNkosi. A king is referred to as an iKumkani.

Authorities Act 4 of 1965. This appointment was, in terms of s 37(2) of the current Act, 'deemed to have been done in terms of the corresponding provisions of this Act'.

[12] Section 22(5) places an obligation on the Premier to review an acting appointment every six months. Section 22(6) provides that the procedure for the removal of an acting headman is the same as that for the removal of a permanently appointed headman. That procedure is set out in s 20. Section 20(3) provides:

'Where it has been decided by a royal family to remove an iNkosi or iNkosana in terms of subsection (2), the Premier must –

- (a) advise the iNkosi iNkosana of such decision and, in writing, call upon such iNkosi iNkosana to make representations to him or her as to why the decision to remove him or her should not be given effect to;
- (b) consider the representations submitted to him or her and withdraw the certificate of recognition with effect from the date of removal if the decision to remove him or her is in accordance with custom;
- (c) inform the royal family concerned, the removed iNkosi or iNkosana, and the Provincial House of Traditional Leaders concerned, of such removal;
- (d) publish a notice with particulars of the removed iNkosi or iNkosana in the *Gazette*.'

[13] Section 21 of the Act makes provision for the appointment of regents in circumstances in which 'a royal family has identified the successor to the position of iKumkani, iNkosi or iNkosana who is a minor'.³ An obligation is placed on the Premier to review the appointment of a regent every three years and 'immediately after the successor has attained the age of majority'.⁴ Section 21(6) deals with the termination of a regency. It states:

'As soon as the successor to the position of iKumkani, iNkosi, iNkosana ceases to be a minor in terms of customary law –

- (a) the regent recognised in terms of subsection (1) must relinquish his or her position as regent; and
- (b) in the case of an iNkosi or iNkosana, a certificate of recognition contemplated in section 18(3) must be issued by the Premier after his or her name has been published in the *Gazette*.'

³ Section 21(1).

⁴ Section 21(3).

[14] In *Premier of the Eastern Cape & others v Ntamo & others*⁵ it was accepted (by a full bench) that the appointment of a headman was an administrative action and thus subject to review in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA). I can see no reason why the decision to remove a headman from office is not an administrative action. In effecting such removal, the royal family concerned and the Premier (or his delegate) apply the applicable legislation. There is little scope for the application of policy, the discretion of both is limited by jurisdictional facts and the powers of both are closely defined and structured.⁶

[15] In order to succeed in having his removal from office set aside, therefore, the appellant is required to establish one or more ground of review provided for in s 6 (2) of the PAJA, including any ground of review that is not mentioned but has been developed by the courts.

[16] The argument advanced by Mr Nkubungu, who appeared for the appellant, is that the decision was tainted by an error of law: the decision-maker – either the Premier or the MEC acting on delegated authority – misinterpreted Malusi AJ's order of 20 March 2014, believing that it ordered him to revoke the appellant's appointment.

[17] While it is certainly so that, in his letter dated 27 November 2017, the MEC makes this plain, there appear to me to be two problems with Mr Nkubungu's argument.

[18] The first is that when the evidence as a whole is considered, it is apparent that the MEC's letter contains reasons that are mistaken and that the later letter of the head of his department, being consistent with the evidence, contains the correct reasons for the decision.

⁵ *Premier of the Eastern Cape & others v Ntamo & others* 2015 (6) SA 400 (ECB).

⁶ See *Premier of the Eastern Cape & others v Ntamo & others* (note 5) paras 79-83 (concerning the appointment process).

[19] I say this because the royal family requested the Premier to review the appellant's appointment when the fourth respondent was ready to take his place as headman. Pursuant to this, the appellant was given the opportunity to make representations as to why he should not be removed from office. He did so but, it would appear, the Premier failed to take any steps to consider them and consider the recognition of the fourth respondent. The result was an order to compel him to do so and the order of 20 March 2014.

[20] In the MEC's letter, he spoke of the Department taking the decision to 'terminate' the appellant's 'services'. 'The Department' was not ordered by Malusi AJ to do anything and it has no powers in terms of the legislation to remove anyone from office. The Premier, on the other hand, was ordered by Malusi AJ to consider the appellant's representations.

[21] As the order is clear – the only relevant relief was that the Premier consider the representations and report thereon to the royal family and fourth respondent – it is probable that the MEC wrote the letter of 27 November 2014 in error. The later letter is consistent with the Act, the facts and the order: it is the report envisaged by the order and states what would have been the only possible and obvious outcome – that the acting appointment had to end because of the permanent appointment of the fourth respondent.

[22] The second difficulty I have with the argument of Mr Nkubungu is this. If one accepts that the removal from office of the appellant was the result of a misinterpretation of the order issued by Malusi AJ, the decision is tainted by an error of law. It is, however, not every error of law that results in the setting aside of administrative action: s 6(2)(d) of the PAJA provides that a court may review administrative action if 'the action was materially influenced by an error of law'.

[23] Section 6(2)(d) codified the ratio of *Hira & another v Booysen & another*,⁷ the leading case that mapped out and clarified the ground of review of error of law in its common law manifestation. Corbett CJ held:⁸

⁷ *Hira & another v Booysen & another* 1992 (4) SA 69 (A).

‘Whether or not an erroneous interpretation of a statutory criterion, such as is referred to in the previous paragraph (ie where the question of interpretation is not left to the exclusive jurisdiction of the tribunal concerned), renders the decision invalid depends upon its materiality. If, for instance, the facts found by the tribunal are such as to justify its decision even on a correct interpretation of the statutory criterion, then normally (ie in the absence of some other review ground) there would be no ground for interference. *Aliter*, if applying the correct criterion, there are no facts upon which the decision can reasonably be justified. In this latter type of case it may justifiably be said that, by reason of its error of law, the tribunal “asked itself the wrong question”, or “applied the wrong test”, or “based its decision on some matter not prescribed for its decision”, or “failed to apply its mind to the relevant issues in accordance with the behests of the statute”; and that as a result its decision should be set aside on review.’

[24] In my view, even if the decision-maker misinterpreted the order issued by Malusi AJ, that error of law was not material: once the fourth respondent reached the age of majority, the die was cast for the appellant. His regency had to end. In terms of s 21(6) of the Act as soon as the fourth respondent ceased to be a minor in terms of customary law, the appellant was required to relinquish his position as acting headman and the fourth respondent had to be recognised by the Premier. As the appellant had no right to remain in his position as soon as the fourth respondent became an adult, the error of law made no difference and, not being material, does not result in the unlawfulness of the administrative action taken against the appellant.

[25] The appeal cannot therefore succeed.

The record

[26] Part of the record was a transcription of counsel’s arguments in the court below. Not surprisingly, this was not even referred to in the course of the argument in the appeal. It comprised of 78 pages out of a record of 176 pages.

[27] The argument should not have been part of the record. The parties must have realised that it was irrelevant. There was no reason why anyone should have

⁸ At 93G-I.

perused it. For this reason, I intend making an order that no costs in respect of this part of the record are recoverable on taxation and neither party's legal representatives may charge an attorney and client fee for perusing it.

The order

[28] I make the following order.

(a) The appeal is dismissed with costs.

(b) No costs in respect of pages 81 to 159 of the record are recoverable by the third respondent on taxation.

(c) Neither party's legal representatives may charge an attorney and client fee for the perusing of pages 81 to 159 of the record.

C Plasket

Judge of the High Court

I agree.

S Alkema

Judge of the High Court

I agree.

R Brooks

Judge of the High Court

APPEARANCES

For the appellant: Mr MH Nkubungu of B Makade Inc.

For the third respondent: Mr A Bodlani instructed by VV Msindo & Associates