

NOT REPORTABLE

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

Case no: 1689/2011

In the matter between:

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| 1. | ZULU ROYAL FAMILY OF NCAPAI
KAMADZIKANE KAZULU | First Applicant |
| 2. | LUMUMBA MAKAULA | Second Applicant |
| 3. | MZILIKAZI ELLIOT NCAPAI | Third Applicant |
| 4. | MABALAI JOHAN DABULA | Fourth Applicant |
| 5. | ZIPHATHE MAKAULA | Fifth Applicant |
| 6. | ZUKISILE MAKAULA | Sixth Applicant |
| 7. | ZOLILE MAKAULA | Seventh Applicant |
| 8. | NKOSAYIXAKWA MAKAULA | Eighth Applicant |
| 9. | PHATHIZIZWE MAKAULA | Ninth Applicant |
| 10. | DON DORAN DABULA | Tenth Applicant |
| 11. | SIPHO MPONGOMA | Eleventh Applicant |
| 12. | ZABULALANA DABULA | Twelfth Applicant |
| 13. | FANA MAKAULA | Thirteenth Applicant |
| 14. | SIMPIHWE MAKAULA | Fourteenth Applicant |
| 15. | MNYANEZELI MAKAULA | Fifteenth Applicant |
| 16. | SICELO MAKAULA | Sixteenth Applicant |
| 17. | VUYANI MAKAULA | Seventeenth Applicant |
| 18. | SIZWE MAKAULA | Eighteenth Applicant |

vs

- | | | |
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| 1. | FIKILE MAKAULA | First Respondent |
| 2. | MNCEDISI MAKAULA | Second Respondent |
| 3. | PHAMBILI MAKAULA | Third Respondent |
| 4. | MZWANDILE MAKAULA | Fourth Respondent |

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| 5. | THULETHU MAKAULA-GARANE | Fifth Respondent |
| 6. | THEMBISA MAKAULA | Sixth Respondent |
| 7. | NOMBULELO SHUSHU | Seventh Respondent |
| 8. | MALINGE MAKAULA | Eighth Respondent |
| 9. | NONCEKELELA MAKAULA | Ninth Respondent |
| 10. | THEMBISILE NOKWEZI MAKAULA | Tenth Respondent |
| 11. | THE MEC FOR LOCAL GOVERNMENT
AND TRADITIONAL AFFAIRS, EASTERN
CAPE | Eleventh Respondent |
| 12. | THE SUPERINTENDENT-GENERAL LOCAL
GOVERNMENT AND TRADITIONAL AFFAIRS,
EASTERN CAPE | Twelfth Respondent |
| 13. | HOUSE OF TRADITIONAL LEADERS,
EASTERN CAPE | Thirteenth Respondent |
| 14. | THE PREMIER, EASTERN CAPE | Fourteenth Respondent |
| 15. | MAKAULA TRADITIONAL COUNCIL | Fifteenth Respondent |

Date heard: 9th June 2014

Date delivered: 8 January 2015

SUMMARY: Applicants herein sought an order to declare the existence of the Mngcisane Royal Family formed by the first to ninth respondents and their cohorts to be of no force or legal effect and first applicant to be the only Royal Family of the Makaula Traditional Council. The Court concluded that the respondents' evidence could not be said to amount to a genuine dispute of fact justifying a referral of the case to oral evidence. The application was decided in favour of the applicants with costs.

JUDGMENT

TSHIKI J:

[1] In their notice of motion, the applicants herein seek an order in the following terms:

[1.1] that the alleged existence of the so-called Mngcisane Royal Family formed by the first to ninth respondents and their cohorts be and is hereby declared to be of no force and/or legal effect;

[1.2] that the first to ninth respondents and their cohorts be and are hereby interdicted and restrained from arrogating to themselves and their so-called Mngcisane Royal Family, the right to identify any traditional leader that falls under the auspices of the fifteenth respondent or to perform any activity that has traditionally been performed by the first applicant;

[1.3] that the recognition of the so-called Mngcisane Royal Family by the tenth to fourteenth respondents as an entity that is vested with the right to deal with any affairs of the fifteenth respondent be and is hereby declared improper, irregular and is set aside;

[1.4] that the tenth to fifteenth respondents be and are hereby ordered to fully recognise the first applicant as the proper Royal Family that is vested with the right and authority to deal with issues of identification of traditional leaders that fall under the jurisdiction of the fifteenth respondent;

[1.5] that the processing and implementation of the appointment of the tenth respondent by the eleventh, twelfth and/or fourteenth respondents as the right inkosi and head of the fifteenth respondent on the basis of her identification and recommendation by the so-called Mngcisane Royal Family be and is hereby reviewed and set aside, and the fourteenth respondent be and is ordered to reverse such appointment;

[1.6] that the fourteenth respondent be and is hereby ordered to facilitate the appointment of the fifth applicant as the acting inkosi and head of the first respondent in terms of his identification and recommendation by the first applicant;

[1.7] that any failure by the applicant to strictly comply with the provisions of the Promotion of Administrative Justice Act 3 of 2000 with regard to the launching of this application be and is hereby condoned;

[1.8] that costs of this application shall be paid by the first to ninth respondents as well as the eleventh, twelfth and fourteenth respondents jointly and severally, the one paying the other to be absolved from liability and that the tenth, thirteenth and fifteenth respondents shall pay such costs, jointly and severally with the other respondents, only in the event of their opposition to the application;

[1.9] further and/or any further relief.

[2] The eleventh to fourteenth respondents have opposed the application.

[3] The main applicant herein is the first applicant described in paragraph two of the founding affidavit as the Zulu Royal Family of Ncapai KaMadzikane Kazulu, a royal family as envisaged in the Traditional Leadership and Governance Act 4 of 2005 (Eastern Cape) (the Act). Its task is and has been from time to time immemorial to deal with all aspects pertaining to Chieftainship and Headmanship throughout the royal house of Chief Ncapai which is based at Lungangeni Great place in Mount Frere. The second to eighteenth respondents are residents of Mount Frere district.

[4] The second applicant herein who has deposed to the applicants' founding affidavit is the chairperson of the first applicant. He contends to also have been duly authorised by his co-applicants to depose to the applicants' main affidavit on their behalf as well.

[5] The third to eighteenth applicants, in terms of the founding affidavit, are adult male residents of the various administrative areas of the district of Mount Frere in the Eastern Cape Province.

[6] The first to fourth, and eighth respondents are, as they are described in the founding affidavit, adult male persons of different administrative areas of the district of Mount Frere in the Eastern Cape Province.

[7] The fifth to seventh, ninth and tenth respondents are adult female persons of various administrative areas of the district of Mount Frere in the Eastern Cape Province.

[8] The eleventh respondent is the member of the Executive Council for Local Government and Traditional Affairs, Eastern Cape Province who is said to have been cited herein in his official capacity as the political head of the Department responsible for, amongst others, the task of processing appointments of traditional leaders throughout the Eastern Cape Province, such as the one in issue herein.

[9] The twelfth to fourteenth respondents are the Superintendent-General of the department of Local Government and Traditional Affairs, Eastern Cape, and Premier

Eastern Cape, respectively who have been cited in their capacities as the functionaries described in paragraphs 3.13 and 3.14 of the founding affidavit.

[10] The fifteenth respondent is described as the Makaula Traditional Council, a statutory body formed in terms of the law, whose seat and address is at Lungangeni Great Place, Lungangeni Administrative area, Mount Frere, Eastern Cape.

[11] The first to ninth respondents are said to have been cited herein in their capacities as members of a purported entity called Mngcisane Royal Family, whose validity or legal existence is disputed by the applicants.

[12] The applicant herein is described in the founding affidavit as has been in existence from time immemorial and has been the recognised Royal Family of Ncapai KaMadzikane Kazulu that performs the functions envisaged in Section 18.1 of the Act. In paragraph 6 of the founding affidavit, line 6, the applicant refers to “before the advent of the Act”, “the first respondent was known as the Zulu Royal House of Ncapai KaMadzikane Kazulu”. However, in paragraph 3.1 of the founding affidavit on page 18, the first respondent is referred to as Fikile Makaula, an adult male person of Mgungudlovu administrative area in Mount Frere district. This, in my view, is an error because the first applicant is the Zulu Royal Family of Ncapai KaMadzikane Kazulu.

[13] According to the applicant, it is the rightful body or institution that is clothed with authority to deal with the identification for appointment of all traditional leaders in the Makaula Traditional Authority. Applicant then mentions about five chiefs and

headmen that were appointed through the first applicant's structure. All those chiefs and headmen that were appointed through the applicant were fully recognised and their appointments confirmed by the twelfth and fourteenth respondents in terms of the Act.

[14] According to the applicant, the issues between the two parties herein surfaced after the death of Chief Mvuleni Makaula (deceased) of Lungangeni Administrative Area, who was the head of Makaula traditional authority. He died in January of 2010. After his death, it was customary for the Makaula Traditional Authority to appoint the successor of the deceased chief. That process was necessarily delayed at the suggestion of the first respondent who was part of the first applicant until after the funeral of the deceased. The deponent herein of the applicants' founding affidavit, Mr Lumumba Makaula who was present at the deceased funeral announced that first applicant had decided to delay the identification of the deceased's successor until after the deceased's funeral. The main reason was that there had been divergent views regarding the proper successor and there were competing claims from the houses of Mngcisane Royal Family. It was also decided to first appoint an acting chief who would hold the reigns until the successor is identified and the date for such meeting was set as the 1st February 2010 where the first respondent was also present. The fifth applicant was subsequently identified as the acting chief. This appointment of the fifth applicant provoked an announcement by the second respondent, who attended as the member of the first applicant, that the Mngcisane Royal Family had already decided to recommend the appointment of the tenth respondent as the regent on behalf of her son who was still young to be installed. It is common cause that according to the minutes and attendance register

of the first applicant's meeting of the 1st February 2010 reflects that the first and second respondents were present as members who were full participants in the deliberations of the first applicant's meeting. Second applicant was immediately informed that there was no such entity known as Mngcisane Royal Family. It is also the contention of the applicant that the second respondent is one of the most junior members of the Mngcisane Royal Family and there are other senior house members of the Mngcisane family who are part of the first applicant. He refers to the fifth, seventh, eighth, fifteenth, seventeenth, nineteenth and twentieth applicants as some of those senior members. Therefore, even if there was such a Mngcisane Royal house, it can never lie with them to constitute such Mngcisane Royal Family even if it existed. A resolution was therefore subsequently made for the selection of the fifth applicant as the acting chief which was implemented.

[15] On the 16th February 2010, the resolution of the identification of fifth applicant in his acting capacity as the regent was finalised and the first applicant totally dismissed the existence of the so-called Mngcisane Royal Family. The written resolution of the said appointment of the fifth applicant as acting chief was duly faxed to the eleventh and twelfth respondents' Department for confirmation. The eleventh and twelve respondents were advised about the identification of the permanent successor to the late Chief Mvumeni. The contents of the meetings aforementioned and the deliberations together with a list of those who were present are contained in the annexure "LM1" appearing on page 53 of the record.

[16] It is common cause that the eleventh and twelfth respondents did not confirm the appointment of the fifth applicant as the acting chief and all attempts by the

applicants to meet with or to arrange a meeting with the eleventh and twelfth respondents were unsuccessful. This was due to the non-cooperation by the eleventh and twelfth respondent's officials. All arranged appointments were not honoured by the eleventh and twelfth respondents' Department's officials. The department of Local Government and Traditional Affairs wrote to the first applicant informing them about that.

[17] The application having been opposed by the eleventh to fourteenth respondents the answering affidavit has been filed by only the first respondent but not confirmed by any of the respondents. In the main the first respondent contends that he is an adult Headman of Mgungundlovu Administrative area Mount Frere district where he resides. He is the Chairperson of the Mngcisanse Royal Family which is the core customary structure consisting of immediate relatives of the ruling family of Amabhaca KaMakaula. At the centre of the family is the late Chief Mvumeni De Villiers Makaula, the deceased. The aforesaid Royal Family is made up of, *inter alia*, the first to ninth respondents. The second, third, fourth, eighth and himself are the uncles of Chief Makaula, the deceased. He also lists the other members of the Royal Family by mentioning other eighteen (18) people of the Makaula surname. He contends that he has been authorised by the members of the Royal Family to depose to the answering affidavit for and on their behalf as well.

[18] The main dispute according to the first respondent relates to the recognition (or lack therefore) of the son of Chief Makaula as his late father's successor and Inkosi. As a result of his tender age his mother, the tenth respondent, has been identified and recommended by the Mngcisanse Royal Family and recognised by the

eleventh respondent to act on his behalf. On the 22nd January 2010 after the death of the deceased, they met as Mngcisane Royal Family, and decided in terms of the custom and tradition of Amabhaca that the eldest son of Chief Makaula would be his successor. He was in fact subsequently identified as such person whose name is Nkosi Gingqi. He was still young and it was therefore necessary for his mother Thembisile Makaula to act in his stead. According to him such a decision was duly communicated to the Traditional Council, Emboland Region and the eleventh respondent. The eleventh respondent duly recognised the tenth respondent as the regent and published such recognition in a government gazette. He contends that the recognition of the tenth respondent as a regent family are in accordance with the provisions of the Act. In his view, any allegations made in the founding affidavit on behalf of the first applicant which are inconsistent with the contents of his affidavit are denied. He contends that Chief Makaula (the deceased) had been the chief of Amabhaca and head of the Makaula Traditional Authority since 1989. He contends further that the existence of the first applicant is unknown and it had played no part in the appointment of any of the chiefs and headmen under the jurisdiction of the fifteenth respondent. He further contended that the applicants are a mere collection of people who are not immediate relatives of the ruling family. According to him the tenth respondent is the Chairperson of Makaula Traditional Council established in terms of section 6 of the Act. The fifteenth respondent accepted the identification of the Mngcisane Royal Family. His contention is that the succession of traditional leaders was that the eldest son of the ruling Chief should succeed his father. He further contends that he was present in all the meetings after the death of the deceased chief. On the 22nd January 2010 they met as Mngcisane Royal Family and

decided that the deceased would be succeeded by his son Gingqi and that in view of the young age of Gingqi the tenth respondent would act in his stead.

[19] First respondent confirms that he and others attended the meeting on the 13th August 2010 on the basis that they were the only structure that was authorised to identify a person to be recognised as the Chief. They left the meeting when the representative of the first applicant insisted that identification of the regent must be decided by a vote. He contends that the matter could not be decided by a vote because the first applicant has no authority to make a decision regarding the identification of a chief. I must say though that it does not make sense to me to refuse to refer a stalemate to a vote more so that they could not resolve the issue by any other democratic solutions. In any event, resorting to a vote is also democratic.

[20] First respondent further contends that at the meetings that were held with the officials of the Department of co-operative Governance and Traditional Affairs they “were required to outline their geology” (the deponent must have meant to refer to genealogy). The reason thereof was that the Royal Family is made of immediate members of the ruling family. On giving the Department’s officials the genealogy relating to the house of the late Chief Mvuleni Makaula (the deceased) it became clear that the first applicant and its members featured nowhere. It is at that stage that they became unhappy and left the meeting. He contends that the applicants have not made out a case for the relief that they seek.

[21] It is significant to note that none of the respondents, or any other person for that matter, has confirmed the contents of the first respondent’s answering affidavit.

[22] I intend to deal with the applicants' replying affidavit as I go along with this judgment.

[23] On the date of argument of the main application *Mr P.M. Mthsaaulana SC* with him *Mr Bodlani* appeared for the applicants and *Mr V. Notshe SC* with him *Mr P.V. Msiwa* appeared for the respondents.

[24] In their heads of argument respondents submit the following contentions:

[24.1] that in the first place the applicant's application is premature in that:

[24.1.1] in terms of section 18 (4) of the Eastern Cape Traditional Leadership and Governance Act, 4 of 2005 if there are allegations that an identification of a person in terms of section 18 (1) was not done in accordance with the Act, customary law or custom, the matter may be referred to the Provincial House of Traditional Leaders for its recommendation. Therefore, the applicants should have requested the eleventh respondent to refer the matter to the Provincial House of Traditional Leaders for its recommendation.

[24.2] Secondly, the affidavits filed together with reasons given by the eleventh respondent reveal certain disputes of fact and therefore applicants cannot, as they do herein, seek a final interdict and her final relief on the papers and without resort to oral evidence.

[24.3] In the eleventh to fourteenth respondents' view the allegations put up by the applicants raise a real, genuine *bona fide* dispute of fact and are not far-fetched or clearly untenable such that the Court would be justified in rejecting them merely on the papers. Therefore, Rule 6 (5)(g) of the Uniform Rules authorises this Court to dismiss the main application if it cannot be properly decided on affidavit.

[25] On the merits the respondents contended that the decision of the eleventh respondent can only be attacked by way of review in terms of Rule 53. If reasons for the decision are given and no supplementary affidavit is filed those reasons stand. Therefore, there is no need for the decision maker to file an affidavit. In his view, reasons for appointing the tenth respondent were furnished and they appear on page 213 of the record. Lastly, the eleventh respondent contends that the application is premature in that the relief that applicants should have sought is to compel the eleventh respondent to refer the matter to the house of traditional leaders.

[26] On the other hand as regards the merits of the application, the applicants contend that when the Regent was appointed there has been no adherence to the provisions of section 34 of the Act which provides:

- “34. (1) The Premier may, subject to such conditions as he or she may determine in writing, delegate any powers conferred on him or her by this Act, except the power to make regulations, to a Member of the Executive Council of the Province.
- (2) The delegation referred to in subsection (1) does not preclude the Premier from exercising any such delegated power.
- (3) The Premier may set aside, amend or withdraw, at any time, any decision of the delegatee made in the exercise of such power.”

[27] In this case we are dealing with, *inter alia*, a situation where the issue is the appointment of a regent because the successor to the deceased Chief is still a minor and cannot be appointed to succeed his late father until he is competent to rule. Such a situation is governed by the provisions of section 13 of the Act which provides:

“13 Recognition of regents

- (1) Where the successor to the position of king, queen, principal traditional leader, senior leader, headman or headwoman identified in terms of section 9, 9A or 11 is still regarded as a minor in terms of applicable customary law or customs –
 - (a) the royal family concerned must, within a reasonable time –
 - (i) identify a regent to assume leadership on behalf of the minor; and
 - (ii) through the relevant customary structure, inform the Premier of the province concerned of the particulars of the person identified as regent and the reasons for the identification of that person; and
 - (b) the Premier concerned must, with due regard to applicable customary law or customs, and subject to subsections (2) and (3), recognise the regent identified by the royal family in accordance with provincial legislation.
- (2) The provincial legislation referred to in subsection (1)(b) must at least provide for –
 - (a) a notice in the Provincial Gazette recognising the person identified as regent in terms of subsection (1);
 - (b) a certificate of recognition to be issued to the identified regent;
 - (c) the recognition of a regent to be reviewed by the Premier at least every three years; and
 - (d) the relevant provincial house of traditional leaders to be informed of the recognition of a regent.
- (3) Where there is evidence or an allegation that the identification of a person as regent was not done in accordance with customary law, customs or processes, the Premier –
 - (a) may refer the matter to the relevant provincial house of traditional leaders for its recommendation; or
 - (b) may refuse to issue a certificate of recognition; and
 - (c) must refer the matter back to the royal family for reconsideration and resolution where the certificate of recognition has been refused.
- (4) Where the matter has been referred back to the royal family for reconsideration and resolution in terms of subsection (3) has been reconsidered and resolved, the Premier must recognise the person identified by the royal family if the Premier is satisfied that the

reconsideration and resolution by the royal family have been done in accordance with customary law.”

[28] The Act gives the royal family concerned powers to identify a regent to assume leadership on behalf of the minor and inform the Premier of the province concerned of the particulars of the identified person as well as the reasons for the identification of such person. The Premier concerned must, with due regard to applicable customary law or customs, and subject to the subsection 92 and 93 of the Act recognise the regent identified by the royal family in accordance with provincial legislation.

[29] The applicants have attacked the manner in which the Premier has approached his or her role in the matter in particular whether or not he or she has complied with the provisions of section 34 of the Act. The allegations by the applicants against the eleventh to fourteenth respondents are serious in that they call for the particular response or responses which would adequately address the conduct complained of by the applicants or anyone of them against the named respondents. Some of those allegations are that the relevant authorities have recognised the tenth respondent as the regent instead of the fifth applicant who was recommended by the first applicant. In my view, such allegations necessitated a response by way of an affidavit addressing the concerns and allegations against them. In my view, mere notice by the eleventh respondent as the one appearing on page 207 does not address the applicants’ concerns and is not a response to the allegations contended in the first applicant’s founding affidavit.

[30] In the first place and contrary to the provisions of section 13 (4) of the Act, there is no allegation that the Premier (fourteenth respondent) has delegated his powers in terms of section 34 of the Act. If he or she did not delegate some powers, it is not clear which of those powers had been delegated to the eleventh respondent (the MEC) and which of those powers did the fourteenth respondent retain. In my view, the MEC could only be delegated by the Premier to exercise powers to recognise the minor as the successor as well as to recognise the regent. In my view, a delegation in the circumstances envisaged in section 34 should be in writing and should specify the powers that the Premier is delegating to the MEC. In the absence of such written delegation it cannot be said that the MEC was delegated in this particular case. In such circumstances, I have no reason not to make a finding that the MEC was not delegated to recognise and appoint the regent in this matter. The problems created by the conduct of the eleventh and fourteenth respondents has been compounded by their failure to file affidavits to explain their role in the whole scenario. It follows that on the first respondent's version the process as envisaged in section 34 of the Act has not been followed because for reasons stated above the MEC had not been empowered in terms of the Act when he or she took the decision to recognise and appoint the regent. Therefore, the decision taken by the MEC to recognise and appoint the regent falls to be set aside. In any event, even if properly delegated he should never have allowed the decision delegated to him to be done by the Superintendent-General Mr Khanyile an act that could not be countenanced in terms of the Act which does not make provisions for sub-delegation.

[31] I now proceed to deal with the issue of the first applicant and the first respondent. *Mr Notshe's* submission is that in this regard there is a dispute of facts

which cannot be resolved without hearing oral evidence. Recognising that the truth almost always lies beyond mere linguistic determination the Courts have said that an applicant who seeks final relief on motion must in the event of conflict, accept the version set up by his or her opponent unless the latter's allegations are, in the opinion of the Court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (Heher JA in ***Whightman t/a JW Construction v Headfour (Pty) Ltd and Another*** 2008 (3) SA 371 (SCA) [2008 (2) ALL SA 512 at para [12]); see also ***Plascon Evans Paints (Pty) Ltd vs Van Riebeeck Paints (Pty) Ltd*** 1984 (3) SA 623 (A) at 634E-635C):

“A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him (**or her**). But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his (**or her**) case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. It also follows that the factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision...” [My emphasis]

(Whightman t/a JW Construction v Headfour (Pty) Ltd and Another supra).

[32] In the case in issue only the first respondent Fikile Makaula has deposed to an affidavit on behalf of the Makaula Traditional Council, the fifteenth respondent. In this answering affidavit the first respondent purports to have been authorised by the

Mngcisane Royal Family to depose to such affidavit on their behalf as well. However, none of the members of the Mngcisane Royal Family has filed confirmatory affidavits confirming their alleged authorisation of the first respondent to depose to the answer on their behalf. Secondly, the first to tenth and fifteenth respondents have never filed a notice to oppose the application which is a necessary document to file if a person cited as the respondent intends to oppose the application. The 16th to 29th respondents were later joined as parties to the application but neither did they file a notice to oppose nor answering affidavits contesting the allegations by the applicants. It follows, therefore, that the authorisation of the first respondent by the Mngcisane Royal Family cannot include reference to the 16th to 29th respondents who at the time of the deposition of the first respondent's answering affidavit were not yet joined as parties to the application. For that reason, they could not at that stage have authorised the first respondent to depose to his affidavit on their behalf. It follows, therefore, that the 16th to 29th respondents have not contested the present application.

[33] As for the eleventh to fourteenth respondents, they have elected at their own peril not to file their answering affidavits to explain their version of events.

[34] On receipt of the notice of application coupled with the founding affidavit, the respondent is expected to file his or her answering affidavit within the time stipulated by the Rules. Rule 6 (5)(i), (ii) and (iii) provides that the respondent shall, *inter alia*, within the time stipulated in the notice by the applicant give applicant notice, in writing that he or she intends to oppose the application. He or she shall also deliver his or her answering affidavit, if any, together with any relevant documents. If he or

she intends to raise any question of law only, he or she shall deliver notice of intention to do so within the time stipulated by the Rules.

[35] It follows from the foregoing that the first respondent has complied with Rule 6 (5)(i)(ii) above. In my view, no person can depose to an affidavit on behalf of another person. This is so because an affidavit stands in the stead of evidence which is led *viva voce* in action proceedings. (***Erhardt v State President and Others*** 1989 (2) SA 499 (T)). Therefore, in essence, in this case only the first respondent has deposed to the affidavit. This Court will therefore deal with his evidence alone and establish whether the first respondent's evidence amounts to a dispute of fact when compared to that of the applicants. I say so, because notwithstanding that the eleventh to fourteenth respondents have filed their notices to oppose they failed to file any affidavits to gainsay the contentions stated in the founding affidavit which has been confirmed by the third to eighteenth applicants.

[36] In his answering affidavit, Fikile Makaula the first respondent, contends as follows: "I am the headman of the Mngcisane Royal Family [which] is a core customary structure consisting of immediate relatives of the ruling family of Amabhaca KaMakaula. At the centre of the family is the late Chief Mvuleni De Villiers Makalua (Chief Makaula). The aforesaid Royal Family is made up of, among others, the first to ninth respondents ... The Mngcisane Royal Family has been in existence as long as the existence of the Mngcisanse House of the Mngcisane ruling family albeit under a different name. After the promulgation of the Eastern Cape Traditional Leadership and Governance Act 4 of 2005 (the Act) it was recognised by the eleventh to fifteenth respondents as the royal family of Chief Makaula. Its identification and recommendations of persons as chiefs/headmen was accepted by the eleventh respondent who recognised them as chiefs/headman by notices in the gazette. I

and Diko were identified as chiefs by the Mngcisane Royal Family in terms of the law and customary practice. We were all recognised as such by the eleventh respondent.” It is clear from the foregoing that the Mngcisane Royal Family is the Royal Family as defined in section 1 of the Act.

[37] To me it does not appear that there is a dispute about the heir to the throne, and the only issues here are whether the Royal Family’s name that performs the functions as envisaged in section 18 (1) of the Act is the Zulu Royal Family of Ncapai KaMadikane KaZulu or the Mngcisane Royal Family as well as whether the Regent was properly nominated and appointed.

[38] From the start, it is clear that there is only one person who is content to support the existence of the Mngcisane Royal Family as the recognised Royal Family. There is no other person or persons who have deposed to affidavits in support of the first respondent’s contention as against the eighteen applicants who have supported the first applicant as the recognised Royal Family. The first respondent has not filed a notice to oppose the applicants’ application and for reasons which have not been explained to this Court.

[39] In any event, even the first respondent’s contention is contested by some of the respondents. The first and tenth respondents did not file notices to oppose this application. The very first respondent, Fikile Makaula has elected not to support the affidavit of the fifteenth respondent, (Makaula Traditional Council). Pathilizwe Makaula and Leonard Fana Makaula who are members of the Traditional Council deny that the fifteenth respondent has been involved in the matter of the

recommendation of the tenth respondent as regent. This denial flies on the face of the first respondent's allegations in support of the tenth respondent. The applicants have filed their resolutions in support of their meetings and resolutions but none of the affidavits have been filed by or on behalf of the fifteenth respondent. Therefore, there is no evidence by the fifteen respondent which has the force to gainsay the contention by the eighteenth applicant. In such a situation there can be no dispute of fact because there is no evidence from the respondents.

[40] The eighth respondent in an affidavit written in isiXhosa has filed an affidavit in which he distances himself from the Mngcisane Royal Family. He says he has never attended any meeting of the Mngcisane Royal Family nor has he ever heard of or been invited to such meeting. He is, therefore, not opposing the proceedings. Other respondents who are the second to tenth respondents have also not filed any confirmatory affidavits to confirm that they have authorised the first respondent to oppose the application on their behalf. This also holds true with regard to Asahleli Peter Makaula and Malinge Williamson Makaula who both have denied being members of the Mngcisane Royal Family as contended by Mr Fikile Makaula.

[41] Therefore, the first respondent's allegation that he is authorised to depose to the answering affidavit on behalf of the members of the Mngcisane Royal Family has no support from any other person.

[42] Where a respondent in motion proceedings chooses not to file opposing affidavits, answering the applicant's allegations but to take a legal point only, the applicant's allegations in his founding affidavit have to be accepted. The practice of

not filing opposing affidavits but relying on legal points is to be discouraged. Generally speaking, the application procedure requires a respondent who wishes to oppose an application on the merits to place his or her case on the merits before Court by way of affidavits [***Ebrahim and Another v Georgoulas and Another*** 1992 (2) SA 151 (B)].

[43] By the same parity of reasoning, as is the case herein, where the eleventh and fourteenth respondents had put forward no answer to allegations which, on their face, substantiated the applicants' case but only relied on the application for a referral of the matter to oral evidence would be taking a risk in case the Court, on good grounds refuses to refer the matter to oral evidence. [***Ripoll-Dausa v Middleton NO and Others*** 2005 (3) SA 141 (C) [2005 (2) ALL SA 83 at 151 F]. Whereas in ***United Methodist Church of South Africa v Sokufudumala*** 1989 (4) SA 1055 (O) at 1059 A it was alleged that the applicant had not acted in terms of its constitution. That allegation was not contradicted and was accepted. Also where the allegation by the applicant has not been contradicted, it should be taken as being admitted unless the contrary can be gleaned from the context.

[44] The fact that the second to tenth respondents have not filed notices to oppose the application is a clear indication that they do not oppose the application and that their names must have been added to that of the first respondent to give the false impression that they have supported the first respondent.

[45] The following people have refuted the allegation by the first respondent that the Mngcisane Royal Family has been in existence for some time. They are Malinga

Makaula, Asahleli Phathilizwe a tradition leader, Fana, Mnyazana, Avumile, Scelo Makaula and others have not supported the existence of the Mngcisane Royal Council. They have deposed to affidavits which are annexed to the replying affidavit as annexures “LM-14 to LM-21” respectively.

[46] It is strange that, on the face of the overwhelming evidence proving the existence of the Zulu Royal Family of Ncapai KaMadzikane KaZulu which existed since 1845 the eleventh to fourteenth respondents have decided to recommend the alleged decisions made by the Mngcisane Royal Family. There is overwhelming evidence which shows that for a long time, even before the Mngcisane Royal Family was created, that they were aware of the applicant’s existence. Not only that the proof of the existence of the Zulu Royal Family of Ncapai KaMadzikane KaZulu is supported by cogent evidence it is opposed by allegations which have no basis at all. For that reason, it cannot be said that there can be a genuine dispute of fact in the circumstances.

[47] It also follows that the totality of the evidence also shows that on the 13th August 2010 the issue between the two Royal families had been known since July 2010. The two families have even met on the 13th August 2010 with a view to make a recommendation by way of a vote. The fifth respondent received the majority of the votes and the Mngcisane family refused to recognise the decision and left in protest. The MEC who is said to have been purportedly delegated by the Premier was not properly delegated. The Premier therefore did not act in accordance with the provisions of the Act. His decision in this regard should be set aside because he

sub delegated his powers to Mr Kanyile the Superintendent-General an act which is *ultra vires* in the circumstances.

[48] I am of the view that from the evidence before me the contention that the first applicant, the Zulu Royal Family of Ncapai KaMadzikane KaZulu is the only Zulu Royal Family which should deal with the affairs of the first applicant has been down to exist and has been confirmed. The other so-called authority known as Mngcisane Royal Family cannot be and should not be recognised by the eleventh to fourteenth respondents as the valid Royal Family of Makaula Traditional Authority which comprises the Royal House of Chief Ncapai which is based at Lungangeni Great Place, Lungangeni Administrative Area, Mount Frere.

[49] The overwhelming evidence which proves the existence of the first applicant as the Makaula Traditional Authority is confirmed and that the Mngcisane Royal Family as the Makaula Traditional Authority is hereby declared null and void.

[50] My conclusion is that the Mngcisane Royal Family does not exist as the Makaula Traditional Council. For that reason, the meeting that was held on the 1st February 2010 when the fifth applicant was appointed as the regent was valid. It cannot, in my view, be referred to any other tribunal or authority because that meeting which appointed the fifth applicant as regent was a body recognised by the Makaula Traditional Council operating under the auspices and directions of the Zulu Royal Family of Ncapai KaMadizane KaZulu. There is, in my view no justification to have that decision referred back to any other authority. It is hereby confirmed.

[51] In the circumstances, the Premier should have recognised the regent identified by the royal family in accordance with section 13 (b) of the Act. There was no valid justification by the Premier to fail to recognise the regent in terms of the Act. Neither has the Premier or his or her delegated MEC has justified their purported recognition of the tenth respondent elected by the Mngcisane Royal Family. Even if the Premier had delegated its powers to act in terms of section 13 (1)(b) to the MEC the decision stands to be set aside because the MEC was not properly delegated in terms of the Act and this is so even for other reasons stated in paragraphs [46] nad [47] *supra*. Even if the Premier or the MEC or one of them, was not aware of who of the two bodies was the real royal family, he or she should have referred the matter to the House of Traditional Leaders for clarity. He or she failed to do so and for reasons not advanced in these proceedings.

[52] I agree that the application against the Premier and the MEC should be upheld with costs including the costs occasioned by the appointment of two counsel.

[53] For the above reasons, I make the following order:

[53.1] The processing and implementation of the appointment of the tenth respondent by the eleventh or twelfth and or fourteenth respondents as the regent Inkosi and head of the fifteenth respondent on the basis of her identification and recommendation by the so-called Mngcisane Royal Family be and is hereby reviewed and set aside and the fourteenth respondent is hereby ordered to reverse the appointment.

[53.2] The fourteenth respondent be and is hereby ordered to facilitate the appointment of the fifth applicant as the Acting Inkosi and head of the fifteenth respondent in terms of the identification and recommendation by the first applicant.

[53.3] It is declared that the recognition of the so-called Mngcisane Royal Family by the eleventh to fourteenth respondents is null and void and of no force and effect.

[53.4] It is declared that the first applicant is the only proper Royal Family of Amabhaca.

[53.5] That the first to ninth respondents or their cohorts are hereby interdicted and restrained from arrogating to themselves and their so-called Mngcisane royal Family the right to identify any traditional leader that falls under the auspices of the fifteenth respondent or to perform any activity that has traditionally been performed by the first applicant.

[53.6] It is declared that the alleged existence of the so-called Mngcisane Royal Family has never been part of the Makaula Traditional Council and is null and void and of no force and effect.

[53.7] The first, eleventh and fourteenth respondents are hereby ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved.

P.W. TSHIKI
JUDGE OF THE HIGH COURT

Counsel for the applicants	:	Mr P.M. Mtshaulana SC with him Mr Bodlani
Instructed by	:	X.M. Petse Incorporated

MTHATHA

Counsel for the respondents : Mr V. Notshe SC with him Mr P.V.
Msiwa
Instructed by : State Attorneys
MTHATHA

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

Case no: 1689/2011

Date: 12.01.2015

In the matter between:

- | | |
|--|------------------------------|
| 1. ZULU ROYAL FAMILY OF NCAPAI
KAMADZIKANE KAZULU | First Applicant |
| 2. LUMUMBA MAKAULA | Second Applicant |
| 3. MZILIKAZI ELLIOT NCAPAI | Third Applicant |
| 4. MABALAI JOHAN DABULA | Fourth Applicant |
| 5. ZIPHATHE MAKAULA | Fifth Applicant |
| 6. ZUKISILE MAKAULA | Sixth Applicant |
| 7. ZOLILE MAKAULA | Seventh Applicant |
| 8. NKOSAYIXAKWA MAKAULA | Eighth Applicant |
| 9. PHATHIZIZWE MAKAULA | Ninth Applicant |
| 10. DON DORAN DABULA | Tenth Applicant |
| 11. SIPHO MPONGOMA | Eleventh Applicant |
| 12. ZABULALANA DABULA | Twelfth Applicant |
| 13. FANA MAKAULA | Thirteenth Applicant |
| 14. SIMPIHWE MAKAULA | Fourteenth Applicant |
| 15. MNYANEZELI MAKAULA | Fifteenth Applicant |
| 16. SICELI MAKAULA | Sixteenth Applicant |
| 17. VUYANI MAKAULA | Seventeenth Applicant |
| 18. SIZWE MAKAULA | Eighteenth Applicant |

VS

1.	FIKILE MAKAULA	First Respondent
2.	MNCEDISI MAKAULA	Second Respondent
3.	PHAMBILI MAKAULA	Third Respondent
4.	MZWANDILE MAKAULA	Fourth Respondent
5.	THULETHU MAKAULA-GARANE	Fifth Respondent
6.	THEMBISA MAKAULA	Sixth Respondent
7.	NOMBULELO SHUSHU	Seventh Respondent
8.	MALINGE MAKAULA	Eighth Respondent
9.	NONCEKELELA MAKAULA	Ninth Respondent
10.	THEMBISILE NOKWEZI MAKAULA	Tenth Respondent
11.	THE MEC FOR LOCAL GOVERNMENT AND TRADITIONAL AFFAIRS, EASTERN CAPE	Eleventh Respondent
12.	THE SUPERINTENDENT-GENERAL LOCAL GOVERNMENT AND TRADITIONAL AFFAIRS, EASTERN CAPE	Twelfth Respondent
13.	HOUSE OF TRADITIONAL LEADERS, EASTERN CAPE	Thirteenth Respondent
14.	THE PREMIER, EASTERN CAPE	Fourteenth Respondent
15.	MAKAULA TRADITIONAL COUNCIL	Fifteenth Respondent

ADDENDUM TO MAIN JUDGMENT / ORDER

TSHIKI J:

[1] On the 8th January 2015, the main judgment in this case was delivered.

[2] After the judgment had been delivered, it was brought to my attention by the attorney of the applicant that there was an error in regard to paragraph [53.2] on page 26 which reads as follows:

“[53.2] The fourteenth respondent be and is hereby ordered to facilitate the appointment of the fifth respondent as the Acting Inkosi and head of the fifteenth respondent in terms of the identification and recommendation by the first applicant.”

[3] Paragraph [53.2] of the order dated the 8th January 2015 is hereby rectified to read as follows:

“The fourteenth respondent be and is hereby ordered to facilitate the appointment of the fifth applicant as the Acting Inkosi and head of the fifteenth respondent in terms of the identification and recommendation by the first applicant.”

P.W. TSHIKI
JUDGE OF THE HIGH COURT