

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

CASE NO. 2062/2011

In the matter between:

LUZUKO MATIWANE Applicant

and

**THE PRESIDENT OF THE REPUBLIC
OF SOUTH AFRICA 1st Respondent**

**MINISTER OF CO-OPERATIVE
GOVERNANCE AND TRADITIONAL
AFFAIRS 2nd Respondent**

**THE GOVERNMENT OF THE REPUBLIC
OF SOUTH AFRICA 3rd Respondent**

VICKS VELILE TONJENI 4th Respondent

MASIBULELE MASETI 5th Respondent

**COMMISSION ON TRADITIONAL
LEADERSHIP DISPUTES AND CLAIMS 6th Respondent**

JUDGMENT

GRIFFITHS, J.:

[1] The AmaMpondomise are people who reside predominantly in the districts of Qumbu and Tsolo, Eastern Cape. They previously resided in those two districts and in the neighbouring districts of Mount Frere, Mount Fletcher, Maclear and Elliot, but were displaced from the latter four by previous colonial governments. For many years they have steadfastly maintained and claimed that before such dispossession they were a united nation led by a king. This application has as its underlying purpose the restoration of such kingship which has been denied them by a series of governments prior to the advent of democracy.

[2] The applicant seeks an order in the following terms:

1. Reviewing and setting aside the decision of the Commission on Traditional Leadership Disputes and Claims the substance of which was that AmaMpondomise never had a kingship and thus refusing to instate or re-instate it (the kingship).
2. Declaring that AmaMpondomise did have a Kingship.
3. Instating or re-instating or restoring the said kingship.
4. Declaring that the applicant is the person entitled to become king of AmaMpondomise.
5. Costs against the first and third respondents and against the remaining respondents only in the event of them opposing this application.

[3] There were initially five respondents but, by way of a court order dated 5 April 2012, the Commission on Traditional Leadership Disputes and Claims (“the Commission”) was joined as the sixth respondent. The first, second, third and sixth respondents have opposed the grant of all the orders mentioned earlier, whilst the fifth respondent has only opposed the grant of prayer four. In doing so, he has joined forces with the applicant in the applicant’s quest for a grant of the orders sought in prayers one, two and three but has maintained that he, and not the applicant, should be restored as king of the AmaMpondomise Nation. The fourth respondent has not opposed the application.

[4] The matter served before me as an opposed motion on 12 June 2013. At that hearing the applicant was represented by Mr. Mbenenge SC (with him Mr Sambudla), the first second third and sixth respondents were represented by Mr. Arendse SC (with him Mr Matebese) and the fifth respondent was represented by Mr. Gabavana. Subsequent thereto, the Constitutional Court matter of **Sigcau v President of the RSA and Others**¹ was handed down. In my view, that case has no relevance to the present but as a measure of caution, I requested counsel to indicate their views in this regard. They did so by way of further heads of argument from which it emerges that they are in agreement with my aforementioned view.

[5] During November 2013 I was furnished with a set of unreported judgments which had been referred to in the heads of argument filed on behalf of the first, second, third and sixth respondents. These judgments, whilst also dealing with decisions of the Commission, dealt in the main

¹ CCT 93/12 [2013] ZACC 18 (13 June 2013)

with individual claims to kingship and, in my view, have no direct bearing on the present matter.

BACKGROUND

[6] The institution, status and role of traditional leadership are recognized in accordance with customary law but subject to the relevant provisions of the Constitution. In this regard, sections 211 and 212 of the Constitution provide:

“211 Recognition

- (1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
- (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.
- (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

212 Role of traditional leaders

- (1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.
- (2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law—
 - (a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and
 - (b) national legislation may establish a council of traditional leaders.”

[7] In pursuance of the imperative contained in 212(1) of the Constitution, the Legislature enacted the Traditional Leadership and

Governance Framework Act² ("the Act"), which provided the necessary framework envisaged in that subsection. This Act was amended in 2009 by the Traditional Leadership and Governance Framework Amendment Act³.

[8] The Act provided for the recognition of traditional communities,⁴ the establishment and recognition of traditional councils and withdrawal of recognition of traditional communities,⁵ and for the functions of traditional councils.⁶ It recognised three leadership positions within the institution of traditional leadership, namely kingship, senior traditional leadership and headmanship.⁷ For present purposes only the provisions relating to kingship are of importance .⁸

[9] The recognition and removal of kings and queens under the Act would, in the normal course, proceed in terms of sections 9 and 10. Both these sections require the involvement of the royal family concerned.⁹

[10] Disputes concerning leadership positions within the institution of traditional leadership¹⁰ had to be resolved by the Commission.¹¹ The Commission had the authority to investigate, either on request or of its

² No. 41 of 2003.

³ No. 23 of 2009.

⁴ Section 2 of the Act.

⁵ Sections 3 and 7.

⁶ Sections 4 and 5.

⁷ Id section 8.

⁸ Although section 8(a) of the Act speaks of "Kingship" only, the further provisions envision the recognition of both kings and queens.

⁹ Sections 9 and 10 of the Act

¹⁰ For those not resolved internally within a traditional community or customary institution: see section 21(1)(a) and (2) of the Act.

¹¹ The Commission was established under section 22 of the Act.

own accord, cases of doubt as to whether a kingship, senior traditional leadership or headmanship was established in accordance with customary law and customs,¹² and where the title or the right of the incumbent to a traditional leadership position was contested.¹³

[11] Section 25(3)(a) and (b) of the Act provided that:

- “(a) When considering a dispute or claim, the Commission must consider and apply customary law and the customs of the relevant traditional community as they were when the events occurred that gave rise to the dispute or claim.
- (b) The Commission must—
 - (i) in respect of a kingship, be guided by the criteria set out in section 9(1)(b) and such other customary norms and criteria relevant to the establishment of kingship; and
 - (ii) in respect of a senior traditional leadership or headmanship, be guided by the customary norms and criteria relevant to the establishment of a senior traditional leadership or headmanship, as the case may be.”

[12] Section 26 regulated the decisions of the sixth respondent, and provided that:

- “(1) A decision of the Commission is taken with the support of at least two thirds of the members of the Commission.
- (2) A decision of the Commission must, within two weeks of the decision being taken, be conveyed to—

¹² Section 25(2)(a)(i) of the Act.

¹³ Section 25(2)(a)(ii) of the Act.

- (a) the President for immediate implementation in accordance with section 9 or 10 where the position of a king or queen is affected by such a decision; and
 - (b) the relevant provincial government and any other relevant functionary which must immediately implement the decision of the Commission in accordance with applicable provincial legislation in so far as the implementation of the decision does not relate to the recognition or removal of a king or queen in terms of section 9 or 10.
- (3) Any decision taken by the Commission must be conveyed to the President.”¹⁴

[13] One of the changes which the amending Act brought about was to reduce the powers of the Commission. At the time when the Commission made its determination in this matter, it had the power to determine whether or not a kingship existed and, if it did, to determine who should be the incumbent. The amended Act reduced the role of the Commission to more of an advisory one in terms of which the Commission advises the President who makes the final determination.

[14] Section 25(4) of the Act provided that the Commission has the authority to investigate all Traditional Leadership claims and disputes dating from 1 September 1927, subject to the provisions of subsection 2(a)(vi) which provides as follows:

"Where good grounds exist, any other matters relevant to the matters listed in this paragraph, including the consideration of events that may have arisen before 1 September 1927."

¹⁴ See generally in this regard: *Sigcau v President Of The Republic Of South Africa & Others* Case CCT 84/12 [2013] ZACC 18

[15] Prior to embarking upon the claim made by the AmaMpondomise, the Commission was obliged to investigate the position with regard to paramountcies and paramount chiefs that had been established and recognized and which were still in existence and recognized before the commencement of the Act¹⁵. Apparently the applicant and the AmaMpondomise did not fall under section 28(7) of the Act as they were not recognised as a paramountcy. On 29 to 30 April 2008 the sixth respondent released its findings on the status of the 12 paramountcies as required by section 28 (7) of the Act.

[16] The AmaMpondomise lodged a claim for the restoration of the AmaMpondomise kingship and the applicant's brother, together with two other claimants, laid claim to the position of king. The other two claimants were the fourth and fifth respondents respectively. Prior to the hearings of the commission, the applicant was substituted for his brother upon his brother's demise.

[17] After the commission had held three public hearings and completed its own investigations, it made its determination on 21 January 2010, which determination was apparently unanimous. This determination, which was the conclusion of some 34 pages of reasons, read as follows:

"8.1.1 In terms of the Framework Act, AmaMpondomise do not have a kingship.

8.1.2 Thus, there is no kingship to be restored.

¹⁵ Section 28 (7) of the Act.

8.1.3 Therefore claims by Loyiso Matiwane, Vicks Velile Thonjeni and Masibulele Maseti are unsuccessful."

[18] According to the answering affidavit of Moleleki, the Commission was composed of persons who are practicing lawyers, academics and linguists who are knowledgeable experts in matters relating to the institution of traditional leadership, South African history, customary law and traditional affairs in general. Its members, who heard the claim of the AmaMpondomise, were: Moleleki himself, a professor of African languages and employed as such in the Department of African Languages at the University of the Free State; Mr. A S Hlebel, a practicing attorney; Ms S R Mdluli a member of the department of African languages at UNISA; Adv. S D Ndengezi; Dr. R M Ndou a retired educationist; Prof. PP Ntuli a sociologist; Adv. S Poswa-Lerotholi; Adv. Z B Pungula and Ms P P Robinson, a Magistrate.

[19] At the time when the Commission was appointed, it was chaired by Prof. R T Nhlapo and was thus referred to as the "Nhlapo Commission". Nhlapo resigned during December 2007 and Moleleki duly took up the position of acting chairperson.

[20] Initially, there were 12 members of the commission. However, apart from the resignation of Nhlapo, there were two other resignations, namely Prof. J B Pieres and Prof. J C Bekker due, apparently, to pressure of work.

[21] As will be noted, the Commission accordingly consisted of a number of eminently qualified persons who were undoubtedly chosen

because of the expertise which each of them could bring to bear on the Commission's work.

[22] It was common cause amongst the parties that the determination by the Commission amounted to administrative action for the purposes of the Promotion of Administrative Justice Act¹⁶ ("PAJA") and therefore subject to judicial review. As I have indicated, the Commission consisted of an eminently qualified panel of experts who, one would assume, would have applied their considerable expertise to the matter at hand. In these circumstances, a court would be loath to interfere with such a commission's findings and should be particularly careful lest it cross the boundary, as blurred as it might be, between appeal and review. Indeed, much time was spent by counsel in arguing this very point.

[23] On the other hand, courts are not to lose sight of the purpose of judicial review which, as expressed in section 33 of the Constitution, is that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Where, in any given case, a court comes to the conclusion that the administrative action in question does not pass muster in this regard it should not refrain from exercising its duty to correct administrative action which is unjust. As stated by Harms JA:

“The right to just administrative action is derived from the Constitution and the different review grounds have been codified in PAJA, much of which is derived from the common law. Pre-constitutional case law must now be read in the light of the Constitution and PAJA. The distinction between appeals and reviews must be maintained since in a review a court is not entitled to reconsider the matter and impose its

¹⁶ No. 3 of 2000

view on the administrative functionary. In exercising its review jurisdiction a court must treat administrative decisions with 'deference' by taking into account and respecting the division of powers inherent in the Constitution. This does not 'imply judicial timidity or an unreadiness to perform the judicial function'.”¹⁷

[24] Mr. Mbenenge, in arguing that the Commission's findings should be reviewed and set aside, has levelled a multipronged attack on the procedure, and the findings of the Commission. He has submitted, *inter alia*:

- 24.1 That the Commission was not properly chaired at all relevant times;
- 24.2 That the Commission was not quorate at all relevant times;
- 24.3 The Commission misconceived the nature of the discretion conferred upon it resulting in it taking into account irrelevant considerations whilst ignoring relevant ones;
- 24.4 That the decision to refuse recognition of the AmaMpondomise kingship is not rationally connected to the purpose, spirit and objectives for which the Commission

¹⁷ Foodcorp (Pty) Ltd v Deputy Director-General: Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management and Others 2006 (2) SA 191 (SCA) at 196E-G; ([2005] 1 All SA 531)

was established in that the evidence clearly showed that the AmaMpondomise nation had senior traditional leaders who served under an even more senior traditional leader, i.e. the King;

- 24.5 That the decision of the Commission is bad in law and irrational;
- 24.6 That the Commission failed to apply its mind when taking the decision and completely ignored vital information relevant to the decision it ought to have taken;
- 24.7 That it failed in its mandate to investigate the claim properly and readily rejected evidentiary material in support of the claim;
- 24.8 That it took a decision that is so unreasonable that no person acting reasonably would have taken it;
- 24.9 That it failed to properly apply the *audi alteram partem* rule.

On the other hand Mr Arendse submitted that the Commission had conducted itself within the law, fairly, and that its conclusion was unassailable.

SUBSTANTIVE FAIRNESS

[25] There is much force in the argument presented by Mr. Mbenenge to the effect that the Commission appears to have overlooked certain important information which was readily available, or has, at the least, failed to conduct sufficient research in order to ensure that it had before it all the material relevant to its reaching a just and proper conclusion. This is particularly so in view of the fact that, as is apparent from the record of the proceedings, the applicant (together with those other respondents who, as applicants before the Commission, sided with the applicant in his quest to prove that there existed an AmaMpondomise kingship) presented largely oral submissions based upon historical fact which had been handed down through the generations. The more objective material which emanated from sources outside the AmaMpondomise, such as writings of local magistrates and missionaries of the time¹⁸, the report of the Cape Law Commission (of 1893) and material from other writers such as F Brownlee and Stainier Green, which were easily obtainable, appears to have been largely overlooked.

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

¹⁸ For example; "The Reminiscences of Sir Walter Stanford" Van Riebeeck Press; Edited by J.W. Macquarrie

"(a) Stavenisse survivors: During 1688, the Dutch ship Stavenisse was wrecked off the Transkei coast. The survivors recorded the names of the nations through which they passed: "the Semboes (abaMbo), Mapontemousse (amaMpondomise), the Maponte (amaMpondo), the Matimbes (abaMthembu), the Magryghsa (Griquas) and Magosse (amaXhosa). R Vigne, Guillaume Chenu de Chalezac (Cape Town: Van Riebeeck Society, 1993,p. 108.)

(b) Vete, the son of Mizba, recounted to the Cape Native Commission in 1883 as follows: "Four of the chiefs living at the Dedesi (ancestral River) were Togu, the ancestor of what are now called Gcakelas, Hala, the ancestor of what are now called the Abatembu, and Malangana and Rudula, the fathers of the Amampondomise. The Amampondo separated from us before this time, and crossed the Umzimvubu River lower down that we did¹⁹.

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

"He was blessed with twins, Mpondomise and Mpondo. The two children, Mpondomise the older one and Mpondo the younger one, grew up."²⁰

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

[28] The Commission's response to this was, in effect, to maintain that these sources do not show that the AmaMpondomise were ever a kingship. Nowhere in the answering affidavit does the Commission state

¹⁹ F Brownlee, *Transkeian Native Territories; Historical Records* (Lovedale, 1923), page 111

²⁰ As directly translated from isiXhosa by the applicant.

that it took these sources into account, that it analyzed them fully and properly and that on a proper understanding of them, it concluded that such authorities do not establish the existence of a kingship.

[29] A further disturbing aspect is the fact that, as I have alluded to, Prof. Pieres resigned from the Commission during the course of its hearings. The applicant has, as an annexure, put up a letter from Prof. Pieres dated 20 June 2011 in which he (Prof. Pieres) stated:

"I am a professional historian, currently employed by Rhodes University as the head of the Cory Library, a specialist library concentrating on the history of the Eastern Cape. From 1989 to 1994, I was the professor of History at the University of Transkei in Mthatha, during which time, I interviewed the late Chief Isaac Matawani of Sulekama on the history of the AmaMpondomise. From 2005 to 2007, I was a member of the Nhlapo Commission. However I was excluded from the Mpondomise hearings with my own consent, due to the fact that I had already publicly expressed my opinion concerning the restoration of the Mpondomise kingdom."

[30] In that letter, and other documentation prepared by Prof. Pieres which was also annexed to the founding affidavit, he referred to various sources in support of his statement that:

"In conclusion, as a professional historian, I can assert with confidence that the AmaMpondomise have a kingdom"

[31] To this, the Commission made the somewhat extraordinary response that the research document prepared by Prof. Pieres was not submitted to the Commission during the hearings. It was clearly thus not taken into account by the Commission. It seems to me that the Commission must have been possessed of the knowledge that Prof. Pieres is an historian who is clearly well versed in the very subject matter which

the Commission was mandated to decide. Prof. Pieres was a member of the Commission and, according to his letter, left the Commission for these hearings for the very reason that he had made clear his view that the AmaMpondomise was a kingdom. In the circumstances, one would have thought that the Commission would have turned to him as an expert in this field and taken advantage of his knowledge and obvious expertise. By its own admission it clearly did not.

[32] However, in the view which I take of this matter, it is not necessary for me to decide whether or not the failure by the Commission to take into account these obvious sources of historical information renders the Commission's conclusions so unfair or unreasonable that they fall to be set aside on review.

PROCEDURAL FAIRNESS

[33] Section 3(2)(a)(ii) of the Promotion of Administrative Justice Act²¹ requires an administrator to ensure that a reasonable opportunity is given to make representations, within the greater imperative to ensure procedural fairness. The extent of this requirement has been the subject of much judicial debate but it seems to be clear that whether or not this requirement has been complied with will depend largely on the nature of the proceedings. It is also clear that the administrator concerned is enjoined to ensure that, in any given context, such opportunity must be a meaningful one and that paying mere lip service to this requirement will not suffice²².

²¹ No. 3 of 2000

²² *Sokhela v MEC for Agriculture and Environmental Affairs (Kwa-Zulu Natal)* 2010 (5) SA 574 (KZP) at paragraph 55; Hoexter "Administrative Law in South Africa" (2nd. Ed.) at page 371 – 372

[34] In a case where the administrator concerned relies on evidence or information of an expert nature, and particularly where the conclusion of the administrator is likely to rest squarely on such information, it seems to me equally important for the administrator to ensure that a reasonable opportunity is given to the parties concerned to make representations in response. This is even more so where the information so relied upon by the administrator is adverse to the conclusion sought by that particular party. In the case of **Heatherdale Farms (PTY) Ltd. v Deputy Minister of Agriculture and Another**²³ Colman J expressed this aspect of the audi alteram partem principle as follows:

"It is clear on the authorities that a person who is entitled to the benefit of the audi alteram partem rule need not be afforded all the facilities which are allowed to a litigant in a judicial trial. He need not be given an oral hearing, or allowed representation by an attorney or counsel; he need not be given an opportunity to cross-examine; and he is not entitled to discovery of documents. But on the other hand (and for this no authority is needed) a mere pretence of giving the person concerned a hearing would clearly not be a compliance with the Rule. For (Nor) in my view will it suffice if he is given such a right to make representations as in the circumstances does not constitute a fair and adequate opportunity of meeting the case against him. What would follow from the lastmentioned proposition is, firstly, that the person concerned must be given a reasonable time in which to assemble the relevant information and to prepare and put forward his representations; secondly he must be put in possession of such information as will render his right to make representations a real, and not an illusory one.

As to the provision of information to the person who is to be heard there is authority. In *Minister of the Interior v Bechler and Others*; *Beier v Minister of the Interior and Others* 1948 (3) SA 409 (A) it was indicated at 451 that what should be disclosed to the person concerned is "the substance of the prejudicial allegations against him". But what is meant by that "substance" appears from other decisions. In *Sachs v Minister of Justice* 1934 AD 11 STRATFORD JA at 38 approved the approach adopted by TINDALL J (as he then was) in the

²³ 1980 (3) SA 476 (T)

Court below. And what TINDALL J had said was that the person concerned should have "a fair opportunity of submitting any statements in his favour and of controverting any prejudicial allegations made against him". And in the later Appellate Division case of *R v Ngwevela* (supra) CENTLIVRES CJ again approved that formulation.

A special application of the general principle, invoked in *Lukral Investments (Pty) Ltd v Rent Control Board, Pretoria, and Others* 1969 (1) SA 496 (T), arises in relation to a fact which is equivocal, in the sense that it tends to support a certain inference, but may not do so if it is put in its proper setting. It was held that there cannot be a fair hearing unless the person against whom such a fact is to be used has been given an opportunity to place the equivocal fact in its setting and thus show that no inference should be made from it which is adverse to his interests.

I do not know of any authority which discusses the application of the *audi alteram partem* rule to a situation where the case against a person whose interests are in jeopardy rests wholly or partly upon the opinion of an expert. It seems to me, however, to flow necessarily from the relevant principles that the person concerned:

- (a) should be made aware, not merely of the expert's conclusion, but also of his reasoning and of the relevant facts accepted or assumed by him; and
- (b) should have an opportunity of refuting or correcting the relevant facts, of putting forward other relevant facts, and of adducing contrary expert opinion."²⁴

[35] In the present matter, the Commission held three separate public hearings. After the first two of these, the Commission recessed for the expressed purpose of doing its own research. According to the answering affidavit:

"After the first two hearings the Commission, through its own researchers, collected information relevant to the claim by

²⁴ At 486D – G; See further: Baxter "Administrative Law" (1984) 546; Hoexter (fn 22) 371 – 376; *Kadalie v Hunsworth* 1928 TPD 495 at 506 – 507; *Lawson v Cape Town Municipality* 1982 (4) SA (C) at 12 E – F.

amaMpondomise and prepared questions which were afforded to the claimants for their attention and comments."

[36] The claimants, including the applicant, were required to submit their answers to these questions and were given an opportunity to amplify thereon in a subsequent public hearing. In the applicant's supplementary affidavit the point was made that the Commission only furnished the applicant with the document embodying these specific questions but that the materials and information allegedly accessed by the Commission subsequent to the initial hearings, was not availed to him .

[37] This elicited the following response from the Commission in a supplementary answering affidavit:

"12.1 The materials and information that I referred to was a collection of information that we, as Commissioners, obtained from a number of sources and which we used to compile the questions that we directed to the claimants.

12.2 The information that was obtained by the Commission to which I referred on 7 and 8 September 2009 was different to that submitted by the claimants hence they were given an opportunity through the list of questions and invitation to make oral representations to respond thereto.

12.3 The Commission had, in terms of the Act, wide powers to conduct its affairs and proceedings provided the claimants were given a fair opportunity to present their cases and to respond to whatever information that the Commission obtained in the course of its investigation, which is what the Commission did in this case.

12.4 The fact that the sources of the information were not disclosed is irrelevant for review purposes."

[38] I have read the transcript of the proceedings, inclusive of the final hearing. For some reason, the record provided by the Commission does not include the actual questions posed. However, it becomes patently

clear from the answers given that some of those questions were directed at the question of kingship, whereas the remainder were directed at the issues of the individual claims to kingship.

[39] Nowhere in the answering affidavit, or the supplementary answering affidavit, delivered by the Commission has the Commission disclosed precisely what these questions were or, more importantly, the precise nature of the information which came to light during the course of its research. It has, as I have indicated, referred to "*a collection of information.... obtained from a number of sources*" and has alleged under oath that such information "*was different to that submitted by the claimants*". The import of these statements, as against the background and nature of the Commission's task, would tend to indicate that this was vitally important information upon which the Commission ultimately concluded that no kingship existed. If this is incorrect, one finds it somewhat strange that the Commission did not produce chapter and verse of this "collection" of information which would indicate its precise nature. In this regard, the Commission was specifically invited by the applicant to provide this information, which invitation it refused with the statement that its failure to disclose the sources of such information "*is irrelevant for review purposes*".

[40] In my view this was wholly insufficient to satisfy the requirement that the applicant be given a reasonable opportunity to make representations. On a reading of the transcript it is clear that a few specific questions were levelled with regard to the question of the AmaMpondomise kingship and that such questions clearly did not convey the import of the "collection" of adverse information which the Commission alleges it had gathered. The applicant ought to have been

provided with all the information which the Commission had independently gathered, particularly that which was adverse to his quest for a declaration that a kingship existed, in order that he might have been placed in a position to meaningfully deal therewith. This is particularly so in that the contextualization of such information given the nature of the matter could well have provided a completely different meaning or slant thereto. This had the potential to affect Commission's deliberations had it been availed of such submissions, but it was not.

[41] I am accordingly of the view that this failure on the part of the Commission was procedurally unfair and sufficient to render the decision of the Commission subject to being set aside on review.

[42] As indicated at the outset of this judgment, in the event of my coming to this conclusion I have been requested to make a determination that indeed a kingship existed and to determine whether the applicant or the fifth respondent qualifies for the position of King. However, neither Mr. Mbenenge nor Mr. Gabavana argued this aspect with much force and I am of the view that this is not a matter where there is any basis for this court to substitute its decision for that of the Commission.

[43] In the result, I make the following orders:

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

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

JUDGE OF THE HIGH COURT

DELIVERED ON : 12 DECEMBER 2013

**COUNSEL FOR APPLICANT : Mr Mbenenge SC with
: Mr Sambudla**
INSTRUCTED BY : Mvuzo Notyesi Inc.

**COUNSEL FOR 1ST, 2ND, 3RD, 6TH
RESPONDENTS : Mr Arendse SC with
: Mr Matebese**
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COUNSEL FOR 5TH RESPONDENT : Mr Gabavana
**INSTRUCTED BY : M/s M.A. Mhlutshana
: Attorneys**