

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION: MTHATHA)

CASE NO: 434/2009

In the matter between:

NONCEDO MADENGE BALENI

APPLICANT

AND

LUNGA BALENI

1ST RESPONDENT

KING JUSTICE MPONDOMBINI SIGCAU

2ND RESPONDENT

MEC FOR HOUSING, LOCAL GOVERNMENT

AND TRADITIONAL AFFAIRS, EASTERN

CAPE

3RD RESPONDENT

JUDGMENT

PAKADE ADJP:

[1] This judgment concerns the validity of the appointment of senior traditional leadership of the Amadiba Traditional Council in Mbizana. The pertinent issue before the Court is the determination of the competing claims of the Applicant and the First respondent as to who, between Luzuko Baleni and the First Respondent, is the rightful person to be appointed and recognized as the senior traditional leader of the Amadiba Traditional Council.

[2] It is common cause as having not been disputed or seriously disputed by the parties that Luzuko Baleni and the First Respondent are the sons of the late Senior Traditional Leader (Chief) Malungelo Baleni who, before his death on 18 February 2002, was the Head of the Amadiba Traditional Council in Mbizana. Luzuko Baleni is born in wedlock between the late Chief Baleni and his third wife, the applicant, who were married in terms of customary law, while the First Respondent is born out of wedlock. The first two wives of the said late Chief, who are also wives married in terms of customary law, had no issues.

[3] On 04 June 2004 the Qaukeni Regional Authority, acting in terms of section 66 of the Transkei Constitution Act, no 15 of 1976, designated First Respondent as the chief of the Amadiba Tribe in the area of Amadiba Tribal Authority. There was no recommendation from either the Baleni Royal Family or Amadiba Traditional Authority in support of the designation of the First Respondent. I will revert to this point at a later stage in the judgment.

[4] The Applicant, whom I have referred to as the third wife of the late Chief and the mother of Luzuko Baleni, was aggrieved by the designation of the First Respondent as the Chief of the Amadiba Traditional Council and not her son, Luzuko. She then, on 02 March 2009, approached this Court on Notice of Motion seeking the following relief:

4.1 that the recognition of the appointment of the First Respondent together with the remuneration paid to him for the position of senior traditional leader be reviewed, corrected and set aside;

4.2 that this court issue a declarator that the Applicant be recognized by the Third Respondent as acting Senior Traditional Leader of Amadiba Traditional Council with effect from the 04 November 2002, being the date of her appointment by the Royal Family to that position.

[5] Paramount Chief Justice Mpondombini Sigcau was cited together with the Member of the Executive Council for Housing, Local government and Traditional Affairs of the Provincial Government of the Eastern Cape as the Second and Third Respondents, respectively over and above Lunga Baleni, who was cited as the First Respondent.

[6] Although the application was served on all the respondents, personally on the Second Respondent, only the First Respondent is actively opposing the relief sought and had deposed to an answering affidavit. The Second Respondent did not

file notice to oppose and the Third Respondent, who had filed notice to oppose from the onset, withdrew her opposition before filing an answering affidavit.

APPLICANT'S CASE

[7] It emerges from the founding affidavit that the applicant was appointed by the Royal family on 04 November 2002, after the death of her husband, to act as the senior traditional leader and head of Amadiba Traditional Council. In support of this averment, she has annexed to the founding affidavit, a copy of the resolution of the meeting of the Royal Family (MB1). It further appears in paragraph 10 of the founding affidavit that the Royal family resolved on the same meeting that her son, Luzuko was the rightful person to inherit his father's traditional leadership of the Amadiba Tribe. This averment is confirmed by the minutes in MB1. However, those minutes do not confirm her averment that she was appointed to act in her husband's position as senior Traditional Leader of the Amadiba Tribe.

[8] The Applicant's averment that the late chief's second wife, Mangutyana, challenged the resolution of the Royal family by disclosing that the first respondent is the biological son of Mambelu, the first wife of Chief Baleni, is not supported by MB1 and is also disputed by the First Respondent as well as by Khaliphile Baleni, the younger brother of the late Chief. This then affects the credibility of the Applicant.

[9] The dispute, so averred the Applicant, was referred to Qaukeni Regional Authority which in turn appointed a committee of three senior traditional leaders, Chief Ntola, Chief Mlindazwe, and Chief Ndabankulu, to investigate it and advice on the rightful person, between Luzuko and the First Respondent, to be designated as the senior traditional leader of the Amadiba Tribe. However, before any report could be received by the Regional Authority from that committee, the Qaukeni Regional Authority designated the First Respondent as the Senior traditional leader of Amadiba tribe.

[10] Although there is no letter attached to the founding papers from the Third Respondent confirming the designating of the First Respondent, it was common cause between the parties during the hearing that the designation was confirmed and that the First Respondent is receiving remuneration from the Third Respondent for services rendered.

[11] Again for reasons which have not been explained to the Court, after the First Respondent had been designated, the Royal Family met on the 23 May 2007 to revive its resolution of the 04 November 2002 and also to appoint the Applicant to act for her son, Luzuko. This appears in the applicant's founding affidavit. However, while the minutes of the 23 May 2007 (MB6) confirm the nomination of Luzuko as the Senior traditional leader of the Amadiba Tribe, they do not confirm that the Applicant was appointed to act for him. This is again another unsatisfactory feature in her evidence which affects the credibility of her averments.

[12] It was further resolved in that Royal family meeting of the 23 May 2007 to institute the present motion proceedings.

FIRST RESPONDENT'S CASE

[13] The First Respondent asserts himself to be the eldest son of the late Chief who grew up staying in the Great House together with the senior wife, Mambelu, up until her death in 1999. When the late Chief died she had no child with his two wives and the Applicant had just been married.

[14] In a Royal Family meeting of the Baleni clan which was held towards the end of 2003, the First Respondent was nominated to inherit the senior Traditional leadership of his father notwithstanding the fact that he was the child born out of wedlock. It was the second wife of the late Chief, Mangutyana, who initiated that nomination. There is, however, no document on record embodying the resolution of the family which purportedly appointed the First Respondent, a son of late chief Baleni born out of wedlock to inherit the chieftainship of the Amadiba tribe in preference to Luzuko Baleni who is an undisputed heir of chief Baleni nor are there reasons which have been proffered justifying such deviation from the well recognized Pondo custom that a child born out of wedlock cannot inherit *ab intestato* from his father. The Pondo custom in this respect is in line with the

common law that a child born out of wedlock cannot inherit from his father *ab intestato* but can only do so by will of his father.

[15] It therefore seems to me from the very onset that the mere saying so (*ipse dixit*) of the First Respondent, who conceded in the papers that he is born out of wedlock, that he was nominated by the Royal Family, cannot carry the day without reasons why the royal family deviated from custom and decided to appoint a person who is not from the royal family. But this is a *prima facie* view I have in the matter which may not be conclusive if the points in *limine* succeed.

[16] It also emerges from the First Respondent's version of events that it was the dispute over the Applicant's eagerness to act as a chief and the other unidentified woman which saw the matter being referred to Qaukeni Regional Authority by the royal family.

[17] A meeting was subsequently convened by the Second Respondent, who is the Head of the Regional Authority, early in 2004. The matter was debated and discussed in that meeting after which a delegation of three senior traditional leaders was appointed to investigate the claims and report back to the Regional Authority. That delegation failed to carry out its mandate. Instead, a self appointed delegation comprised of headman Jali, Chief Langasiki and Chief Mlindazwe conducted the investigation and submitted the report to the Regional Authority, which declined it on the ground that the investigators had no mandate to investigate the matter.

[18] The dispute was then debated in the Regional Authority and in the absence of consensus, it was put to vote. The First Respondent was unanimously appointed as the rightful person to inherit the senior traditional leadership from the late Chief.

[19] According to the First Respondent the Applicant was present in the meeting when the results were announced but she raised no objection to them. On 11 October 2007 the designation of the First Respondent was confirmed by the Third Respondent with retrospective effect from 01 April 2006 after which the First Respondent received his salary from 19 December 2007 to date.

[20] The First Respondent further averred that he commenced with his duties from 05 June 2004, a day after he was designated by the Regional Authority and that the Applicant had not raised any objection except to bring this application in 2009. The applicant denied all the First Respondent's factual averments. In particular, she denied that he had performed any duties as the head of Amadiba Traditional Council nor had he ever attended meetings of Baleni Royal Family as he knew that he is not a child of isilili as he was born out of wedlock. She reaffirmed her earlier averments that a child born out of wedlock has no right to inherit from his father *abi ntestato*.

SUBMISSIONS

[21] The First Respondent sought to have the application dismissed on three points in *limine*, which are:

21.1 unreasonable delay in bringing the application;

2.1.2 failure to exhaust domestic remedies, and

2.1.3 foreseeable dispute of fact.

[22] The first point in *limine*-unreasonable delay- is founded on the premise that the administrative action arose on the 4th June 2004 when the Qaukeni Regional Authority made a decision to designate the First Respondent as Senior Traditional Leader of Amadiba Traditional Council. The review application was launched on 02 March 2009. The Applicant averred in her founding affidavit that she became aware of the decision appointing the First Respondent in March 2008. There is no application for condonation of the late launching of this application by the Applicant.

[23] The second point in *limine* – failure to exhaust domestic remedies- is also founded on the premise that, notwithstanding the fact that the Applicant is contesting the title or right to traditional leadership position, she failed, as she was obliged to, to refer the matter to the commission which has been specifically created for this purpose before bringing the dispute before the courts of law.

[24] On the third point in *limine*- dispute of fact- the applicant relies on a number of material averments that are in dispute between the parties. The submission goes on to allege that the dispute of fact was foreseeable and for that reason the applicant should not have proceeded by way of notice of motion.

[25] I will, hereinafter, first deal with the points in *limine* as they are, by their very nature, dispositive of the entire application if the court finds that they are well taken. If the court so finds, there will be no need to traverse the rest of the issues in the application and that will constitute the end of the matter. But if the court dismisses the points in *limine* then it will traverse the merits of the application and decide thereon.

[26] Application proceedings do not prescribe but are hit by the unreasonable delay principle. But where the review is directed at challenging an administrative action, the time frames for launching it are regulated by the Promotion of Administrative Justice Act, (PAJA)¹

[27] PAJA provides as follows

“7(1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date-

(a), on which any proceedings instituted in terms of internal remedies ...have been concluded;

(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

¹ Act 3 of 2000

(2)(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.”

[28] It is important to first determine if the decision sought to be reviewed is an administrative decision to which PAJA applies. There are many authorities which deal with and define an administrative decision.

[29] PAJA has its genesis from the Constitution of the Republic of South Africa², section 33 of which guarantees everyone a right to administrative action that is lawful, reasonable and procedurally fair. It provides for the review of administrative action by a court or an independent and impartial tribunal where appropriate. The transitional provisions of the Constitution in Schedule 6 required that the legislation envisaged in section 33 be passed within three years of the

² Act 108 of 1996

Constitution coming into operation. PAJA was then assented to on 3 February 2000.

[30] Prior to the Constitutional era, the control of public power by the courts through judicial review was exercised through the application of common law principles. After the adoption of the Constitution, such control is now regulated by the Constitution which contains the provisions of section 33 dealing with judicial review. The common law principles that previously provided the grounds of judicial review of public power have now been subsumed under the Constitution and derived their force from the Constitution. They are not two separate systems of law but one grounded in the Constitution. The power of the court to review an administrative action now flows from the Constitution and PAJA³. That is why in *President of RSA & another v Hugo*⁴, the power of the President to pardon or reprieve offenders had to be dealt with under s 82(1) of the interim Constitution and not under the prerogative of the common law. Similarly in **Fedsure Life Assurance Ltd and others v Greater Johannesburg TMC & others**⁵, the question of legality had to be dealt with under the Constitution and not under the common law principle of ultra vires. In **President of RSA & others v South African Rugby Football Union & others**⁶, the power of the President to appoint a commission and the exercise of that power had to be dealt with under s 84(2) of the Constitution and the doctrine of legality and not under the common law principles of prerogative and administrative law.

³ Pharmaceutical Manufacturers Association of SA & Another: In re Ex Parte President of RSA & Others 2000(2) SA 674 (CC) at 694 par [41]

⁴ 1997(4)SA 1 (CC)

⁵ 1999 (1) SA 374 (CC)

⁶ 2000(1) SA 1 (CC)

[31] Therefore this Court derives its review powers from the Constitution and PAJA⁷.

[32] Section 1 of PAJA defines an administrative action as:

“Any decision taken, or any failure to take a decision, by –

a. an organ of state, when – (i) exercising a power in terms of the Constitution or a provincial Constitution; or (ii) exercising a public power or performing a public function in terms of any legislation; or

b. a natural or juristic person, other than an organ of the state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect but does not include-

(aa) the executive powers or functions of the national executive, including the powers or functions referred to in section 79(1)(4), 84(2)(a), (b), (c), (d), (f), (g), (h) (i) and (k), 85(2)(b), (c), (d) and (e), 91(2), (3), (4) and (5), 92(3), 93, 97, 98, 99 and 100 of the Constitution:

(bb) the executive powers or functions of the executive, including the powers or functions referred to in section 121(1) and (2), 125(2)(d), (e) and (f), 126, 127(2), 132(2), 133(3)(b), 137, 138, 139 and 145(1) of the Constitution;

(cc) the executive powers or functions of a municipal council;

⁷ See also *School Governing Body of Ntilili JSS & others v Makhitshi & others* (615/2008)[200] ZACMHC 23 “2 July 2009”

- (dd) *the legislation of parliament, a provincial legislature or a municipal council;*
- (ee) *the judicial functions of a Judicial Officer of a court referred to in section 166 of the Constitution or of a special tribunal established under section 2 of the special investigating unit and Special Tribunal Act, 1996 (Act 74 of 1996), the judicial function of a Traditional Leader under customary law or any other law;*
- (ff) *a decision to institute or continue a prosecution;*
- (gg) *a decision relating to any aspect regarding any appointment of a Judicial Officer, by the Judicial Service Commission;*
- (hh) *any decision taken or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or any decision taken, or failure to take a decision, in terms of section 4 (1).”*

[33] In the same section “administrator” is defined as an organ of state or any natural or juristic person taking administrative action. For purposes of this application a decision is defined in section 1 of PAJA as any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including the decision relating to –

(a)...

(b)...

(c)....

(d)....

(e) making a declaration, a demand or requirement.

[34] In **Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council and others**⁸, the Constitutional Court had an occasion to determine what is meant by ‘administrative action’ in section 24 of the Interim Constitution, whether the passing of the resolutions constituted such an action or not. The Court sought to distinguish legislative decisions from administrative decisions and held that resolutions passed by a local council in terms of a by-law or by-laws are not administrative decisions.

[35] In **Transnet Ltd v Goodman Brothers Pty (Ltd)**⁹ Olivier JA held that the tender process amounted to administrative action and that the respondent was entitled to protection afforded by section 33 of the Constitution¹⁰ because Transnet exercised public power and performed the public functions of a government department.

[36] In terms of section 1(b) of PAJA, an administrative action can be taken by a natural or juristic person other than the organ of the state. But in **President of the Republic of South Africa and others v South African Rugby Football Union and others**¹¹, it was stated that in determining whether an act is an administrative act or not the emphasis should be on the function rather than the functionary, not

⁸ 1991(1) SA 374 (CC)

⁹ 2001(1) SA 853 (SCA)

¹⁰ Act 108 of 1996

¹¹ 2000(1) SA 1 (CC); 1999(10) BLCR 1059 at par [140]-[141]

on the arm of government to which the actor belongs but on the nature of power exercised.

[37] The power to designate or appoint any person as a chief or acting chief in the area of Transkei was regulated by section 66 of the Constitution of the former Republic of Transkei, Act 15 of 1976, which continued to apply notwithstanding the advent of the new Constitutional dispensation of the Republic of South Africa its continued application having not been immediately repealed by the Justice Laws Rationalisation Act, 18 of 1996. It then continued to apply in Transkei until the entire section 66 together with schedule 4 and 10 of that Act was repealed by section 37(1) of Act 4 of 2005 with effect from 1 April 2006. It is important to observe that the First Respondent was designated as chief on 4 June 2004 at the time section 66 was in force in Transkei. The Traditional Leadership and Governance Framework Act , 41 of 2003 came into operation on 24 September 2004 , meaning that it was not in operation at the time the First Respondent was designated a chief . This means therefore that the applicable legislation in the appointment of the First Respondent is section 66 of the Transkei Constitution.

[38] No doubt , the decision designating the First Respondent is an administrative decision made by a juristic person in terms of legislation - section 66(1) of the Transkei Constitution which then applied at the time of the designation .

[39] It is necessary, for the sake of understanding the institution of paramount chieftainship, chieftainship and the manner of appointing the incumbents of those positions, to reproduce sub-section 1 of section 66 in its entirety. It provides that:

“66 (1) Subject to the provisions of sub-section (2), the power -

- (a) to designate or appoint any person as paramount chief or chief or sub-chief, whether in a permanent or in an acting capacity, or;
- (b) to institute any permanent chieftainship in addition to the paramount chieftainships mentioned in schedule 10, or;
- (c) to institute any other chieftainship of whatever class or status, shall continue to vest in the regional authority concerned subject to the confirmation of such designation, appointment or institution by the President at his discretion.”

[40] The powers conferred to the President by section 66(1) were later assigned to the Premier of the Eastern Cape Provincial Government by section 235(8) of the Interim Constitution of the Republic of South Africa, Act 200 of 1993. Subsequently, however, these powers were assigned to the Member of the Executive Council (MEC) for Housing, Local Government and Traditional Affairs of the Eastern Cape Provincial Government by Proclamation no. 6 published in the Provincial Gazette no. 323 dated 13 July 1998.

[41] It is against this legal background that the MEC for Housing, Local Government and Traditional Affairs of the Eastern Cape Provincial Government was cited by the applicant as Third Respondent. It is because the powers of the Premier to confirm the designation of a person as paramount chief or chief (in the case of the First Respondent) or sub-chief were assigned to him or her.

[42] If I understand the peremptory language of section 66(1) properly and correctly the power to designate or appoint a person as a chief vests in the regional authority , in this case , Qaukeni Regional Authority which is not before court by reason of non-joinder.

[43] The relief sought is directed only against the Third Respondent and it seeks review and setting aside of his confirmation of the appointment of the First Respondent and of the remuneration he is getting consequent upon his appointment. The second relief is for an order declaring the Applicant an acting chieftainess of Amadiba Tribal Authority and that the Third Respondent should recognize her as such. There is no relief sought against the Second Respondent, rightly so, in my view, because he had taken no decision and as such, he will not be affected by the outcome of the review. It is the Qaukeni Regional Authority which made a decision to appoint the First Respondent and which is a reviewable decision. This view is reaffirmed by the letter of designation which reads as follows:

“REGIONAL AUTHORITY RESOLUTION

Subject to confirmation by the State President , the Qaukeni Regional Authority does hereby , in terms of section 66 of the Transkei Constitution Act 1976 (Act No.15 of 1976) designate Lunga Baleni N.I.N. 7610285768080 as Chiefin the district of Bizana with jurisdiction over the Amadiba tribe resident in the area of Amadiba tribal authority ".

[44] The confirmation by the MEC does not stand alone in vacuum, it is linked to the decision of the Qaukeni Regional Authority. If the confirmation is set aside it follows that the First Respondent would cease to be a chief but the designation

would still remain intact because the applicant does not seek an order against it. The review is sought against the Third Respondent's confirmation of the designation.

[45] The founding affidavit does not disclose any wrong done by the Third Respondent to warrant the setting aside of his confirmation of the designation of Qaukeni Regional Authority. What appears as grounds of review are the irregularities alleged to have been committed by Qaukeni Regional Authority in designating the First Respondent. These are that the designation was made before the report of the committee appointed to investigate the rightful person to be designated a chief of Amadiba tribe was submitted, that there was no resolution of Amadiba Tribal Authority recommending the appointment of the First Respondent and that the designation was influenced by the Second Respondent . The Third Respondent had nothing to do with these issues and could even not have been aware of their existence.

[46] Apart from the fact that the grounds of review are directed against the decision of a party that is not before court, there are no grounds advanced against the confirmation of the Third Respondent. In my respectful view, the Applicant has not established a cause of action.

[47] Even assuming that I am wrong in so finding that there is no cause of action for reviewing the confirmation of the Third Respondent , there are two further alternative grounds on which the applicant may not succeed in this application .These are unreasonable delay in bringing the application and material dispute of fact. The non-joinder point would have resulted in the proceedings being stayed to enable the Applicant to join the Qaukeni Regional Authority had there been a

cause of action established by the Applicant and review brought within a reasonable time .

[48] The courts have consistently held that if in proceedings before the court, a person who is substantially interested in the subject matter of the proceedings is not before the court, then the court will not make an order affecting that person unless he is brought before the court (**Abrahamse and Others v Cape Town City Council**¹². In **Selborne Furniture Store (Pty) Ltd v Steyn N.O.**¹³ the Court of Appeal ordered a stay of the hearing of the matter pending the joinder of the persons who had a direct and substantial interest in the subject matter of the proceedings .

[49] The Qaukeni Regional Authority, a juristic person, is not before the Court. It is the party which made the decision which triggered this application. The applicant decided to come to Court because the Qaukeni Regional Authority made an unfavourable decision against Luzuko and which sidelined him as a chief over Amadiba tribe and preferred a child born out of wedlock. Surely that decision is reviewable but the maker thereof must be in Court and be heard. The Second Respondent as the Head of that Regional Authority does have an interest in the subject matter of the review but the Regional Authority is the proper person to be joined because it and not the Second Respondent made the decision. In **No-Italy Phindiwe Mtirara v MEC for Housing Local Government and Traditional Affairs and three Others, unreported case no.30/2005** of the Transkei Division , Dalindyebo Regional Authority had designated the applicant to act as chief on behalf of her minor son . The MEC for Housing, Local Government and Traditional Affairs refused to confirm the designation, thus leaving the applicant

¹² 1954 (2)SA 178 (C)

¹³ 1970 (4) SA 422 (A)

with no option but to approach this Court for an appropriate relief. Dalindyebo Regional Authority had been joined but the acting King thereof, who had signed the resolution designating the applicant, had not been joined in the proceedings. The point of non-joinder raised against him was rejected by this Court on the ground that the acting King did not have an interest separate from that of the Dalindyebo Regional Authority.

[50] The next point, which is the unreasonable delay point, is dispositive of the matter. The reasonableness or unreasonableness of the delay depends entirely on the facts and circumstances of a particular case (*Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie en 'n Ander*¹⁴). The designation was made on 4 June 2004 and the First Respondent commenced duties of a chief on the following day. The designation was confirmed on 11 October 2007 with retrospective effect from 1 April 2006. The First Respondent has been receiving income from 19 December 2007. The review application was brought on 2nd March 2009 although the applicant (as she says) became aware of the First Respondent's appointment in March 2008. In any event the First Respondent's averment that the applicant was present in the Regional Authority when he was appointed was not disputed by her. There is no application for condonation for the late bringing of this review application beyond the 180 days.

[51] The attitude of our courts when faced with the issue of delay in launching application proceedings on notice of motion is captured by Brand JA in *Associated Institutions Pension Fund and Others v Van Zyl and Others*¹⁵ as follows :

¹⁴ 1986 (2) SA 57 (A) at 86 E-F

¹⁵ 2005(2)SA 302 (SCA) [2004] 4 All SA 133 at 321B

"[46].....It is a long standing rule that courts have the power , as part of their inherent jurisdiction to regulate their own proceedings , to refuse a review application if the aggrieved party had been guilty of unreasonable delay in instituting the proceedings . The effect is that, in a sense, delay would 'validate ' the invalid administrative action (see eg **Oudekraal Estates (Pty) Ltd v City of Cape Town and Others**¹⁶. The *raison d'être* of the rule is said to be twofold. First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions (see eg **Wolgroeiërs Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad**¹⁷)"

[52] The application of the delay rule requires consideration of two questions:

(a) was there an unreasonable delay, if so,

(b) should the delay in all the circumstances be condoned?

[53] In **Gqwetha v Transkei Development Corporation Ltd and Others**¹⁸, the appellant instituted review application in this Court approximately 14 months after having been dismissed from her employment pursuant to disciplinary proceedings .When the point of unreasonable delay was raised by the respondents, the appellant argued that the delay was occasioned by the fact that she was waiting receipt of the copy of the record of the disciplinary proceedings. The court of first instance found that the delay had been unreasonable but condoned it on the basis that the appellant's application was strong on the merits. An appeal to the Full Bench on

¹⁶ 2004 (6) SA 222([2004] 3 All SA 1 at par [27]

¹⁷ 1978(1) SA 13(A)at 41

¹⁸ 2006(2) SA 603 SCA

the issue of condonation was upheld on the basis that the court of first instance had failed to exercise its inherent discretion judicially since it had failed to take into account the likelihood of prejudice to the respondent should the delay be condoned.

[54] In a further appeal to the Supreme Court of Appeal , it was held that the administration of justice and public interest in the finality of administrative decisions required that challenges to the validity of such decisions by way of proceedings for judicial review be initiated without undue delay .It was further held that although a delay might cause potential prejudice to both the efficient functioning of the public body and to those relying on its decisions , proof of actual prejudice was not a precondition for refusing to entertain review proceedings by reason of undue delay . The Appeal Court rejected the appellant's explanation for the delay (the absence of a transcript of the disciplinary hearing that led to her dismissal) as spurious: that it had no relevance to her ability to commence review proceedings since all but one of the grounds on which she had sought the review were quite unrelated to the content of the transcript. The decision of the court of first instance that the lapse of 14 months before launching the review was unreasonable was upheld by the Supreme Court of Appeal. The court of first instance condoned the 14 months delay on the ground that it was 'not very long ' and that the appellant was ' quite strong on the merits of the application'. The Supreme Court of Appeal agreed with the Full Bench that the learned Judge's approach was unduly narrow in this respect.

[55] The delay cannot be evaluated in a vacuum but only relative to the challenged decision and particularly with the potential for prejudice in mind. “In abstract terms the period of delay might be described as being 'not very long ' but it was correctly found to have been unreasonable. I do not think that a delay that is

unreasonable in its extent can simultaneously, and without more, serve as the basis for overlooking it. What the learned Judge overlooked, as correctly pointed out by the Court *a quo*, was the inherent potential for resultant prejudice if the decision was set aside” per Nugent JA at para [33]- Ggwetha judgment (*supra*).

[56] The review proceedings were instituted more than 4 years from the date of designation and there is no explanation therefor .That the Applicant became aware of the appointment of the First Respondent only in March 2008 is spurious. On the 23 June 2004, the Applicant instructed her Attorneys of record to address a letter to the Third Respondent requesting him not to confirm the appointment of the First Respondent. In any event she had been present when the decision was made.

[57] As Nugent JA said, an unreasonable delay cannot, simultaneously, without more, serve as a basis for overlooking it. Unlike in the Ggwetha case, above, where the delay was 14 months, the delay in the present application was more than 4 years without an explanation. To condone it will obviously prejudice the First Respondent who is already occupying the position of a Chief lawfully and earning a salary for it. Further , I have already alluded to the fact that there is no explanation for the delay but even if there was any , I would not be in a position to know , in the light of the dispute of fact , if the Applicant' s son , Luzuko , would be appointed in the position of chieftainship if I were to condone the delay . The contest over the position would take a long time to be resolved, even longer than 4 years the matter had taken to be brought to Court, to the further prejudice of the Amadiba tribe which would be without a traditional leader. I have observed that the review is sought against the confirmation of the designation but there are no grounds pointing fault at the Third Respondent's confirmation. The grounds that have been advanced are directed at the Qaukeni Regional Authority which has not been joined in the proceedings. In the circumstances, to condone the unreasonable

delay will not result in the review of the decision of the Qaukeni Regional Authority in its absence.

[58] Having considered all the circumstances of this matter , I am respectfully of the view that what is fatal in this application is the cause of action for review which is lacking; further the unexplained unreasonable delay which the Court cannot condone and last ,material dispute of fact which cannot be resolved on papers. The non-joinder of the Qaukeni Regional Authority is not fatal because, as already alluded to above, it would be cured by joinder with the leave of the Court.

[59] In conclusion I wish to sound my displeasure at the draftsmanship of the application papers in this matter. The cause of action was not properly conceived in a matter so complex as to require composure to collect and collate material evidence before embarking into litigation. The notice of motion embodying relief was not in the papers when the matter was heard. The poor state of the Applicant's founding papers reminds me of the remark once made by Stegmann J in **Reynolds v Maclenbeg**¹⁹, about the need for practitioners to return to disciplined practice. He said:

“Lest I should be thought to condone this state of affairs, I must take this opportunity to record that I consider the time to be overdue for a return to a much more disciplined form of practice. What should occur is, of course, that an attorney should take instructions from his client in an orderly way. This involves obtaining and considering all of the relevant documents; arranging them, and the relevant facts which they tend to establish, in a chronological sequence; and taking statements from the various witnesses in which the relevant allegations of fact are also arranged in chronological

¹⁹ 1996(1) SA 75 (WLD) at 78-79

sequence. The preparatory work provides the raw material on which a decision can be taken about what relief to seek and whether to proceed by way of action or by way of motion.”

[60] I would consider, for purposes of costs, the fact that the Applicant was vindicating the constitutional right of his son, Luzuko to inherit the chieftainship of his late father. Quite obviously, the Applicant is an indigent rural woman and to order her to pay costs of this application would certainly discourage her and the public from pursuing their constitutional rights in the fear that if they lose in the litigation, they would be mulcted in costs.

ORDER

[61]In the circumstances, I make the following order:

1. That the application is dismissed;
2. That each party shall pay its own costs.

LP Pakade

ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

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Date Heard : 23 March 2012

Date delivered : 20 December 2012

