



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO ☒ NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO ☒ NO

(3) REVISED: *yes*

1/7/2024
DATE

[Signature]
SIGNATURE

CASE NO: 38689/2022

In the matter between:

MKHARI, RISMATI WILSON
MKHARI ROYAL FAMILY

First Applicant
Second Applicant

and

**THE CHAIRPERSON OF THE AD HOC PANEL ON THE
RESTORATION OF THE VATSONGA KINGSHIP CLAIM
SHIRINDA, SHIRHAMI
MOPAI, ZAMOKUHLE BM
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA
THE MINISTER OF COOPERATIVE GOVERNANCE AND
TRADITIONAL AFFAIRS**

First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent

THE DIRECTOR GENERAL:

Sixth Respondent

DEPARTMENT OF COOPERATIVE

GOVERNANCE AND TRADITIONAL AFFAIRS

MUKHARI, HLEKANI SAMUEL

Seventh Respondent

THE NJHAKANJHAKA TRADITIONAL COUNCIL

Eighth Respondent

MUKHARI, SIKHETO THOMAS

Ninth Respondent

THE KHENSANI TRADITIONAL COUNCIL

Tenth Respondent

JUDGMENT DELIVERED ON 1 JULY 2024

CP WESLEY AJ

Introduction

1. According to the notice of motion, in this application the applicants seek the following relief:

- 1.1 In terms of prayer 1, an order that the *"Report on the Reconsideration for the Restoration of the Vatsonga Kingship Claim by Rismati Wilson Mkhari, prepared by Mopai ZBM and Shirinda SE"*, dated 29 October 2021 ("the October Report"), under the signature of the second and third respondents, be declared not to constitute a report in compliance with the mandate of the Ad-hoc Panel in terms of the order of court of 21

September 2020 by Molopa-Sethosa J, under case number 12543/2016, and that the October Report be declared to be unlawful and invalid, and be reviewed and set aside.

- 1.2 In terms of prayer 2, an order that, in consequence of prayer 1, the fourth respondent's decision as per President's Act No. 24 (81/172488 (Z 19E)) dated 19 February 2022, declining the first applicant's Vatsonga Kingship claim, be declared to be unlawful and invalid, and be reviewed and set aside.
- 1.3 In terms of prayer 3, an order that fourth respondent is to consider only the *"Report of the Ad hoc Panel for the Reconsideration of the Vatsonga Kingship claim"*, dated 28 July 2021 ("the July report"), under the signature of the first respondent, and to make a new decision within 30 (thirty) days from the date of the order being handed down, on the first applicant's Vatsonga Kingship claim in accordance with this report and its recommendations only.
- 1.4 In terms of prayer 4, in the alternative to prayer 3, an order that the decision of the fourth respondent mentioned in prayer 2 be substituted in terms of section 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act,¹ with a decision as follows:

¹ 3 of 2000 ("the PAJA").

"Having considered the 'Report of the Ad Hoc panel for the Reconsideration of the Vatsonga Kingship claim', dated 28 July 2021, under the signature of the first respondent, it is decided that the Vatsonga Kingship claim of the first applicant is recognised in terms of section 3 of the Traditional Kho-San Leadership Act 3 of 2019, read with section 2A of the Traditional Leadership and Governance Framework Act 41 of 2003."

- 1.5 In terms of prayer 5, an order that the fifth respondent, in consequence of prayer 4, is to issue a new President's Act, recognising the first applicant's Vatsonga Kingship claim, within 30 (thirty) days from the date of an order being issued.
 - 1.6 In terms of prayer 6, an order that any respondent who opposes the application be ordered to pay the applicants' costs.
2. The applicants submit that the October Report and fourth respondent's decision of 19 February 2022 fall to be reviewed and set aside in terms of the PAJA and, failing that, in terms of the principle of legality. The fourth, fifth and sixth respondents contest this.
3. The crux of the dispute between the parties, and the issue that falls to be decided, is whether or not the October Report and fourth respondent's decision of 19 February 2022 fall to be reviewed and set aside.

The parties

4. The first applicant is Rismati Wilson Mkhari. He is the most senior member of the Mkhari Royal Family. He brought the application for the recognition of the Vatsonga Kingship on behalf of the second applicant.
5. The second applicant is the Mkhari Royal Family. It purports *inter alia* to administer the affairs of the Vatsonga Kingdom.
6. The first respondent is the Chairperson of the Ad-hoc Panel on the Restoration of the Vatsonga Kingship ("the Ad-hoc Panel"). He is Professor Jabulani Simon Maphalala. He was appointed to the Ad-hoc Panel for his expertise in history.
7. The second respondent is Advocate Shirhami Shirinda, an advocate of the High Court of South Africa, and a member of the the Ad-hoc Panel. He was appointed to the Ad-hoc Panel for his expertise in law.
8. The third respondent is Ms Zamokuhle BM Mopai, a member of the the Ad-hoc Panel. She was appointed to the Ad-hoc Panel for her expertise in traditions and customs.
9. The first, second and third applicants are cited as members of the Ad-hoc Panel, and out of the interest that they have in the relief that is sought.

10. The fourth respondent is the President of the Republic of South Africa, who is cited in his official capacity. He took the decision of 19 February 2022 to decline the Vatsonga Kingship claim.
11. The fifth respondent is the Minister of Cooperative Governance and Traditional Affairs, who is cited in her official capacity. She administered the Traditional Leadership and Governance Framework Act,² which was repealed with effect from 1 April 2021,³ and also appointed the first, second and third respondents to the Ad-hoc Panel.
12. The sixth respondent is the Director General of the Department of Cooperative Governance and Traditional Affairs, who is cited in his official capacity.
13. The seventh respondent is Hlekani Samuel Mukhari, who is cited as the current senior traditional leader of the Njhakanjhaka Traditional Council.
14. The eighth respondent is the Njhakanjhaka Traditional Council.
15. The ninth respondent is Sikheto Thomas Mukhari, who is cited as the current senior traditional leader of the Khensani Traditional Council.

² 41 of 2003 ("the Frameworks Act").

³ See section 65 read with schedule 4 of Act 3 of 2019.

16. The tenth respondent is the Khensani Traditional Council.
17. The seventh to tenth respondents made submissions to the the Ad-hoc Panel in the course of its investigations, and they are likewise cited out of the interest that they have in the relief that is sought.
18. The application was opposed by the fourth, fifth and sixth respondents alone.

The relevant facts

19. The relevant facts are, in brief, as follows.
 - 19.1 On 31 August 2010 the first applicant, on behalf of the second applicant, lodged an application for the restoration of the Vatsonga Kingship with the Commission on Traditional Leadership Disputes and Claims ("the Commission"). The Commission was established with effect from 1 February 2010 in terms of the Framework Act.
 - 19.2 According to subsection 25(1) of the Framework Act, the Commission had authority to investigate and make recommendations on any traditional leadership dispute and claim contemplated in subsection 25(2). Subsection 25(2)(a)(i) provided that the Commission had authority to investigate and make recommendations on *inter alia* a case where

there was doubt as to whether a kingship was established in accordance with customary law and customs. In terms of subsection 25(2)(a)(iv) the Commission could investigate and make recommendations on claims by communities to be recognised as kingships.

- 19.3 In May 2015, after having concluded its investigations, the Commission issued its report. In its report the Commission recommended that the Vatsonga Kingship claim be declined.
- 19.4 In August 2015 the fourth respondent, acting in terms of section 26(3) of the Framework Act, duly declined the Vatsonga Kingship claim.
- 19.5 In 2016, and feeling aggrieved by the fourth respondent's decision as foresaid, the applicants took the Commission's report and recommendation, and the fourth respondent's decision, on review to the High Court, Gauteng Division.
- 19.6 On 21 September 2020 the High Court, per the honourable Molopa-Sethosa J, made an order in the review application which provided, apart from costs, for the following:

- 19.6.1 the decision taken by the Commission in May 2015 to recommend to the fourth respondent that the Vatsonga Kingship claim be declined was reviewed and set aside;
- 19.6.2 the decision taken by the fourth respondent in August 2015 to accept the Commission's recommendation that the Vatsonga Kingship claim be declined was reviewed and set aside;
- 19.6.3 the fifth respondent was directed to, within thirty days of the order, appoint suitably qualified members to form an ad-hoc panel solely for the purpose of reconsidering the Vatsonga Kingship claim;
- 19.6.4 the ad-hoc panel was directed to conduct its work and issue a final report, with recommendations, within 6 months of being appointed; and
- 19.6.5 the fourth respondent was directed to make a fresh decision in terms of the Framework Act within sixty days of receiving the final report of the ad-hoc panel in terms of section 26(3) of the Framework Act.

- 19.7 On 27 January 2021, the fifth respondent appointed the first, second and third respondents as members of the Ad-hoc Panel.
- 19.8 On 28 July 2021, after having concluded its investigations, the Ad-hoc Panel issued its report, under the signature of the first respondent. This is the July Report. The July Report recommended that the Vatsonga Kingship claim be upheld.
- 19.9 On 29 October 2021 the Ad-hoc Panel purported to issue a second report, under the signatures of the second and third respondents. This is the October Report. The October Report recommended that the Vatsonga Kingship claim be declined.
- 19.10 Both the July Report and the October Report were then presented to the fourth respondent for consideration before making his decision on the Vatsonga Kingship claim.
- 19.11 On 19 February 2022, after considering the July Report and the October Report, the fourth respondent decided, as per President's Act No. 24 (81/172488 (Z 19E)), to accept the recommendation that was made in the October Report and thus declined the Vatsonga Kingship claim. The decision read, in the material part, as follows:

***“And whereas** on 21 December 2021, the Presidency received two reports from members of the Ad-Hoc Panel. One report from Professor Maphalala (the Chairperson) and another report by the other two members of the Ad-Hoc Panel, Ms Mopai and Adv Shirinda.*

***And whereas** I have considered the two reports provided by the members of the Ad-Hoc Panel.*

*I **now** in terms of section 26(3) of the Traditional Leadership and Governance Framework Act 41 of 2003, accept the majority report by Ms Mopai and Adv Shirinda, which concluded the Vatsonga do not have a kingship.*

The Vatsonga kingship’s claim as lodged by Mr Risimati Wilson Mkhari and the Mkhari Royal Council is therefore declined.”

(bold in the original)

20. The applicants contend that the July Report is the only legitimate report of the Ad-hoc Panel. The fourth, fifth and sixth respondents contest this. The particular bases on which the parties rely for their opposing contentions are not presently material. What is material, however, is the fact that neither the fourth, fifth and sixth respondents, nor anyone else, has taken any steps in order to have the July Report reviewed and set aside by a court.
21. The fourth, fifth and sixth respondents contend in turn that the July Report and the October Report together constitute the report of the Ad-hoc Panel.

The October Report

22. For purposes of this part of the judgment, this court will accept for the sake of argument that the July Report and the October Report together constitute the report of the Ad-hoc Panel.
23. In section 1 of the PAJA the term “administrative action” is defined as meaning, for present purposes-

“any decision taken by ... an organ of state, when ... exercising a public power or performing a public function in terms of any legislation ... which adversely affects the rights of any person and which has a direct, external legal effect ...”.

24. According to *Competition Commission of South Africa v Telkom SA Ltd and Other*,⁴ there are two separate aspects of the definition of administrative action in the PAJA. These are, first, the requirement that the decision must be one of an administrative nature and, second, the requirement that the decision must have the capacity to affect legal rights.

⁴ [2010] 2 All SA 433 (SCA) at para 10: “Care must be taken here not to conflate two different aspects of the definition of administrative action in PAJA, namely, the requirement that the decision be one of an administrative nature and the separate requirement that it must have the capacity to affect legal rights.”

25. Regarding the first aspect, in Hoexter and Penfold *Administrative Law in South Africa*,⁵ the learned authors discuss action of an administrative nature as opposed to action of an investigative nature. They point out that in *Bernstein v Bester NO*,⁶ the Constitutional Court found it difficult to fit an investigation into the affairs of a company “into the mould of administrative action”, particularly since the investigation was not aimed at making binding decisions. Hoexter and Penfold then make reference to *Competition Commission of South Africa v Telkom SA Ltd and Others*,⁷ in which the Supreme Court of Appeal addressed *inter alia* the Competition Commission’s functions. These functions include the investigation and evaluation of alleged contraventions of the Competition Act.⁸ In its judgment,⁹ the Supreme Court of Appeal affirmed the earlier approach adopted in *Simelane and Others NNO v Seven-Eleven Corporation (Pty) Ltd and Another*,¹⁰ holding that “the decision in *Simelane* that the ultimate decision to refer a matter to the Tribunal and the referral itself are of an investigative and not an administrative nature remains a correct reflection of the position under PAJA and the decision that PAJA does not apply in this review is correct.”

⁵ Third Edition at 257.

⁶ 1996 (2) SA 751 (CC) at para 97.

⁷ Above.

⁸ 89 of 1998.

⁹ At para 11.

¹⁰ 2003 (3) SA 64 (SCA).

26. As alluded to, *Simelane and Others NNO v Seven-Eleven Corporation (Pty) Ltd and Another*,¹¹ dealt with the Competition Commission's functions to investigate a complaint and to refer it to the Tribunal. The Supreme Court of Appeal held that these functions, being investigative in nature, were not subject to review.
27. The Ad-hoc Panel was set up in order to investigate and report on the Vatsonga Kingship claim, and to make recommendations thereon.¹² The July Report and the October Report contain the results of the investigations that were conducted by the Ad-hoc Panel into the Vatsonga Kingship claim, as well as the Ad-hoc Panel's recommendations on the Vatsonga Kingship claim.
28. Having regard to the functions of the Ad-hoc Panel, as well as the nature, content and purpose of the July Report and the October Report, it is apparent, in this court's view, that the July Report and the October Report are investigative in nature and not administrative in nature.
29. Regarding the second aspect, the July Report and the October Report do not fall within the ambit of the definition of "administrative action" as per section 1 of the PAJA, quoted above, for the following reason. The reports do not, in themselves, adversely affect the rights of the applicants, nor have a direct, external legal

¹¹ Above.

¹² In terms of subsection 25(1) of the Framework Act, the Commission had a similar function, namely to investigate and make recommendations on any traditional leadership dispute and claim contemplated in subsection 25(2) of the Framework Act.

effect. In the words of *Competition Commission of South Africa v Telkom SA Ltd and Others*,¹³ the July Report and the October Report do not have the capacity to affect legal rights. In the words of *Bernstein v Bester NO*,¹⁴ these reports are not aimed at making binding decisions. As stated, the July Report and the October Report contain the results of the investigations that were conducted by the Ad-hoc Panel, coupled with the recommendations that are made therein by the Ad-hoc Panel, concerning the Vatsonga Kingship claim. No external effect at all flowed from the same, nor did they have any effect on the applicant's legal rights. Any direct, external legal effect, and any adverse effect on the legal rights of the applicants, would only arise if, and ensue when, the fourth respondent acted on the July Report and the October Report and made a binding decision based thereon concerning the Vatsonga Kingship claim. That is, however, a separate matter entirely.

30. It follows, in this Court's view, that the October Report is not susceptible to being reviewed under the provisions of the PAJA.
31. As stated, the applicants argued that the October Report could be reviewed under the principle of legality. This court agrees.

¹³ Above.

¹⁴ Above.

32. It is not necessary to expand extensively on the principle of legality for purposes of this judgment. The following brief account will suffice.¹⁵ The principle of legality is aspect of the rule of law, which is a concept that is a founding value that features in section 1(c) of the Constitution. Section 1(c) expressly provides that South Africa is founded on the rule of law. The principle of legality expresses the fundamental idea that the exercise of public power is only legitimate when it is lawful. This is evident from the oft cited passage from the judgment of the Constitutional Court in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*,¹⁶ that “[i]t seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.”
33. The common law doctrine of *functus officio* is coupled with the principle of legality.¹⁷ Again, it is not necessary to expand extensively on the doctrine of *functus officio* for purposes of this judgment. It suffices to state that the doctrine entails that absent an express enabling legislative provision, once an administrator has made a decision it cannot be recalled, set-aside or amended

¹⁵ See Hoexter and Penfold at 157 to 161 and authorities there cited.

¹⁶ 1999 1 SA374 (CC) at para 57. And see *Masetlha v the President of the Republic of South Africa and Another* 2008 (1) BCLR 1 (CC) at para 12.

¹⁷ See Pretorius “The Origins of the Functus Officio Doctrine with Specific Reference to its Application in Administrative Law” 2005 SALJ 832–864; Henrico “The Functus Officio Doctrine and Invalid Administrative Action in South African Administrative Law: A Flexible Approach” 2020 (34) *Spec Juris* 115; *The Law of South Africa Administrative Justice* (Volume 2 - Third Edition) at para 18.

by the administrator. Having made the decision, the administrator is *functus officio*; he has exhausted his powers. This applies whether decision made by the administrator is lawful or not. Even if the administrator's decision is unlawful, it must be treated as being lawful and binding until it is set aside by a court. The doctrine of *functus officio* is squarely premised on the principle of legality. If an administrator attempts to recall, set-aside or amended his decision once made, he will be acting unlawfully because, having exhausted his powers, the same are spent and the administrator has no further power to act.

34. In this court's view, when the Ad-hoc Panel issued the July Report on 28 July 2021, the Ad-hoc Panel became *functus officio*. The powers that the Ad-hoc Panel had to investigate the Vatsonga Kingship claim and to make recommendations thereon, conferred on it by the order of 21 September 2020 that was made by the honourable Molopa-Sethosa J, were exhausted. This applies whether the criticism of the fourth, fifth and sixth respondents concerning the lawfulness of the July Report is correct or not. As indicated, neither those respondents nor anyone else has had the July Report reviewed and set aside by a court. It follows that when the October report was issued, purportedly by the same Ad-hoc Panel, it acted unlawfully because having exhausted its powers regarding the Vatsonga Kingship claim, the same were spent and it had no further power to act.

35. It follows, in this court's view, that the October Report is reviewable under the principle of legality, and that it offends the principle of legality for the reasons given in the preceding paragraph.

The decision of the fourth respondent of 19 February 2022

36. As indicated, after considering the July Report and the October Report, on 19 February 2022, the fourth respondent decided, as per President's Act No. 24 (81/172488 (Z 19E)), to accept the recommendation that was made in the October Report and thus declined the Vatsonga Kingship claim. As shown, in taking this decision the fourth respondent took into account and relied on the October Report, and adopted the recommendation of that report. The fourth respondent did this in circumstances where the October Report was unlawful.
37. It is established law that any subsequent administrative action that arises from an initial administrative action that is invalid, will also be invalid. In *Seale v Van Rooyen NO*,¹⁸ with reference to *Oudekraal Estates (Pty) Ltd v City of Cape Town*,¹⁹ the Supreme Court of Appeal pointed out that "*it is clear from Oudekraal, and it must in my view follow, that if the first act is set aside, a second act that depends for its validity on the first act must be invalid as the legal foundation for its performance was non-existent.*"

¹⁸ 2008 (4) SA 43 (SCA) at para 13.

¹⁹ 2004 (6) SA 222 (SCA).

38. Presently, the fourth respondent's decision of 19 February 2022 depends on the validity of the October Report, which is not valid. If the October Report is set aside, the legal foundation the fourth respondent's decision of 19 February 2022 falls away. It follows that in the present circumstances the invalidity of the October Report vitiates the validity of the fourth respondent's decision of 19 February 2022.
39. Even if the invalidity of the October Report did not vitiate the validity of the fourth respondent's decision of 19 February 2022, that decision would nevertheless fall to be reviewed and set aside in terms of the PAJA on the basis that the fourth respondent took irrelevant considerations into account when taking the decision, the irrelevant considerations being the October Report.²⁰

Conclusions

40. This court therefore concludes that the October Report is reviewable in terms of the principle of legality, and that it falls to be reviewed and set aside for offending the *functus officio* doctrine, and accordingly for offending the principle of legality.
41. Further, the decision of the fourth respondent of 19 February 2022 falls to be reviewed and set aside on the basis that its validity is vitiated by the invalidity of

²⁰ See subsection 6(2)(e)(iii) of the PAJA.

the October Report, or otherwise on the basis of subsection 6(2)(e)(iii) of the PAJA because irrelevant considerations were taken into account.

42. Having reached these conclusions, it is not necessary to deal with the applicants' other grounds of review and the fourth, fifth and sixth respondents' countervailing arguments thereto.

Appropriate relief

43. In my view, this is not a case where any substitution of this court's decision for that of the fourth respondent should take place, as contemplated in section 8(1)(c)(ii)(aa) of the PAJA. This is clearly a matter which calls for a remittal to the fourth respondent, together with the necessary direction. That direction should be that the fourth respondent must only consider the July Report in taking a fresh decision on the matter of the Vatsonga Kingship claim.
44. In prayer 3 of the notice of motion the applicants seek, as part of the relief, an order that the fourth respondent is directed to take a new decision in accordance with the July Report and its recommendations only. This court is not prepared to grant such relief. The relief is capable of being read as being prescriptive as to the outcome of the fourth respondent's fresh decision-making process. If granted, it would tend to hamstring the fourth respondent when taking a fresh decision, and direct the outcome of the process, which is a situation that should be avoided.

45. In prayer 3 of the notice of motion the applicants also seek, as part of the relief, an order that the fourth respondent is directed to make a fresh decision within 30 (thirty) days from the date of this order being handed down, on the Vatsonga Kingship claim. This court considers the period of 30 (thirty) days to be too stringent, and that a period of 60 (sixty) days is more appropriate.

Costs

46. The general rule is that costs follow the event, that is that the successful party in litigation is entitled to recover its costs from the unsuccessful party.²¹ Having secured the review and a setting aside of the October Report and the fourth respondent's decision of 19 February 2022, it cannot be gainsaid that the applicants have been substantially successful in this application. Costs should thus follow the event.
47. The costs awarded to the applicants should, in the circumstances, be on the party and party scale, and on Scale A in terms of Rule 69.

Order

48. In the result this court makes the following order:

²¹ *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1984 (1) SA 839 (A).

- 48.1 The *“Report on the Reconsideration for the Restoration of the Vatsonga Kingship Claim by Rismati Wilson Mkhari, prepared by Mopai ZBM and Shirinda SE”*, dated 29 October 2021, under the signature of the second and third respondents, is declared not to constitute a report in compliance with the mandate of the Ad-Hoc Panel in terms of the order of court of 21 September 2020 by Molopa-Sethosa J, under case number 12543/2016, is declared to be unlawful and invalid, and is reviewed and set aside.
- 48.2 The fourth respondent's decision as per President's Act No. 24 (81/172488 (Z 19E)) dated 19 February 2022, declining the first applicant's Vatsonga Kingship claim, is declared to be unlawful and invalid, and is reviewed and set aside.
- 48.3 The matter is remitted back to the fourth respondent who is to consider only the *“Report of the Ad hoc Panel for the Reconsideration of the Vatsonga Kingship claim”*, dated 28 July 2021, under the signature of the first respondent, and make a fresh decision within 60 (sixty) days from the date of this order being handed down, on the Vatsonga Kingship claim.
- 48.4 The fourth, fifth and sixth respondents are to pay the applicants' costs of suit, jointly and severally, the one paying the other to be absolved, on the party and party scale and on Scale A in terms of Rule 69.

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CP WESLEY

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Appearances

For applicant: Adv Q Pelser SC with Adv P Eilers
instructed by Hurter Spies Incorporated

For the fourth, fifth, and sixth respondents: Adv F Nalane SC with Adv A Mofokeng instructed by State Attorney, Pretoria

Date heard: 24 May 2024

Date of Judgment: 1 July 2024