



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: D8583/2019

In the matter between:

INKOSI LANDOWAKHE DAVID NTSHANGASE

Applicant

and

PREMIER OF THE PROVINCE OF KWAZULU-NATAL

First Respondent

**MEMBER OF THE EXECUTIVE COUNCIL FOR
CO-OPERATIVE GOVERNANCE AND TRADITIONAL
AFFAIRS**

Second Respondent

**KWAZULU-NATAL COMMISSION ON TRADITIONAL
LEADERSHIP DISPUTES AND CLAIMS**

Third Respondent

KHULEKANI MTUNGWA

Fourth Respondent

ORDER

1. The main application is dismissed.
2. I make no order in the counter-application.
3. I make no order as to costs.

JUDGMENT

HENRIQUES J

Introduction

[1] Colonial and apartheid laws had a negative impact on customary law. Customary law was not applied if it was adverse to the common law and ranked lower than the common law. Our Constitution recognises customary law as a system of law equivalent to the common law and both customary law and common law derive legal force from the Constitution. As is consistent with the history of our country, to right the wrongs of the past, especially in relation to customary and indigenous law, Parliament enacted the Traditional Leadership and Governance Framework Act 41 of 2003 (the Framework Act) to regulate traditional leadership and give consistency to the Constitution which recognised traditional leadership institutions established in terms of customary law only.¹

[2] Among the objects of the Framework Act was to “restore the integrity and legitimacy of the institution of traditional leadership in line with customary law and practices.” The Framework Act established the Commission on Traditional Leadership Disputes and Claims, whose members were appointed by the President and who were persons “knowledgeable regarding customs and the institution of traditional leadership.” The Framework Act obliged the Commission to carry out its functions in a manner that was fair, objective, and impartial.

Nature of the application

[3] This application concerns a review instituted by the applicant in terms of s 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) to *inter alia* review the decision of the Premier (the first respondent) in rejecting the recommendations contained in a report of the Commission on Traditional Leadership Disputes and

¹ *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims and Others* [2014] ZACC 36

Claims, KwaZulu-Natal in which it rejected the claim of the fourth respondent's father for recognition as Senior Traditional Leader of the AmaNtungwa clan.

[4] The relief foreshadowed in the notice of motion is the following:

- '1. That the decision of the First Respondent to reject the decision of the Commission on Traditional Leadership and Claims rejecting Themba Esau Mntungwa as Inkosi be reviewed and set aside.
2. The decision of the First Respondent dated 14 May 2018 to approve the recognition of the Mntungwa Traditional Community be declared unlawful, reviewed and set aside.
3. The decision of the First Respondent dated 14 May 2018 to recognise Khulekani Mntungwa, the Fourth Respondent, as Inkosi of the Mntungwa Traditional Community be declared unlawful, reviewed and set aside.
4. To the extent that this is necessary the 180 day period referred to in Section 7(7) of the Promotion of Administrative Justice Act, be and is hereby extended;
5. That the First Respondent pay the costs of the application on an unopposed basis if it is unopposed, but, if opposed, that the respondents who oppose pay the costs of application, jointly and severally.'

[5] The application is opposed by the first, second, and fourth respondents. The third respondent has not opposed the application nor has it filed an explanatory affidavit.

[6] The fourth respondent² opposes the granting of the application and has also instituted a counter application in which he too seeks an order—

'That the decision of the Third Respondent of 15 August 2017 to decline the claim of the Fourth Respondent to be the Senior Traditional Leader of AmaNtungwa Clan is hereby declared unlawful and is reviewed and set aside.'³

The parties

[7] The applicant is recognised as Inkosi of the Ntshangase Traditional Community in the Pongola area. The first respondent is the Premier of the Province of KwaZulu-Natal who performs functions in terms of the Framework Act read with the KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005 (KZN Leadership Act)

² I may add that at the hearing of the application on 17 November 2023 the fourth respondent appeared in person and made submissions in opposition to the review application.

³ Notice of Motion page 270, Index 3.

being the appointment and recognition of traditional leaders and senior traditional leaders. The second applicant, the MEC for Co-operative Governance and Traditional Affairs is responsible for, *inter alia* traditional affairs in the Province of KwaZulu-Natal referred to in the KZN Leadership Act and performs functions in terms of such Act.

[8] The third respondent is the KwaZulu-Natal Commission on Traditional Leadership Disputes and Claims (KZN Commission), a provincial committee established in terms of s 26A of the Framework Act mandated to deal with disputes and claims relating to traditional leadership. The Commission makes recommendations on all matters delegated to it in terms of s 25(6) of the Framework Act.

[9] The fourth respondent is a member of the Mntungwa Traditional Community, a direct descendant of Themba Esau Mntungwa (Themba Esau) whom the first and second respondents have indicated they intend to appoint as Inkosi of the Mntungwa Traditional Community.

The background facts

[10] The genesis of the application has the following facts. The applicant was appointed as Inkosi on 11 August 1988 in terms of the provisions of s 20(1)(a)(ii) of the Black Administration Act 35 of 1927 and was authorised as Inkosi of the Simdlangentsha district of KwaZulu-Natal. The certificate of jurisdiction authorised the applicant to try and punish any “black person in his area and under his control for any offences contravened in terms of the certificate of jurisdiction”.⁴

[11] On 18 January 2007, Themba Esau, the fourth respondent’s father, lodged a claim for traditional leadership relating to the traditional authority of Ndlangamandla which fell under the Zululand District Municipality. He indicated he was the rightful heir to the status of Inkosi in Phondwana and was the current traditional leader of the traditional authority. In addition to the claim lodged by the fourth respondent’s father, other traditional leadership claims were also lodged within the area of jurisdiction of the applicant.

⁴ Page 36, Certificate of Jurisdiction, Index 1

[12] On 26 November 2007, the applicant opposed the claims of five of the persons claiming to be Amakhosi in his area, including that of Themba Esau. The basis of his challenge was set out in annexure C but was also placed before the KZN Commission when he participated during the public hearings and shared his views on the claims lodged specifically by Themba Esau and by the fourth respondent. During the public hearings, he indicated what his objections to the claims were and sought to have the KZN Commission dethrone five of the Amakhosi and their traditional councils and return the land which had been given to them.

[13] It is apparent that in keeping with its mandate the KZN Commission researched and reviewed archival information, reviewed relevant literature, and collated oral evidence in interviews and public hearings to consider the history of traditional leadership in the area. Community participation was regarded as reliable and a critical source of information and public hearings afforded an opportunity to the community to interact with the KZN Commission and the claimant. Archival and research information is tested at such public hearings. In considering Themba Esau's claim to senior traditional leadership, the KZN Commission conducted research through literature review, analysed written submissions, and conducted interviews. It is common cause that the Phondwana area claimed by AmaNtungwa falls under the jurisdiction of the applicant.

[14] On 15 August 2017, by way of a two-thirds majority, the third respondent recommended that the claim for the senior traditional leadership position of the AmaNtungwa clan in Phongolo by Themba Esau be declined. In coming to such conclusion, the KZN Commission had regard to the historical background relating to the emergence of the Ntshangase senior traditional leadership in Phongolo and the recommendations of the office of the Native Affairs Commissioner. It also had regard to the historical developments leading to the AmaNtungwa clan.

[15] This involved input from the claimant and his witnesses as well as by Zabazendoda Nkosi who spoke on behalf of the applicant. The genealogical tree as presented by the claimant was also considered together with the archival records and documentation and recommendations from the office of the Native Affairs Commissioner. The report considered the evidence presented and noted that there was a discrepancy between what had been presented by the fourth respondent's

father and the data obtained from archival sources. It found that having regard to the information supplied by the claimant, Themba Esau, Shayinja Mntungwa was deposed in 1961 when AmaNtungwa were merged with the Ntshangase tribe.

[16] On the other hand, the information obtained from the archival sources evinces that both Shayinja Mntungwa and his heir Silwanempi Mntungwa were recognised by the then government as headmen. In addition, there was no recorded information to support the claim that Shayinja Mntungwa had ever been deposed from any senior traditional leadership position.⁵

[17] Paragraphs 8.1.2 and 8.1.3 of the analysis in the KZN Commission's report read as follows:

'8.1.2 It is on record that amaNtungwa were senior traditional leaders in the area way before the establishment of Ntshangase Traditional Authority but the records also show that inkosi Langa of amaNtungwa tribe was chased out by King Shaka and fled to Swaziland. Shaka ruled approximately between 1817 and 1828. There is no evidence to support that ubukhosi continued to exist after the death of Langa.

8.1.3 Ntshangase ubukhosi was recognised in terms of Section 2(7) of the Native Administration Act of 1927 and the very same legislation was used not to recognise amaNtungwa ubukhosi hence we have the claim.'

[18] In its conclusion, the KZN Commission reported that the evidence obtained proved without any reasonable doubt that Shayinja Mntungwa had never been deposed from his position and that both Shayinja and his heir were recognised as headmen under Ntshangase ubukhosi. Mntungwa ubukhosi ceased to exist when inkosi Langa Mntungwa fled to Swaziland during Shaka's wars and therefore ubukhosi bamaNtungwa was lost outside the mandate period of the commission. It was this reason that formed the basis for the recommendation that the claim by Themba Esau Mntungwa be declined.

[19] The recommendations of the KZN Commission were submitted to the first and second respondents for consideration, but such recommendations were rejected.

⁵ Paragraph 8.1.1, page 82 Index 1

[20] Subsequently and on 14 May 2018⁶ the first respondent wrote to the fourth respondent's father and indicated as follows:

'This letter serves to inform you of the outcome of the application to the Commission after the investigation and a public hearing into your claim. The Commission recommended that your claim for a senior traditional leadership position of amaNtungwa clan be declined.

I have accordingly studied the report from the Commission in respect of this matter and I am not satisfied that the conclusion reached by the Commission is correct and fair.

It is for this reason that I have rejected the recommendations made by the Committee of the Commission on Traditional Leadership Disputes to decline the claim by made by Mr Themba Esau Mntungwa, instead I have approved the recognition of the Mntungwa Traditional Community with Khulekani Mntungwa as *iNkosi*.

Accordingly your claim for the senior traditional leadership position of *ubuKhosi* bamaNtungwa in Zululand District is approved.'

[21] According to the applicant he was never informed by the first respondent of the decision and learnt about it from a third party although he does not say when and from whom he learnt this. On 27 August 2018, he approached his attorneys who then sent correspondence to the first and second respondents. Such correspondence recorded that he had heard of the decision made by the first and second respondents and that he had participated in the process of hearings by the KZN Commission and that he had been represented at the public hearings and participated therein. The applicant requested access to the findings of the KZN Commission.

[22] On 26 November 2018, once again the applicant's attorneys wrote to the first and second respondents informing them that he was in receipt of the KZN Commission's report which he had acquired via a PAIA application.⁷ Such correspondence requested the appointment letter of the Inkosi appointed within the applicant's jurisdiction, a recognition letter of his tribe, the Inkosi and the tribe's jurisdiction, the report which informed the first and second respondents of the recognition as well as a copy of a publication in the Government Gazette.

⁶ Annexure E page 84 Index 1

⁷ In terms of the Promotion of Access to Information Act

[23] According to the applicant there was no response to both sets of correspondence, and on 5 December 2018, his attorney addressed a second letter to the Department of Co-operative Governance and Traditional Affairs (COGTA) and threatened court action. The applicant's papers are silent as to what transpired during the intervening period from 5 December 2018 up to, and on 25 March 2019 when further correspondence was addressed by his attorney to the first respondent dated 25 March 2019.

[24] Such correspondence alluded to the correspondence sent by the first respondent on 14 May 2018 to the fourth respondent. It recorded the applicant's intent to oppose and object to the first respondent's decision and required the first respondent to provide substantial reasons why he opted to deviate from the panel of experts' findings. In addition, paragraph 5.4 of the correspondence alluded to "undue influence in the whole process." It made mention of several meetings whereby COGTA officials, the claimants, and AbaNtwana baseNdlunkulu met before the Premier's decision to deviate from the KZN Commission's finding and an undertaking was made to restore ubukhosi. It also alluded to the claimant sending cows in terms of the ukuthela amanzi ritual at KwaKhangela Palace.

[25] Paragraph 5.5 of the letter alluded to the fact that the applicant was not formally informed by the first and second respondents that the fourth respondent had been recognised and heard of such recognition at an informal discussion between the applicant and a COGTA official, Mr Mpungose. It mentioned that during such discussions the COGTA official required the applicant to cede a certain piece of land to the claimant. The applicant declined to do so and required a formal meeting with his legal representative being present. Once again, the applicant threatened a court application.

[26] On 1 April 2019 the Department of Co-operative Governance and Traditional Affairs addressed correspondence to the COGTA official Mr Mpungose, and the applicant's attorneys of record in relation to the letter of demand that had been sent.

[27] It alluded to prior correspondence sent on 2 December 2018 to the applicant in which the Premier had—

'taken an in-principle decision to recognise the Mntungwa Traditional Community in the Zululand District, subject to several processes that still have to be completed. This process includes consultations with surrounding *amaKhosi*, including your client, regarding the proposed area of jurisdiction of the Mntungwa Traditional Community, although initial meetings have already been convened, which were attended by your client on 18 May 2018 and 17 July 2018. The consultation process has however not been concluded as yet, and the Honourable Premier has not issued a proclamation formally recognising the area of jurisdiction of the Mntungwa Traditional Community, or a Notice formally recognising an *iNkosi* for the said Community.

In the premises any litigation instituted on behalf of your client will be strenuously opposed, the costs of which will be for your client's account, as such litigation will be premature in the circumstances. In addition, the Department is not prepared to litigate this matter by way of correspondence, and it is suggested that your client awaits notice of further consultations to finalise the process.'⁸

[28] On 5 April 2019 the applicant's attorney responded and requested the letter of appointment to be retracted. It in addition alluded to the fact that there was an informal discussion with the COGTA official Mr Mpungose and such consultation was an attempt to justify "an in-principle decision" which was taken prematurely without following the correct process. The applicant again called upon the first and second respondents to retract the letter of appointment and make all reports public but also to afford interested parties an opportunity to object to the process of the Premier's report.

[29] Further correspondence must have been addressed on 18 April 2019, although not referred to or annexed to the applicant's papers. The second respondent responded to such correspondence of 18 April 2019 on 20 April 2019. The contents of the letter records the following⁹:

'As you are presumably aware, all decisions taken by the Honourable Premier in accordance with specific legislative mandates amount to administrative action in accordance with the provisions of the Promotion of Administrative Justice Act, 2000 (Act. No. 3 of 2000). Once a decision has been taken, the Honourable Premier becomes *functus officio*, and he is accordingly unable to "retract" his decision, as you have demanded in your correspondence.

⁸ Annexure "J" page 94, Index 1

⁹ Annexure "L" page 98 Index 1

In support thereof, may I refer you to the seminal decision of the Supreme Court of Appeal in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA), which decision was confirmed by the Constitutional Court in *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* [2014] ZACC 6. Accordingly, the only option available to your clients to set the decision of the Honourable Premier aside, is to take his decision on review to the High Court.

Having said that, I reiterate that the decision of the Honourable Premier to recognize the Mntungwa Traditional Community, is an in-principle decision only, and that no decisions have been taken on the proposed area of jurisdiction of the said Community. This process is subject to a consultation process with all affected parties, including your client, and only once this process has been completed, will the Honourable Premier issue a proclamation formally recognizing the area of jurisdiction of the Mntungwa Traditional Community, and a Notice formally recognizing an *iNkosi* for the said Community.

In addition, and as indicated in previous correspondence, your client is welcome to avail himself of his rights contained in the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000), in the event that he wishes to obtain any information regarding the process to date.

In closing, I repeat that any litigation instituted on behalf of your client at this stage will accordingly be premature and will be strenuously opposed, the costs of which will be for your client's account.'

[30] This prompted, further correspondence on 2 May 2019 from the applicant enclosing form J750 requesting access to the record of a public body. I am advised that the application for access to information in terms of PAIA was successful and the applicant obtained documentation although the papers are silent as to when such application was brought and when the order was granted and precisely what documents the applicant gained access to.

[31] The applicant in addition seeks condonation for the late institution of the PAJA application. He indicates that the Premier was required to consult with him prior to taking a decision to reject the recommendations of the KZN Commission and recognise the fourth respondent. In addition, he submits that once the first respondent indicated he was *functus officio*, he had no alternative but to bring the application to review the decision.

The opposition: First and Second Respondents

[32] In opposing the relief, the first and second respondents prior to filing their answering affidavits, served and filed the record of proceedings as requested in terms of Rule 53 on 10 June 2020¹⁰. The documents filed supported the decision taken by the first and second respondents to reject the recommendation of the KZN Commission dated 15 August 2017, the memorandum to the Executive Council, notes and reasons for the Premier's decision, the letter addressed to the fourth respondent from the Premier's office acknowledged by him on 18 May 2018 and a progress report on the restoration of ubukhosi bakwa Mntungwa at oPhondwane area in the Zululand District referred to the KZN Commission. The first and second respondents indicate that there has been no formal recognition of the fourth respondent – processes are still being followed including but not limited to consultations with relevant persons.

[33] In answer to the applicant's claim that it acted arbitrarily and did not consider relevant matters and took into account irrelevant matters, the first and second respondents indicate that in terms of s 26 of the Framework Act once the Provincial Committee finalised its investigations and reports such is conveyed to the Provincial Government, namely the Premier. The Premier is empowered to consider the recommendations and decide whether to accede to the recommendations or take a variant view provided he furnish reasons for his decision specifically in circumstances where he rejects the recommendations.

[34] The Framework Act, according to the first respondent, empowers the Premier to reject the recommendations of the KZN Committee if he is not satisfied that there was compliance with the Framework Act. It is evident from the first and second respondents' answering affidavit that they elected not to accept the findings of the KZN Commission report and to correct an injustice perpetuated against the Mntungwa clan as the KZN Commission failed to consider relevant circumstances.

[35] From the documents filed constituting the record, it is evident that the following common cause facts arise. Namely that in the 1800s Langa was a recognised king of Amantungwa whose area of jurisdiction encompassed uPhondwana, a disputed area

¹⁰ I can find no indication in the application papers that the applicant supplemented his papers on receipt thereof or amended the notice of motion.

in the proceedings. Langa died in Swaziland. The applicant's forebear was appointed as Chief in 1962 in terms of s 2(7) of the Native Administration Act over the people on Trust owned farms which included the Phondwana area.

[36] The fourth respondent's father's claim for recognition as a senior leader of the Amantungwa clan relates to the Phondwana area which had been under the rule of his forebears including King Langa. Despite undeniable evidence that the AmaMntungwa Traditional Community, whose senior traditional leader was amongst others King Langa, had been in existence since at least around the 1800s, and that King Langa's rule extended to various areas within uPhongolo including the uPhondwana area, the KZN Commission did not properly consider this.

[37] Although Langa died in Swaziland after being defeated by King Shaka, the AmaMntungwa did return to South Africa and one of their traditional houses was recognised as ubukhosi bakwaNdlangamandla, eMnyandeni in the Phongolo area. In 1879 when the Zulu nation was defeated by whites, the tribes and monarchy rule were suppressed. In 1950 and 1960 the prevailing white government reintroduced the ubuKhosi rule. Amantungwa were also recognised under the eMnyandeni house.

[38] When the white government reintroduced the amaKhosi rule they legislated many restrictions and administered the way the amaKhosi were to rule their subjects. It was the prerogative of the white government to recognise amaKhosi and allocate jurisdictional areas for each Inkosi. The recognition of amaKhosi depended on the type of relationship the Inkosi had with the white government. It did not recognise any Inkosi who did not conform to its way of ruling. As a result, many of the amaKhosi who were not compliant with the white government's rule were shunned as amaKhosi and relegated to headmen or left out of the kingdoms.

[39] It is undisputed AmaMntungwa has a rich history of kingship within the Pondwana area as far back as the 1800s under the leadership of Langa. Having regard to the documents the report dated 3 March 1962 of the Bantu Affairs Commissioner acknowledged Mkunjini as the king of Amatungwa but refused to recognise him as such because—

'from the above it will appear that Mkunjini's forbears ruled the tribe as kings for many years and this delegation put it to me that Mkunjini's great grandfather was king when Sibiya's father

was only an Induna. It seems to me in the circumstances that Mkunjini should be appointed. He has about 200 taxpayers under him, and claims that his followers occupy three of the Trust farms which have been allotted to Sibiya.'

[40] If one considers the report of the Commissioner, Chief of Bantu Affairs it acknowledges Mkunjini as the king of the Amatungwa tribe within the Phondwane area. Despite his entitlement as king, he is deemed to be undesirable to be recognised as such given his unfavourable relationship with the white government. The Commissioner refused to formally recognise him as Inkosi of Amatungwa but recognised him as a headman's son.

'Shayinja is not recognised as a Chief but all natives look upon him as a headman under Mpiyonke. Shayinja is not considered suitable for the appointment as a Chief and to give him recognition as such is in my opinion wholly undesirable. His conduct has been far from satisfactory and he has not co-operated with this office in any way.'

[41] It does appear that the Commissioner made an arbitrary decision and dismissed Amatungwa's claim on the basis that Shayinja was not co-operating with the Government. This was the scale of the injustice perpetuated against the Mtungwa clan by the then government. In addition, it is evident from the family tree presented by the claimant that Themba Esau, the fourth respondent's father was one of the direct descendants of Shayinja.

[42] What is evident from the report dated 2 December 2019¹¹ is that both the royal houses as well as the fourth respondent and uMndeni were advised that the fourth respondent had not received a recognition letter nor had his appointment been gazetted as inter alia the land demarcation process had yet to take place. He was formally informed that he was not *iNkosi* at present as various consultations had to take place and a family tree had to be aligned accordingly. On 28 May 2018 officials of the Department of Cooperative Governance and Traditional Affairs, Province of KwaZulu-Natal met with the uMndeni wakwaMntungwa to create the family tree.

Fourth Respondent's opposition

¹¹ Page 167 and 168 Index 3

[43] The fourth respondent in essence in his answering affidavit seeks to have the decision of the KZN Commission to decline his claim for Senior Traditional Leader declared unlawful and irrational and to be reviewed and set aside. Secondly, he has pleaded that the review proceedings are premature as there is no “impugned” decision as the first and second respondents have not published a notice of his recognition as Inkosi nor have they issued a certificate of recognition in compliance with the provisions of s 19 of the KZN Leadership Act. Allied to this is the fact that the consultation process and other related processes in compliance with the Act are still taking place. Thirdly, that s 19(4) of the KZN Leadership Act provides for an internal mechanism and internal remedies which the applicant must exhaust prior to approaching the court by way of review proceedings.

[44] In support of the assertion that the KZN Commission misdirected itself in finding it did not have jurisdiction, his affidavit deals with the history of the Amantungwa clan and pertinently asserts by reference to inter alia the family tree and documents annexed to the papers that the UbuKhosi of Amantungwa have consistently existed and been recognized by their Zulu Monarchs through the custom of “Ukuthela Amanzi”. In addition, he traces the history of the AmaNtungwa from the time of King Shaka right down until the former reigning King Goodwill Zwelithini Zulu. He accepts that until such time as the consultation processes, a land demarcation and other related processes are finalised he is not formally recognized as Inkosi and his recognition must not be published in any Government Gazette nor must a certificate of recognition be issued until the finalization of all processes.

Counter application

[45] The fourth respondent has additionally filed a counter application in which he seeks an order reviewing the KZN Commission’s decision declining his claim for recognition.

The issues for determination

[46] The issues for determination in this application are the following:

- 1 condonation – whether given the factual circumstances an order is warranted;
- 2 the merits of the review application in terms of PAJA;
- 3 the prematurity or ripeness of the PAJA application;

4 in the alternative whether the ‘administrative act’ or “decision” is reviewable on the basis of legality.

[47] The review application in terms of s 6 of PAJA is one in which the applicant submits that:

- 1 the first and second respondents’ decision is tainted by procedural unfairness¹²;
- 2 the first and second respondents’ decision is irrational in light of the recommendations of the KZN Commission¹³;
- 3 the first and second respondents’ did not take into consideration relevant considerations and/or took into account irrelevant considerations¹⁴; and
- 4 the first and second respondents’ acted arbitrarily¹⁵ and
5. the decision breaches the requirement of reasonableness.

Analysis

[48] The review application appears to have been drafted on the basis of a breach of one or more of the grounds in s 6 of PAJA. The initial heads of argument also raise questions of the reasonableness of the decision and rationality. The first and second respondents approach the application on the basis of a rationality and legality review, tackling the reasonableness argument as well as canvassing the grounds in s 6 of PAJA. Having regard to the application papers and the oral submissions it behoves me to deal with the application for review both in terms of PAJA and the principle of legality. During the course of argument, the applicant’s representative’s argument in respect of a PAJA review morphed into one of a legality review.

[49] Having said this, it warrants mentioning, there are in my view certain issues which are dispositive of the application. However, given the warning sounded by the Supreme Court of Appeal and the Constitutional Court it behoves me to consider all the issues raised in the application. The Supreme Court of Appeal in *Spilhaus Property Holdings (Pty) Ltd and others v Mobile Telephone Networks (Pty) Ltd and another*¹⁶ has cautioned against a lower court not dealing with all issues which arise in an

¹² s 6(2)(cc)

¹³ s 6(2)(f)(ii)

¹⁴ s 6(2)(e)(iii)

¹⁵ s 6(2)(e)(vi)

¹⁶ *Spilhaus Property Holdings (Pty) Ltd and others v Mobile Telephone Networks (Pty) Ltd and another*¹⁶ 2017 (4) SA 406 CC paras 44 and 45 are particularly relevant.

application so as to avoid an appeal court reversing a decision of a lower court in circumstances where the lower court has not dealt with the merits of the matter in its entirety. The approach in *Spilhaus* has been followed in subsequent judgements which state that even if the matter can be disposed of on one issue the remaining issues must also be dealt with.¹⁷

[50] Fundamental to the review application is whether an administrative act exists, the applicant insisting that the letter of 14 May 2018 constitutes the 'administrative act' or 'decision' which is the subject of the review application.

[51] Section 1 of PAJA defines 'administrative action' to mean 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 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 sections 79(1) and (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 Provincial Executive, including the powers or functions referred to in sections 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;

[52] It further defines 'decision' to mean "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 a decision relating to-

- (a) making, suspending, revoking or refusing to make an order, award or determination;
- (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
- (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;

¹⁷ *Motala v Master, North Gauteng High Court* 2019 (6) SA 68 SCA at paragraph 65; *South African Breweries (Pty) Ltd and others v President of the Republic of South Africa and another* [2022] 3 All SA 514 (WCC); *Studenteplein and Another v Stellenbosch University and Others* 2022 JDR 2870 (WCC) at paragraph 75

- (d) imposing a condition or restriction;
- (e) making a declaration, demand or requirement;
- (f) retaining, or refusing to deliver up, an article; or
- (g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly;"

[53] The existence of a decision as a prerequisite for any judicial review was reiterated by Nugent JA in *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*¹⁸ at paragraph 22 as follows:

'At the core of the definition of administrative action is the idea of action (a decision) of an administrative nature taken by a public body or functionary.'

[54] In this particular application whether 'a decision' or 'administrative act' exists is a preliminary issue which must be decided, given the nature of the relief sought in the notice of motion. The first "decision" foreshadowed in the notice of motion, is the one taken by the first respondent not to follow the recommendations of the KZN Commission rejecting Themba Esau's claim for recognition. The second is the "in principle" decision taken by the first and second respondents to recognise the fourth respondent as Inkosi of the AmaNtungwa community.

[55] The court in *Bhugwan v JSE Ltd*¹⁹ had cause to consider what set of facts resulted in a 'decision' for purposes of PAJA. At paragraph 10 of the judgment the court issued the following guidelines:

'[10] Having regard to the aforesaid definitions and authorities, it would seem to me correct, as submitted by Mr *Marcus* that for a decision to have been taken which is capable of review, all or at least some of the following steps must have been completed in the decision-making process:

1. Save where an authority legitimately acts coercively or of its own accord, a *final application, request or claim* must have been addressed by a subject to an authority which exercises statutory or public powers to exercise those powers in relation to a set of factual circumstances applicable to the subject.

¹⁸ *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) (2005 (10) BCLR 931; [2005] 3 All SA 33)

¹⁹ *Bhugwan v JSE Ltd* 2010 (3) SA 335 (GSJ)

2. All relevant information, either presented by the subject or otherwise reasonably available *must have been gathered* (which may require an investigative process) *and placed before the authority* which is to make the decision.
3. There must have been an *evaluative process* where the authority considers all of the information before him or her, identifies which components of such information are relevant and which are irrelevant and in which the authority assigns, through a process of value judgments, a degree of significance to each component of the relevant information, regard being had to the relevant statute or other empowering provision in terms of which the authority acts.
4. A *conclusion* must have been reached by the authority, pursuant to the evaluative process, as to how his or her statutory or public power should be exercised in the circumstances.
5. There must have been an *exercise of the statutory or public power* based on the conclusion so reached.'

[56] The determination of whether there has been "administrative action" is not easily made. The determination needs to be made on a case-by-case basis, there is no ready-made panacea or solve-all formula!²⁰

[57] What emanates from case authorities is that each case must be considered and "the facts in each circumstance will have to be evaluated to determine whether or not the processes referred to above have been complied with, or to what degree these processes exist, for purposes of deciding whether an administrative decision had been taken. When applied to a set of facts it will be a matter of degree to determine whether an issue is ripe for review adjudication on the basis that the decisional process had been completed".²¹

[58] In my view the first decision to reject the recommendations of the KZN Commission is a decision or administrative act which is subject to review. It meets the requirements referred to in the cases hereinbefore.

[59] The Framework Act specifically allows the first and second respondents to delegate to the KZN Commission the responsibility to deal with claims and disputes relating to traditional leadership. It is evident that the process embarked upon by the KZN Commission involved public hearings, in which all relevant parties could

²⁰ *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC) para 36

²¹ *Bhagwan supra* para 11

participate and a consideration of documentary and archival records. There can be no complaint nor is one alleged concerning the process followed by the KZN Commission in reaching a decision.

[60] The first and second respondents declined to follow the recommendations. The first question which arises is whether they are bound by the recommendations of the KZN Commission.

Is the Premier bound by the recommendations of the Commission on Traditional Leadership Disputes and Claims?

[61] This is not dealt with in the application papers nor was it addressed by Counsel for the applicant during argument before me. Chapter 6 of the Framework Act, deals with mechanisms for the resolution of disputes and claims and deals with the establishment of the Provincial Commissions. The functions and obligations of the KZN Commission is set out in s 25 of the Act. The recommendations of the KZN Commission must be made with the support of at least two thirds of the members of the Commission²² and must be conveyed within two weeks of being made.²³ A decision on the recommendation of the KZN Commission must be made within a period of 60 days.²⁴

[62] It would seem that the relevant functionary is not bound by the recommendations of the Commission and may make a decision which differs from such recommendation provided that the written reasons for such decision are provided.²⁵ This is evident if one has regard to the provisions of s 26(4) which read as follows:

‘If the President or the relevant functionary takes a decision that differs with the recommendation conveyed in terms of subsection (2), the President or the relevant functionary as the case may be must provide written reasons for such decision.’

[63] The first and second respondents in rejecting the recommendations of the KZN Commission considered all the relevant material. They had regard to the fact that the

²² S 26(1) *Bapedi* paragraph 24

²³ S 26(2) *Bapedi* paragraph 24

²⁴ S 26(3)

²⁵ S 26(4)

KZN Commission did not have regard to Themba Esau's evidence that the community had never left the area and consequently had jurisdiction. The KZN Commission also in rejecting the claim did not properly consider that Themba Esau had performed the ukuthela amanzi ritual. Consultations with the royal household confirmed this – a fact which the KZN Commission did not consider when making its recommendations.

[64] Having regard to the record the first and second respondents correctly considered all the relevant material when deciding not to follow the recommendations. The decision taken to decline to follow the recommendations is a rational one based on a proper consideration of all the evidence placed before the KZN Commission.

[65] In arriving at the decision to reject the recommendations of the KZN Commission, the first and second respondents considered relevant documentation including the history of Amatungwa and the history relating to the fourth respondent's claim. The documentary evidence indicated that it was a result of their non co-operation with the white government Amatungwa were made to be headman under Ntshangase, as is evident from page 65 which was referred to by *Mr Tshangana* who appeared for the applicant in argument.²⁶ In addition it is evident that after the KZN Committee had submitted its report to the Provincial Cabinet, the Cabinet returned the report to the KZN Committee with the request that it investigate the assertions by the fourth respondent's father and his family that the King had allowed him to perform the ritual of *ukuthela amanzi*.

[66] On 10 April 2018 a delegation of the second respondent led by the Director-General met with the executive of abaNtwana and izindlu zobuKhosi bamaNtungwa of the senior house led by Khulekani Mntungwa, the son of the fourth respondent, the house of eManyandeni led by iNkosi Samson Mntungwa and the house of eMandlovini led by Thanduyise Nkanyamba Nkosi and all houses agreed and reached a consensus that the fourth respondent's father did perform the *ukuthela amanzi* ritual at KwaKhangela Palace. The KZN Committee had not considered this aspect in its investigation.

²⁶ Page 156 Index 2

[67] The record filed by the first and second respondents reveals that the Premier in Council did not agree with the KZN Commission's recommendations for the following reasons as well:

- '1 The fact that while it is true that amaNtungwa had fled to Swaziland during the times of the Mfecane wars during King Shaka times, amaNtungwa did return to South Africa and one of their junior houses was recognized as ubuKhozi bakwaNdlangamandla, eManyandeni in the uPhongolo area during the 1960s when ubuKhozi was formalized in the uPhongolo area. Currently inkosi Qedubukhosi Mtungwa is iNkosi in the area. The senior house did not make the trip to Pretoria then to have their area of jurisdiction determined and their leader (Shayinja) appointed formally as iNkosi.

- 2 Accordingly, the assertion by the Commission that ubuKhosi bamaNtungwa ceased to exist fails to acknowledge that when ubuKhozi was recognized in the uPhongolo area during the 1950s and 1960s and amaNtungwas were also recognized under the eManyandeni house, junior to the Ophondwane House where Esau comes from, but existing in a separate geographical location. If the statement is left as is, it will convey an unintended and unfortunate consequence that there is no Mtungwa ubuKhosi in the province, and thereby to inadvertently abolish the current ubuKhosi under the house of eManyandeni. The Commission was seemingly totally oblivious of the fact that there is a current Mtungwa ubuKhosi which is closely related and junior to the claimant. Accordingly, the claim by the Commission that the Mtungwa claim falls outside of its mandate (1927) was flawed.

- 3 His Majesty the King is the Monarch of the Province in terms of the law. From time in history previous Kings appointed some amaKhosi from the ranks of war heroes/veterans, princes from the Zulu Royal family as well as other eminent individuals:-
 - a) Sithambi kaMasiphula Ntshangase (the ancestor to the current Inkosi Ntshangase) was sent by the then King in the 1800s to establish himself as an iNkosi, and prevent the Swati people from advancing into KwaZulu-Natal. He had been a hero in Ndondakusuka wars at the time.
 - b) Despite being informed by Themba Esau that he had been accepted by His Majesty the King to perform the ritual of ukuthela amanzi, the Commission ignored this fact and found negatively on the claim; and

- c) The Premier sent the Director-General of the Province, Dr N. Mkhize, to go and confirm with the Mtungwa family and the Royal House of His Majesty the King, that indeed Mr Themba Esau Mtungwa had performed the ritual of ukuthela amanzi and was accepted by Isilo as iNkosi. This was unanimously accepted by the family and abantwana.

- 4 During the Commission proceedings, from the report, it is clear that iNkosi Ntshangase did not oppose the application by the Mtungwa's, but only expressed his knowledge that he knew the Mtungwa's as headmen under Ntshangase, an arrangement made by the government when the Ntshangase community was proclaimed.
- 5 Having noted the history of the community, the fact that Shayinja was overlooked by the Apartheid government in the 1960s (despite being the higher/senior house of the Ndlangamandlas/Mtungwas); the recent acceptance of the community and claimant by His Majesty the King; the glaring material gaps/omissions in the Commission investigation of the matter; and all facts relating to restoration of dignity of ubuKhozsi, the Premier took a decision to restore ubuKhosi bakwaMtungwa and the son of Esau (Khulekani) as iNkosi.
- 6 The Premier is indeed allowed by the law to disagree, with reasons, with the findings and recommendations of the Commission.²⁷

[68] The first respondent is not bound by the recommendations of the KZN Commission. Secondly, it considered all relevant material when deciding not to follow them. In addition, it also provided reasons for such decision which is evident from the record.

[69] Having regard to the grounds of review advanced by the applicant I can find no basis for the allegation that the decision not to follow the recommendations is tainted by procedural unfairness. The applicant participated in the process embarked upon by the KZN Commission and had a representative participate in the public hearings. Secondly, the reasons provided by the first and second respondents for declining to follow the recommendations are rational and accord with the documentary and archival records and oral submissions made. It is in fact the KZN Commission that failed to take relevant material into account. There is no basis for the suggestion that

²⁷ Page 163 to 164, Index 2

the first and second respondents acted arbitrarily or that the decision not to follow the KZN Commission's recommendation is unreasonable given the facts which prevailed.

[70] Turning now to the second 'in principle decision'.

Prematurity or ripeness of the PAJA application

[71] One of the further issues which arises in the application and has been raised in opposition by the fourth respondent is the ripeness / prematurity of the decision. The fourth respondent has indicated that the "in principle" decision to appoint him is not final and consequently raised an objection on the basis that the review application is premature and not "ripe" for hearing.

[72] The court in *Bhagwan* quoting *Baxter Administrative Law 1984* indicates that to determine whether a decision has been taken one considers whether prejudice has resulted or is inevitable irrespective of whether the action is complete or not.²⁸

[73] Of further relevance to the enquiry are the circumstances under which the decision was taken. I align myself of the sentiments of Nugent JA quoted at paragraph 12 of *Bhagwan* referring to Lord Steyn in *R v Secretary of State for the Home Department, Ex parte Daly* in which he indicated "context is everything" and continued 'And so it is when it comes to construing the language used in documents, whether the document be a statute, or a contract, or, as in this case, a patent specification.'

[74] The Supreme Court of Appeal in *Chairman of the State Tender Board v Digital Voice Processing (Pty) Ltd: Chairman of the State Tender Board v Sneller Digital (Pty) Ltd & others*²⁹ held the following:

'Generally speaking, whether an administrative action is ripe for challenge depends on its impact and not on whether the decision-maker had formalistically notified the affected party of the decision or even on whether the decision is a preliminary one or the ultimate decision in a layered process... Ultimately, whether a decision is ripe for challenge is a question of fact, not one of dogma.'

[75] Act 5 of 2005 deals with the formal recognition of an Inkosi. S 19 provides that the Premier once he is satisfied that proper processes have been followed and there

²⁸ *Bhagwan supra* para 11

²⁹ *Chairman of the State Tender Board v Digital Voice Processing (Pty) Ltd: Chairman of the State Tender Board v Sneller Digital (Pty) Ltd & others* 2012 (2) SA 16 SCA para 20

has been proper consultation, issues a certificate of recognition to the Inkosi as well as gazettes such recognition in the Government Gazette. To date, and it appears to be common cause, no such certificate of recognition has been issued nor has it been gazetted. Consequently, the fourth respondent has not been appointed as Inkosi.

[76] The letter of 14 May 2018 makes it explicitly clear that although an in-principle decision has been made, it is subject to various legislative processes and consultations. This is also acknowledged by the applicant. The letter of 14 May 2018 also makes it clear that until such time as those processes have been finalised, no formal recognition has been issued or will be issued. Thus, it would seem that the application to review cannot be instituted as there is no final decision which has been made regarding the appointment of the fourth respondent.

[77] Even if I am wrong in this regard, none of the grounds for review in s 6 of PAJA have been met. The first and second respondents have pertinently dealt with the reasons why the recommendations of the Commission were not accepted. This was a decision taken by the first and second respondents together with the Traditional Council after consultation. Proper reasons have been provided and even though the applicant may not like the reasoning he is bound by it. Consequently, none of the requirements of s 6 have been met for a review.

[78] In my view following on the decision in *Chairman of the State Tender Board* the 'in principle' decision is not a final one and is a preliminary one in a "layered process". All relevant parties including the applicant concede that there has not been a final recognition.

The alleged lack of consultation in relation to the 'in principle decision'

[79] The main complaint of the applicant appears to centre around the fact that he is of the view that no proper consultation has taken place. In relation to the 'in principle decision' this, however, does not appear to be correct. The type of consultation which the applicant seeks to be alluding to is the necessity for a formal interaction. He acknowledges, however, that his views were presented before the Commission and were considered by the Commission. In addition, there has been informal discussions and interactions between him and representatives of COGTA.

[80] Should he decide that these consultations are insufficient, or if he is of the view that there have been no consultations, which is not borne out by his own affidavit, then his remedy would be to bring an application to compel proper consultation or to act in terms of s 19(4) of Act 5 of 2005. He is not entitled to dictate the nature of the consultations that take place. Paragraph 43 of the judgment in *Scalabrini Centre, Cape Town v Minister of Home Affairs*³⁰ is relevant where the court held the following:

“[43] What also appears from those cases is that an obligation to consult demands only that the person who is entitled to be consulted be afforded an adequate opportunity to exercise that right. Only if that right is denied is the obligation to consult breached.”

[81] It is also evident that although dated 14 May 2018 meetings took place on 18 May 2018, the same day the letter was issued to the fourth respondent.

[82] The applicant on his own version also acknowledges that the process relating to the appointment of the fourth respondent has not been completed as yet. He has pertinently acknowledged that the consultation process has not been finalised. Consequently, I do not agree that there has been a failure to consent.

[83] Further in *Electronic Media Network Limited and Others v e.tv (Pty) Limited and Others*³¹ the court held:

‘[37] Given the prominent role of consultation in the determination of this matter, it behoves this Court to remind itself and the public of the rationale behind any consultative process. Consultation, as distinct from negotiations geared at reaching an agreement, is not a consensus-seeking exercise...’

[84] In this particular matter, the initiation of consultation is to obtain the views of interested parties and to comply with the requirements for consultation and public hearings envisaged in terms of the Leadership Act. The point has not been reached in this particular matter where a final decision has been made.

[85] The aspect of consultation was once again raised in the matter of *Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and others*³²

³⁰ *Scalabrini Centre, Cape Town v Minister of Home Affairs* [2017] ZASCA 126 (29 September 2017)

³¹ *Electronic Media Network Limited and Others v e.tv (Pty) Limited and Others* 2017 (9) BCLR 1108 (CC)

³² *Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and others* 2021 (3) SA 593 (SCA) para 45

where the court held the following:

‘[45] As a general rule, policies that have been formulated and adopted by the executive will not be ripe for review until they are implemented, usually after having been given legal effect by some or other legislative instrument. Two principles come into play in this regard: first, that in order for an exercise of public power to be ripe for review, it should ordinarily be final in effect; and secondly, that the decision must have some adverse effect for the person who wishes to review it, because otherwise its setting aside would be an academic exercise which courts generally eschew.’

The counter application

[86] In my view there is no need to make an order or deal with any of the relief sought in the counter application. As the first and second respondents are not bound by the decision of the KZN Commission, no purpose would be served in granting an order reviewing and setting aside their failure to accept the fourth respondent’s claim and such relief is superfluous. In any event from the record of the proceedings it is evident that the first and second respondents have not accepted the recommendation of the KZN Commission rejecting the claim of Themba Esau for reasons already stated herein. As regards the “in principle” decision to recognise him as the traditional leader of the AmaNtungwa community, such process has not been finalised and any determination in that regard is premature for reasons already mentioned in the judgment. In any event the fourth respondent may at a later stage reconsider his position depending on what transpires with the formal recognition process and institute further proceedings.

Condonation

[87] As regards condonation, the Constitutional Court in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*³³ pertinently deals with the aspect of condonation. PAJA provides that a review application must be instituted within 180 days after the applicant became aware of the decision. The applicant submits that although he became aware of the decision in May 2018, he only became aware of the reasons therefor in 2019, at the very latest in February 2019 and instituted the application in October 2019. He submits that there has not been an undue delay in

³³ *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 CC

instituting the application for condonation and consequently because of the prospects of success, ought to be granted condonation.

[88] In assessing the delay, the provisions of s 7 of PAJA apply. However, this time period is not absolute as s 9 of PAJA provides for an extension. In deciding whether or not to grant an extension a court is required to consider the interests of justice.³⁴ In doing so the court is required to determine whether the delay is unreasonable. A consideration of condonation also involves a consideration of the merits of the matter.

[89] In my view the applicant instituted the application within a reasonable time. An adequate explanation has been provided for any delay. Having said this however, a legality review must be brought within a reasonable time.

[90] Given the conclusions reached in this matter, nothing more need be said concerning the aspect of condonation.

Application papers and the state of the court file and the belated application to amend the notice of motion

[91] This matter was allocated preference by the Acting Judge President as a consequence of a written request received on 19 May 2023 from the applicant's attorneys of record. Such correspondence was not copied to the respondents or their legal representatives for input to be forthcoming. I would have expected having such request being granted, the applicant's attorneys of record would have ensured that at the time of the request the court file was in order and properly indexed and paginated. This was not done. What complicated and frustrated the hearing of the matter was the manner in which the court file was indexed and paginated. Advices on Memorandum from Counsel to legal representatives were included in the court papers as were email correspondence between candidate attorneys and their principals. Of greater concern is that every conceivable notice formed part of the indexed papers. These ranged from notices of bar, notices of intention to defend and a notice of an irregular step in respect of the counter-application.

[92] The applicant's attorneys of record duplicated the annexures at least five times yet the annexures were not legible. Of concern was that the annexures were not

³⁴ Para 47 *Buffalo City Metropolitan supra*

legible. When I raised the state of the papers as well as the illegible annexures with *Mr Tshangana* who appeared for the applicant, he confirmed that he had reprimanded his attorney about the state of the court file and indexed papers, yet he did nothing to ensure that his attorney corrected the state of the papers in the court file.

[93] In addition, during the course of argument the references made to the papers were incorrect and the pagination was not the same as that in the court file. This conduct of attorneys is to be deprecated, especially considering that the applicant's attorney sought to have the matter allocated preference in circumstances where the court file was in a shambles. In addition, there is also an obligation on counsel appearing in the matter to ensure that there is compliance with the rules and practice directives. Counsel cannot adopt a supine approach.

[94] At the hearing of the matter I requested the applicant's attorneys of record to file legible copies of the documents he specifically wanted to refer to in seeking to review the decision. The applicant's attorneys of record instead of filing legible copies of the documents typed a copy and put it up in the papers. It is not certain who prepared the typed document nor is there a certification as is customary in these kind of matters should something be typed confirming that it is correct.

[95] In addition, accompanying such documents was an affidavit deposed to by the applicant's attorneys of record in which he filed "illegible" documents and provided a brief explanation on the relevance of such documents. This ought to have been canvassed at the hearing not by way of a further affidavit.

[96] In addition, the applicant sought to amend the relief in his notice of motion after the hearing of the matter. The attorney of record confirms that the typed document was "to the best of his ability the correct reading of the relevant portion of the report". The affidavit then at paragraph 5 thereof set out and dealt with the relevance thereof. In my view the relevance of the paragraphs ought to have been stipulated in the founding affidavit and argued during the hearing of the application.

[97] What concerns me is a trend that is developing in our motion courts that after the hearing of an opposed application parties deem it necessary to try and amend their papers to seek relief in accordance with issues canvassed and raised during the course of the argument and interaction with the Judge which ought to have been

canvassed in their founding or replying papers. This is the very same thing that occurred in this instance.

[98] The applicant seeks to amend his notice of motion with an additional order to read as follows:

‘That in the event that the court finds that a decision has not yet been made in relation to orders 2 and 3 above, then the First Respondent be and is hereby ordered to forthwith start the consultation with all the interested parties, including the Applicant and make a decision within 90 calendar days from the date of this order’.

[99] As is typical of the conduct of the applicant’s attorneys of record this affidavit together with the legible documents filed was merely served via email on the first and second respondents. No efforts were made to ensure that delivery and read receipts accompanied them in compliance with the Electronic Communications Act.

[100] In addition, no effort was taken to ensure that these documents actually reached the respondents’ attorneys of record. In any event, correctly so, there was an objection to the amendment proposed by the first and second respondents as they considered that this was an attempt by the applicant to raise new matters. I agree with this submission that should this court allow this kind of litigation by ambush it would constitute a violation of the rights of fairness and the rights to a fair hearing. In any event there is an objection to the proposed amendment by the first and second respondents and I have to have regard thereto. The amendment seeks to cure the imperfections in the original application subsequent to the hearing of argument on issues raised by the court during the hearing. This is impermissible in this matter in my view and ought not to be sanctioned. In the result, I do not propose to grant an amendment to the notice of motion as I am not satisfied that in light of the objection it is in the interest of justice to do so. Fairness dictates that this conduct ought not be sanctioned.

Costs

[101] Both the applicant and the first and second respondents’ legal representatives submitted that no matter the outcome of the application the matter raises a constitutional issue relating to the traditional leadership and the *Biowatch*³⁵ principle

³⁵ *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC)

ought to apply as it involves constitutional litigation against an organ of State.

[102] I agree that given the nature of the application the *Biowatch* principle applies and no order as to costs is the most appropriate one in the circumstances.

Conclusion

[103] For the reasons aforementioned the following order will issue.

1. The main application is dismissed.
2. I make no order in the counter-application.
3. I make no order as to costs.



HENRIQUES J

CASE INFORMATION

Date of Hearing:	17 November 2023
Supplementary documents filed:	24 & 28 November 2023
Date of Judgment:	31 July 2024
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Third Respondent:	KwaZulu-Natal Commission on Traditional Leadership Disputes and Claims c/o The First Respondent
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This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand down is deemed to be 16h00 on 31 July 2024.
