



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

**Reportable
CASE NO: 194/2016**

In the matter between:

THANDABANTU WILSON GWEBINDLALA

APPLICANT

and

**PRESIDENT OF THE REPUBLIC
OF SOUTH AFRICA**

FIRST RESPONDENT

MINISTER OF COOPERATIVE GOVERNANCE

SECOND RESPONDENT

**THE GOVERNMENT OF THE REPUBLIC
OF SOUTH AFRICA**

THIRD RESPONDENT

THE PREMIER OF THE EASTERN CAPE

FOURTH RESPONDENT

**MEC FOR CO-OPERATIVE GOVERNANCE &
TRADITIONAL AFFAIRS FOR THE EASTERN CAPE
PROVINCIAL GOVERNMENT**

FIFTH RESPONDENT

KING ZWELONKE MPENDULO SIGCAWU

SIXTH RESPONDENT

CHAIRPERSON OF THE EASTERN CAPE

SEVENTH RESPONDENT

HOUSE OF TRADITIONAL LEADERS

JUDGMENT

Noncembu J

[1] The advent of a democracy post-1994 rendered the institution of traditional leadership in the whole of South Africa one that has been fraught with sensitive and thorny issues. The institution is not only riddled with its own weaknesses and internal squabbles, but it presents a challenge for the government today for various reasons that are not pertinent for purposes of this judgment. Suffice it to say that it is against this backdrop that the current application serves before this court.

[2] *In casu*, the applicant seeks relief premised on the provisions of PAJA, legality and the Constitution. As set out in the notice of motion, he seeks the review and setting aside of the decision of the fifth respondent (MEC) in refusing the recognition of AmaBomvana as a principal traditional community. He also seeks consequential orders: declaring that AmaBomvana qualifies for recognition as a principal traditional community and that the government and/or respondents recognise the traditional community as such; directing the fourth (the Premier) and fifth respondents to take all necessary measures to effect the said recognition; and declaring that the applicant is the person entitled to become the principal traditional leader of the recognised principal traditional community of AmaBomvana forthwith upon conclusion of the necessary process for recognition.

[3] The impugned decision was sequel to a determination of an application filed by chieftainess Nobangule Gwebindlala, the applicant's mother, on behalf of the Bomvana traditional community, in which the MEC decided as follows:

'3.1 This communique is sequel to numerous engagements by my predecessor and myself with the Bomvana Royal House and King Mpendulo Sigcawu of AmaXhosa;

3.2 The recognition of a traditional community as a principal traditional community as provided in the national legislation;

3.3 However, there is no provision in the provincial legislation for the recognition of a principal traditional community;

3.4 The intention of the legislature, even in the national legislation was to accommodate those traditional leaders who had been recognised by the other senior traditional leaders within their areas of jurisdiction for example those who hold the traditional leadership positions of the then paramount chiefs;

3.5 In the Eastern Cape, for example, only those traditional leaders who were Kings and relegated to the status of principal traditional community by the Nhlapo Commission that the department has recognized as principal traditional leaders;

3.6 In the light of the foregoing exposition, the application for their recognition of Amabomvana as principal traditional community is not approved. In this regard, I attach a copy of the letter marked "A" and refer this honorable court thereto.'

[4] In respect of the legality challenge, the applicant asserts that the application finds expression on the basis that the exercise of power is only lawful when sanctioned by relevant legislation, and that the MEC clearly failed to apply his mind to the provisions of the statute and wrongly interpreted the Act. The assertion therefore, is that the MEC's actions in this context constitute illegality and are reviewable under the legality principle and the Constitution.

[5] Under PAJA, the applicant contends, principally, that the decision is irrational and that the MEC has failed to apply his mind to the provisions of the Act and ultimately misconstrued his powers. Furthermore, it is contended that the MEC acted

ultra vires in that he was not empowered in terms of the relevant legislation to make the said decision, as such powers vested in the Premier.¹

[6] The application is opposed by the respondents, specifically the second, third, fourth, fifth, sixth, and seventh respondents, as the first respondent has filed a notice to abide. The relief in the matter is sought only against the fourth and fifth respondents, with costs being sought against any party opposing the application.

[7] At the onset, a number of preliminary issues were raised in the matter, some of which were said to be dispositive of the matter. An application was thus made by the respondents that these be separated from the main issues and that they be dealt with before the main application. These were the misjoinder of the first, second and third respondents; lack of condonation for the late filing of the review application and the replying affidavit; as well as the *locus standi* of the applicant. The respondents however, did not persist with the latter in their argument in court. After hearing arguments from both parties on the issue, I gave an *ex tempore* judgment that there would be no separation and that all the issues would be dealt with at the same time. In this judgment, I deal first with the preliminary issues before delving into the main application.

Condonation

[8] It is common cause that the impugned decision was made on 12 December 2014 and communicated to the applicants in February 2015. The application in *casu* was only lodged in January 2016. Section 7 of PAJA requires that proceedings for judicial review be instituted within a reasonable time or not later than 180 days. Similarly, in terms of common law, judicial review proceedings must be instituted within a reasonable time.

[9] The applicant contends that there was a delay of five months in the institution of the current proceedings. The argument, however, is that this is not an extensive delay given the complexity of the matter, which is a first of its kind. The explanation

¹ Section 2B of the Traditional Leadership Governance Framework Act 41 of 2003.

given for the delay is that it was occasioned by the nature of the public interest in the matter which involves the entire AmaBomvana nation. Therefore, it required that proper consultation be undertaken before the review was launched. This was further encumbered by the lack of funds on the part of the applicant to lodge the proceedings, which necessitated fundraising from the various communities to secure sufficient funds to cover the proceedings.

[10] A further argument advanced for condonation in this regard is that the unlawfulness of the impugned decision is clear in that the MEC had no power to make the impugned decision, and he took same in ignorance of relevant material. In the circumstances, it is argued that the Gijima principle postulates that even if the court does not condone the unreasonable delay, it must review the impugned decision where the illegality is clear.²

[11] It is also contended that no prejudice has been suffered by the respondents as a result of the delay, and that none is even alleged. And as a Parthian shot on this point, it is argued that it is in the interests of justice that this matter be decided by this court.

[12] Under the common law, an application for review is to be made within a reasonable time. Section 7(1) of PAJA sets an upper limit on the delay, requiring reviews brought under the Act to be brought no later than 180 days after becoming aware of, or reasonably expected to have become aware of the decision and its reasons.³ However, condonation may be granted where the interests of justice require.⁴

[13] Regarding the aspect of the delay, Skweyiya J, relying on section 237 of the Constitution,⁵ held in *Khumalo*:

² State Information Technology Agency SOC Limited v Gijima Holdings (PTY) Ltd 2018 (2) SA 23 (CC).

³ Promotion of Administration of Justice Act 3 of 2000.

⁴ Section 9 of PAJA; see also *Opposition to Urban Tolling Alliance v The South African National Road Agency Limited* 2013 (4) All SA 639 (SCA) (OUTA) para 26 which held that 'section 7 of PAJA creates a presumption that a delay of longer than 180 days is per se unreasonable, whether the delay was unreasonable or not and the extent of that unreasonableness is still a factor to be considered in determining whether an extension should be granted or not'.

⁵ This section provides: "All constitutional obligations must be performed diligently and without delay."

[46] Section 237 acknowledges the significance of timeous compliance with constitutional prescripts. It elevates expeditious and diligent compliance with constitutional duties to an obligation in itself. The principle is thus a requirement of legality.

[47] This requirement is based on sound judicial policy that includes an understanding of the strong public interest in both certainty and finality. People may base their actions on the assumption of the lawfulness of a particular decision and the undoing of the decision threatens a myriad of consequent actions.

[48] In addition, it is important to understand that the passage of a considerable length of time may weaken the ability of a court to assess an instance of unlawfulness on the facts. . . . Thus the very purpose of a court undertaking the review is potentially undermined where, at the cause of a lengthy delay, its ability to evaluate fully an allegation of illegality is impaired.’⁶ (Footnotes omitted.)

[14] The primary reason for requiring reviews to be instituted without undue delay is therefore to ensure certainty and promote legality. In *Merafong* Cameron J said:

‘... The rule against delay in instituting review exists for good reason: to curb the potential prejudice that would ensue if the lawfulness of the decision remains uncertain. Protracted delays could give rise to calamitous effects. Not just for those who rely upon the decision but also for the efficient functioning of the decision-making body itself.’⁷

[15] These aspects however, do not raise material concerns in the present matter. Hence even counsel for the respondents emphasised in his argument that they

⁶ *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal* 2014 (5) SA 579 (CC). at paras 46-48.

⁷ *Merafong City Local Municipality v AngloGold Ashanti Limited* [2016] ZACC 35; 2017 (2) SA 211 (CC); 2017 (2) BCLR 182 (CC) (*Merafong*) at para 73.

joined no issue with the late filling of the application itself, as their main issue on the lack of condonation pertained to the late filling of the replying affidavit. They implored this court to consider the replying affidavit as *pro non scripto* as there was no condonation application filed by the applicant for its late filling.

[16] On this aspect, the applicant's argument is that there was no delay in the filling of their replying affidavit (7 years as alleged by the respondents). This is premised on the argument that the proceedings were suspended as the parties were attempting to resolve the matter in a non-litigious manner. Reference to the Rule 41A Notice in support of this contention is made in this regard.⁸ The contention thus, is that once it became apparent that the resolution of the matter via mediation was not going to succeed, a notice was served on the respondents advising them that the proceedings would be resumed. This is further supported by the said notice.

[17] According to the applicant there was no delay in the filling of the replying affidavit as the proceedings had been suspended to accommodate the aforementioned alternative dispute resolution. The submission is that the delay was primarily due to the suspension of litigation which was partly due to the complexity of the matter. Because of this the matter was held in abeyance as parties engaged in discussions to resolve the matter in a non-litigious manner.

[18] What the applicant's submissions fail to address however, is that the answering affidavits were served on them on 7 July 2016. The matter remained on the roll until it was removed on 26 October 2017 when it was postponed *sine die*.⁹ As indicated above, the rule 41A notice was only served on the respondents on 23 April 2021. No explanation for the period in between (more than 4 years) is proffered by the applicants. The legal position is very clear in this regard, a party seeking condonation must give an explanation for the delay which covers the entire period of the delay. As clearly demonstrated herein, this the applicant has failed to do.

⁸ Dated 23 April 2021 and served on the same day on the respondents.

⁹ Per court order of Laing AJ dated 1 November 2017.

[19] However, considering the nature of the proceedings before me, in particular the constitutional rights implicated in the application. And further taking into consideration that no prejudice is alleged to have been suffered by the respondents due to the delay in both the late launching of the application and the late filling of the replying affidavit, it is my considered view that the interests of justice require that all pleadings be considered in the determination of this matter. For these reasons therefore, condonation of the late launching of the application and the late filling of the replying affidavit is hereby granted.

Misjoinder

[20] The respondents contend that the first respondent (President of the RSA), the second respondent (Minister of Co-operative Governance) and the third respondent (the Government for the Republic of South Africa) are misjoined in the matter as they are not necessary parties in the proceedings.

[21] The applicant, however, persists that the interest of these parties is very clear in that, firstly; traditional institutions are provided for in the Constitution. The argument is that the President, being the custodian of the Constitution, has a vested interest in the outcome of the matter. Secondly, as the matter involves the rights of traditional communities, the MEC for Co-operative Governance has a clear interest. For similar reasons it is contended that the Government of the Republic has an interest in the matter and therefore, is a necessary party.

[22] The legal principle on the question of whether all the necessary parties have been joined in a matter however, does not depend upon the nature of the subject matter of the suit, but upon the manner in which, and the extent to which the Court's order may affect the interests of third parties.¹⁰

[23] The test is whether or not a party has a 'direct and substantial interest' in the subject of the action, that is, a legal interest in the subject matter of the litigation,

¹⁰ Segal v Segil 1992 (3) SA 136 C at 141 A – C; Sikhutshwa v MEC for Social Development, Eastern Cape 2009 (3) SA (TKHC) at 561 – 570A.

which may be affected prejudicially by the judgment of the court.¹¹ This salutary rule is that the mere fact that a party may have an interest in the outcome of the litigation does not warrant a joinder thereof.

[24] The principle is that any person is a necessary part and should be joined if such person has a direct and substantial interest in any order the court might make or if such an order cannot be sustained or come into effect without prejudicing that party, unless the court is satisfied that he has waived to be joined¹².

[25] The respondent's contention is that the President, the Minister of Cooperative Governance and Traditional Affairs as well as the government of the Republic of South Africa have no interest in this litigation. It is equally submitted that they will not be affected by the court orders this Court may grant, and that the order can be sustained or come to effect without prejudicing them. I agree.

[26] Therefore, based on the foregoing, it cannot be said that these parties have a direct and substantial interest in the order that this court might make in the present matter, or that an order cannot be sustained or come into effect without prejudicing them. In the circumstances, it follows that these parties have been misjoined in the present proceedings. Consequently, the point *in limine* of misjoinder in respect of the three must be upheld.

The review (main) application

[27] The following sets out the background to the application as extrapolated from the applicant's founding papers.

[28] The applicant resides at Elliotdale (Xhorha) and has lodged the current application in his personal capacity as the Prince of the AmaBomvana Nation and on behalf of the AmaBomvana Nation. He is the heir apparent to the throne of the AmaBomvana Nation and the eldest son of Chieftainess Nobangile Gwebindlala, the current acting chief of the AmaBomvana. He is the direct descendant of King Bomvu,

¹¹ Judicial Services Commission v Cape Bar Council 2013 (1) SA 170 (SCA) at 176 H-I.

¹² Absa Bank Limited v Naude N.O [2015] ZASCA 97 at para 10

the immediate founding father of AmaBomvana and the heir apparent of the late Chief Gambushe, head of AmaBomvana, occupying the land between Mthatha and Mbashe rivers.

[29] Presently AmaBomvana are settled in the area known as Elliotdale and / eXhorha, whose land was under Chief Gambushe. The applicant is the current Prince of AmaBomvana as his mother is still acting for him since he is still engaged in professional work as a civil servant.

[30] The initial application preceding the impugned decision by the MEC was lodged by the applicant's mother, Chieftainess Nobangile Gwebindlala. The MEC refused the application for the reasons stated in paragraph 3 above. It is this decision by the MEC that prompted the current review application.

[31] The application is predicated on the provisions of section 2B of the Traditional Leadership and Governance Framework Act as amended.¹³ Section 2B of the Act provides –

(1) a number of communities that are grouped together may be recognized as a principal traditional community, if they –

- (a) are recognised as such in terms of applicable provincial legislation;
- (b) each have a recognised traditional council with a defined area of jurisdiction in terms of applicable provincial legislation;
- (c) each have a senior traditional leader recognised in terms of the applicable provincial legislation;
- (d) recognise a recognised senior traditional leader, who is of higher status than the other senior traditional leaders in terms of custom and customary law, as their principal traditional leader;

¹³ Act 41 of 2003 (the Framework Act).

(e) recognise themselves as a distinct group of traditional communities separate from kingships or queenships and all other traditional communities; and

(f) have a system of traditional leadership at the provincial traditional leadership level recognised by other traditional communities.

(2) The traditional communities applying for recognition as a principal traditional community must have a proven history of existence recognising a senior traditional leader of higher status as a principal traditional leader in terms of customary law of succession.

(3) (a) The Premier may, by notice in the Provincial Gazette, after consultation with the provincial house of traditional leaders, and the senior traditional leaders who form part of the principal traditional community being applied for, recognise the traditional communities envisaged in subsections (1) and (2) as a principal traditional community.

(b) The Premier may –

(i) direct the member of the Executive Council responsible for traditional affairs to conduct the consultation referred to in paragraph (a) in his stead; and

(ii) prescribe a fixed period within which the Member of the Executive Council responsible for traditional affairs must finalise the consultation regarding the recognition of a principal community envisaged in subsections (1) and (2).

[32] The applicant avers that the AmaBomvana traditional community complies with the requirements as set out in the above provisions, and that the MEC's decision not to grant their application is a reviewable irregularity which ought to be set aside on the grounds that:

(a) the MEC misconstrued his powers and acted *ultra vires*; and

(b) he did not take into account any historical documents and material relevant to the history of AmaBomvana.

[33] A closer look at the individual grounds raised is pertinent in the determination of the matter.

[34] On the first ground the applicant, underpinning his case on section 2B (3) of the Framework Act, contends that the fifth respondent had no power to make the decision in question as such power vests with the Premier in terms of the said provision.

[35] He argues that the Act is explicit that the power to recognise a principal traditional community lies with the Premier and similarly, the power to withdraw such recognition lies with the Premier in terms of section 2B (5) (b) of the Framework Act. This is underscored by the assertion that the only provision allowing for a delegation in terms of section 2B of the Framework Act is subsection (3) (b), which provides as such, but only in so far as the consultation envisaged in paragraph (a) of subsection (3). The subsection reads –

‘(b) The Premier may –

(i) direct the member of the Executive Council responsible for traditional affairs to conduct the consultation referred to in paragraph (a) in his stead; and

(ii) prescribe a fixed period within which the Member of the Executive Council responsible for traditional affairs must finalise the consultation regarding the recognition of a principal community envisaged in subsections (1) and (2).’

[36] The applicant asserts therefore, that the MEC's decision is unlawful in that it was taken by a functionary with no powers to do so. The contention is that the decision offends section 6 (2) (a) (i) of PAJA which provides that a decision is reviewable if the administrator who took it was not authorised by an empowering provision. In addition, it is argued that by exercising a power that he did not have, the MEC also acted inconsistently with the principle of legality.

[37] The upshot of the applicant's argument in this regard is that in terms of the Framework Act, delegation is limited to consultation only and not to all the powers of the MEC, as such, the delegation cannot go against what the section provides. The argument is that the MEC acted beyond what the section provides in making the said decision and therefore, the decision is a clear illegality which on this ground alone, is liable to be reviewed and set aside.

[38] In assailing this assertion, the respondents contend that the MEC had delegation of authority from the Premier to deal with the application and to make the decision *in casu*. Although not attached to their answering papers, a copy of the said delegation was submitted to court in the course of their argument in court.¹⁴

[39] In addition to the aforementioned delegation, the respondents contend that the applicant acquiesced to the MEC's exercise of authority as his mother, Chieftainess Nobangile Gwebindlala, throughout her persistence with the application, had been dealing with the MEC and his predecessor.

[40] In coming to a decision in this regard it is apposite, as a point of departure, to consider the original source from which the Premier of a province derives his/her powers. Most pertinent in this regard is section 127 of the Constitution,¹⁵ which provides that the Premier of a province has the powers and functions entrusted to that office by the Constitution and any legislation. Another relevant provision is section 133 of the Constitution where it is stated that the Members of the Executive Council of a province are responsible for the functions of the executive assigned to them by the Premier.

¹⁴ Dated 12 June 2014.

¹⁵ The Constitution of the Republic of South Africa, 1996.

[41] The delegation submitted by the respondents to court makes specific reference to section 238 of the Constitution which gives executive organs of state the authority to delegate their powers. The section reads as follows:

‘An executive organ of state in any sphere of government may –

(a) Delegate any power or function that is to be exercised or performed in terms of legislation to any other executive organ of state, provided that the delegation is consistent with the legislation in terms of which the power is exercised or the function is performed; or

(b) ...’

[42] Whilst I agree that the powers of delegation provided for in terms of subsection (3)(b) of the Framework Act are clearly circumscribed, in my view this does not limit the wider powers of delegation nor divest the Premier of his powers of delegation provided for by the Constitution, which the MEC purports to have acted under in dealing with this matter. In the answering affidavit it is specifically stated that the MEC acted in terms of the powers delegated to him by the Premier. The only argument raised by the applicant in this regard was that they were promised to be provided with the said delegation, something which had not happened by the time they were arguing their case in court and was only presented when the respondents presented their case in reply.

[43] In fact, on the applicant’s own papers, further support pertaining to the delegation of the MEC is found in the letter from the Premier (attached to the applicant’s papers) which the applicants referred to as the Premier’s response when they sought his intervention in the matter.¹⁶ In the letter, the Premier explicitly states that the MEC was duly delegated to deal with the matter, and as such, his decision remains extant until overturned by a court of law.

¹⁶ RA 5 to the replying affidavit.

[44] Given the above, coupled with the fact that the applicants had been dealing with the MEC throughout pertaining to the application, I find the ground that the MEC had no power to make the impugned decision to be without merit and therefore unsustainable.

[45] The second ground is that the MEC failed to consider historical documents and material pertaining to the history of AmaBomvana. In this regard it is alleged that the MEC failed to take into account relevant material which includes writings of historians such as the master's thesis by William Soga, which details the history of AmaBomvana and a report of the Sobahle task team which was established to investigate the status of AmaBomvana.

[46] One of the primary reasons given for the assertion that these materials were not considered is that there was no rule 53 record provided by the respondents in the matter. The applicant contends that the absence of the rule 53 record is dispositive of the matter as it demonstrates that the relevant considerations were not considered by the MEC in the decision making.

[47] Rule 53 (1)¹⁷ is a very important tool in review applications as it provides the machinery for the record to be provided to the applicant. The Supreme Court of Appeal dealing with the rule stated the following in *Helen Suzman Foundation v Judicial Services Commission and Others*¹⁸:

'The primary purpose of the rule is to facilitate and regulate applications for review by granting the aggrieved party seeking to review a decision of an inferior court, administrative functionary or state organ, access to the record of the proceedings in which the decision was made, to place the relevant evidential material before court. It is established in our law that the rule which is intended to operate to benefit the applicant, is an important tool in determining objectively what considerations were probably operative in the mind of the decision maker when he or she made the decision sought to be

¹⁷ Uniform Rules of the High Court.

¹⁸ 2017 (1) SA 367 (SCA) at 374 G – 375 C.

reviewed. The applicant must be given access to the available information sufficient for it to make its case and to place the parties on equal footing in the assessment of the lawfulness and rationality of such decision. By facilitating access to the record of proceedings under review, the rule enables the court to perform their inherent review function to scrutinize the exercise of public power for compliance with constitutional prescripts.’

[48] In response to the applicant’s rule 53 notice, a letter dated 1 April 2015 was sent by the MEC stating that there was no record of proceedings because the entire process was through consultations in the presence of the applicant’s mother (the initial applicant). According to the respondents, the applicant’s mother was part of the consultations and would be told throughout the process that what they were seeking was non-existent in the customary structure of the Eastern Cape.

[49] Mr Msiwa for the respondents submitted that the absence of a record of a consultative process in the presence of the applicant’s mother does not bring about an illegality of the decision. Furthermore, confirmatory affidavits from parties who were part of the consultative process were filed by the respondents. The only response by the applicant to these was that they were irrelevant. I do not see how that can be the case.

[50] Whilst I acknowledge that a record is a helpful tool in assisting a court in objectively exercising its inherent review functions, it cannot be said that the absence thereof *per se* renders the proceedings an illegality. More particularly on the circumstances of this case where confirmatory affidavits forming evidential material pertaining to the decision making by the MEC were submitted to court. Further elucidation on this point appears below.

[51] In addition, it is stated in the answering affidavit that the reasons for the decision taken by the MEC are contained in annexure “A” to the founding affidavit, where the decision was communicated to the applicants. What stands out in annexure “A” is that the primary reason for the decision of the MEC is that he found that the applicant’s application for recognition did not meet the legislative prescripts for recognition as a principal traditional community. In other words, on the MEC’s

finding, the application did not meet the jurisdictional requirements provided for in section 2B of the Framework Act. This then leaves the question of whether his interpretation of the legislation was correct in this regard.

[52] Fortifying this view is the applicant himself, where he states in his founding affidavit that ‘the application concerns a narrow, but important legal issue: “*is the interpretation of the MEC correct that recognition of principal traditional communities is reserved for the accommodation of those traditional leaders who were Kings and relegated by the Nhlapho Commission*”’. I agree with this formulation of the issue.

[53] Added to this is the fact that the application is also based on PAJA as a separate cause of action. PAJA has its own built-in mechanisms for the provision of ‘adequate reasons’ for review purposes. In terms of section 5 of PAJA an applicant can request ‘adequate reasons’ for the decision taken by the administrator. Such a request must be made within 90 days after the date on which the interested party (applicant) became aware of the action or might reasonably have been expected to become aware thereof. There is nothing on the papers before me to indicate that such provision was invoked in the present matter.

[54] In my view, the absence of a rule 53 record in the present matter cannot on its own be construed to mean that the MEC considered irrelevant considerations in deciding the matter, or that he did not consider relevant considerations. I also find the reference to the MEC’s statement in the answering affidavit, ie. that ‘he knows nothing of the history of the AmaBomvana’, as lending support to the view that he did not consider the historical material and task team report, to be an inaccurate restatement of what it said in the affidavit. What the said paragraph states is that the MEC has no knowledge of *the accuracy of the history* stated therein.¹⁹ I do not think that one can read more to that than what is actually stated. (emphasis intended)

[55] I agree with the applicant’s averments that this matter turns on whether or not the MEC correctly interpreted the legislative provisions with regards to the

¹⁹ MEC’s answering affidavit, para 44.

recognition of AmaBonvana as a principal traditional community. Which then brings me to that assessment.

The jurisdictional requirements for recognition as a principal traditional community

[56] It is common cause that the jurisdictional requirements for recognition as a principal traditional community are set out in section 2B of the Framework Act as highlighted above.²⁰ It stands to reason therefore, that the starting point in determining the application is to consider whether or not the application meets the jurisdictional requirements as set out in terms of the aforesaid provisions.

[57] In deciding the recognition application, the MEC found that the applicants did not meet the said requirements. His reason primarily, was that there is no provision in the provincial legislation for the recognition of a principal traditional community. Expatiating in this regard he stated that the intention of the legislator, even in the national legislation, was to accommodate those traditional leaders who had been recognised by the other senior traditional leaders within their areas of jurisdiction, for example, those who hold the traditional leadership positions of the then paramount chiefs. He stated further, that in the Eastern Cape, only those traditional leaders who were Kings and relegated to the status of principal traditional community by the Nhlapo Commission that the department has recognised as principal traditional leaders.

[58] To get a better understanding in this regard, a closer examination of the relevant provision is warranted. Subsection (1) (a) of section 2B provides that ‘a number of traditional communities that are grouped together may be recognised as a principal traditional community if they are recognised as such *in terms of applicable provincial legislation*’. (emphasis intended) In this regard, the applicable provincial legislation is the Eastern Cape Leadership and Governance Act (the Governance Act).²¹

²⁰ Para 29 *supra*.

²¹ Act 1 of 2017.

[59] I find it of material significance that nowhere in the founding papers, or even the replying papers, do the applicants refer to the said provincial legislation. This notwithstanding that subsection (1) of section 2B, in terms of which the application is premised, requires that for the said recognition to take place, the traditional community must be so recognised in terms of the applicable provincial legislation. In this regard the application falls short and is found to be wanting.

[60] Whilst the Governance Act²² gives a definition of a kingship/ queenship as well as the various tiers of traditional leadership, it provides no definition of a principal traditional community or a principal traditional leader. The section only defines a principal traditional leader as one who has been recognised in terms of section 22 of the Act (Governance Act).

[61] Section 22 in turn, states the following regarding the recognition of a principal traditional leader:

- (1) The Premier must recognise a person as a principal traditional leader where, pursuant to an investigation conducted in terms of section 25 (2) of the Traditional Leadership and Governance Framework Act, the Commission recommended that a paramountcy does not qualify to be recognized as a kinship or queenship and –
 - (a) the paramountcy has been vacant from 1 February 2010; or
 - (b) the king or queen who had permanently occupied the position, dies.
- (2) If any of the circumstances referred to in subsection (1) (a) and (b), become applicable, the Premier must request members of the royal family concerned to identify a suitable person in terms of section 23 as a principal traditional leader.

²² The definitions section.

- (3) The Premier must recognise a person identified by the royal family as a principal traditional leader in terms of subsection (1) *and must at the same time recognise the community as a principal traditional community.* (Emphasis intended)

[62] Notably, this is the only time that the Governance Act refers to the recognition of a principal traditional community. And from the above provision, it is clear that such recognition is preceded by the recognition of a principal traditional leader, and not the other way around.

[63] On a closer examination of section 25 (2) of the Framework Act, it becomes apparent that the section alludes to the investigation envisaged in section 22 of the Governance Act referred to above. The section provides –

(2) (a) The Commission has authority to investigate and make recommendation on –

- (i) a case where there is doubt as to whether a kingship or, principal traditional leadership, senior traditional leadership or headmanship was established in accordance with customary law and customs;
- (ii) a case where there is doubt as to whether a principal traditional leadership, senior traditional leadership, headmanship was established in accordance with customary law and customs;
- (iii) a traditional leadership position where the title or right of the incumbent is contested;
- (iv) *claims by communities to be recognised as kingships, queenships, principal traditional communities, traditional communities, or headmanships;* (emphasis intended)
- (v) the legitimacy of the establishment or disestablishment of ‘tribes’ or headmanships;

- (vi) disputes resulting from the determination of traditional authority boundaries as a result of merging or division of 'tribes';
- (vii) all traditional leadership claims and disputes dating from 1 September 1927 to the coming into operation of provincial legislation dealing with traditional leadership and governance matters;
- (ix) gender related disputes relating to traditional leadership positions arising after 27 April 1994.

[64] On my examination of the above provisions, considered wholistically, they lend credence to the interpretation proffered by the MEC to the applicable legislation (the Framework Act). Therefore, it behoves me to conclude that the interpretation afforded by the MEC to the provisions of the Framework Act (specifically subsection (1) (a) of section 2B), is the only interpretation to be favoured in this regard. The only other provision that pertains to the recognition of a principal traditional leader in the Framework Act is section 10A. That section however, only refers to the filling of a vacant position of a principal traditional leader, and not the recognition thereof as is the case in the present matter.

[65] From the language used in section 2B of the Framework Act, together with the relevant provisions of the Governance Act as discussed above, and considering the said provisions wholistically and contextually, if one applies the principles enunciated in *Endumeni*²³, the only sensible interpretation one can come to is that there is no provision for the recognition of a principal traditional community in terms of the provincial legislation (the Governance Act). This would also bring some clarity as to why no such reference is made by the applicants in their papers, despite this being a clear proviso in terms of the provisions they predicate their case upon.

[66] In light of these factors, it cannot be correct to say that the MEC failed to interpret the legislative provisions properly.

²³ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA).

[67] Even with the other subsections of the provision (section 2B), I have difficulty in concluding that the applicant has satisfied the jurisdictional requirements of the Act. By way of an example, the respondents contend in their papers that the applicant has not shown that he is recognised as a senior traditional leader of a higher status than the other senior traditional leaders of AmaBomvana.²⁴

[68] As appoint of departure, it is common cause that the applicant is not on the throne currently as he is employed as a civil servant whilst his mother holds the position of acting chieftainess. It can therefore not be said that he enjoys the recognition of other senior traditional leaders as being of a higher status than them. Furthermore, the application itself is supported by four traditional councils; the Ngubezulu traditional council headed by the applicant's mother, the Dubulamanzi traditional council headed by chief Vulindaba, the Ngonyama traditional council headed by chief Ayanda Ngonyama and the Ngqwangele traditional council headed by chief Dumalitshona Siruni.

[69] It is noteworthy that while it is alleged in the founding affidavit that the recognition of AmaBomvana as a principal traditional community is supported by at least seven traditional councils who are all under senior traditional leaders, these are not listed in the affidavit. The only traditional councils listed are those mentioned in the preceding paragraph who submitted letters supporting the current application. This however, tells this court nothing about which traditional councils supported the recognition of AmaBomvana as a principal traditional community. The respondents on the other hand, listed a number of traditional communities belonging to the Amatshezi group, which also forms part of Amabomvana, who are opposed to the aforementioned recognition.

[70] The anomaly that arises here is that the applicant disavows that these communities are part of the Amabomvana. He submits in his replying affidavit that those who filed confirmatory affidavits supporting the respondents in opposing the

²⁴ Section 2B (1) (d) of the Framework Act.

application/recognition of AmaBomvana are not relevant for the present consideration as they belong to the Xhosas.

[71] The confusion here arises in that among those who filed confirmatory affidavits in opposing the application and the recognition of AmaBomvana is No-Office Mdabuka who is the regent chieftainess of Gcaleka-Ncihana traditional council. At paragraph 79 of the replying affidavit the applicant contends that Mdabuka is not a member of AmaBomvana nation and is a member of the Xhosa nation, and as such his affidavit is irrelevant. On the same breath however, and quite confusingly, in his founding affidavit it is stated that his mother, chieftainess Nobangile Gwebindlala, is also the chieftainess of Gcaleka-Nchihana amongst other traditional authorities.²⁵

[72] Acting chieftainess Mdabuka however is averse to this allegation, and even makes various other submissions supporting the opposition of the application. Most significant of these is that she alleges that she is of equal status as chieftainess Nobangile Gwebindlala; they both fall under the jurisdiction of the King (sixth respondent) and both their traditional councils report to the King; her traditional council is one of those that was consulted in the consideration of the recognition of AmaBomvana which, in the presence of the applicant's mother, voiced their opposition to the said recognition (together with other groups of AmaBomvana).

[73] I find it quite telling that none of this is denied in the replying affidavit, except to state that the said affidavit is irrelevant. This leaves this court in a state of quandary because on the one hand the traditional council (Gcaleka-Nchihana) is said to fall under the chieftainship of the applicant's mother (Ngubezulu traditional council) which is part of the AmaBomvana supportive of the application, and yet on the other hand (replying affidavit) they fall under the Xhosa nation. The affidavit by chieftainess Mdabuka supports the version of the sixth respondent (the King), who asserts that the traditional councils said to support the application all fall under his jurisdiction and report to him as the King. Given all these circumstances and in

²⁵ Para 8.1 of the founding affidavit.

applying the *Plascon Evans* principle, I am constrained to accept the respondents' version in this regard.

[74] As clearly demonstrated above, the applicant has failed to establish that the application meets the jurisdictional requirements for recognition as a principal traditional community as provided for in section 2B of the Framework Act.

[75] Under these circumstances, I cannot find that the MEC failed to apply himself in the consideration of the applicable legislative provisions in deciding the matter. I find his interpretation to be in accordance with the legislative prescripts, and therefore correct. In the circumstances therefore, the review application is inept and falls to be dismissed.

Order

[76] Consequently, the following order is made:

The application is dismissed with costs which are to be in accordance with scale B as provided for in terms of rule 69 of the Uniform Rules of Court. Such costs to include the costs of two counsel where so employed.

**V P NONCEMBU
JUDGE OF THE HIGH COURT**

APPEARANCES

Counsel for the Applicant	: <i>L Haskins</i>
Instructed by	: Mvuzo Notyesi Inc Mthatha
Counsel for the Respondents	: <i>P V Msiwa (SC) with L</i>

Instructed by

Mncotsho

: Office of the State Attorney
Mthatha

Date of hearing

: 23 November 2023

Date judgment delivered

: 5 September 2024