

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 2130/2019

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
	
	
DATE: 16 January 2025 SIGNATURE.....	

In the matter between:

RISIMATI WILSON MKHARI

APPLICANT

-and-

THE PREMIER OF THE PROVINCE OF LIMPOPO

FIRST RESPONDENT

**LIMPOPO PROVINCIAL COMMITTEE ON
TRADITIONAL LEADERSHIP DISPUTES AND
CLAIMS**

SECOND RESPONDENT

HLEKANI SAMUEL MUKHARI

THIRD RESPONDENT

SIKHETO THOMAS MUKHARI

FOURTH RESPONDENT

COMMISSION ON TRADITIONAL LEADERSHIP
DISPUTES AND CLAIMS

FIFTH RESPONDENT

LIMPOPO PROVINCIAL HOUSE OF TRADITIONAL
LEADERS

SIXTH RESPONDENT

JUDGMENT

BRESLER AJ:

Introduction:

[1] The Applicant applies for the review and setting aside of:

1.1 The decision of the Second Respondent (the 'Committee'), taken on 22 December 2017, to recommend that the Applicant's claim for the restoration of senior traditional leadership positions from the second house of Nwa'Xikundu II to the alleged rightful first house of Nwa'Xikhundu I (the 'Applicant's claim'), be declined; and

1.2 The decision of the First Respondent (the 'Premier'), taken on 10 October 2018 to decline the claim.

[2] The Applicant prays for the claim to be upheld, alternatively:

- 2.1 Directing the Premier, within 30 (thirty) calendar days of the date of the order of this Court, and after consultation with the Department of Cooperative Governance, Human Settlements and Traditional Affairs in the Limpopo Provincial Government, to appoint suitably qualified persons to form an *ad hoc* panel solely for the purpose of reconsidering the Applicant's claim;
- 2.2 Granting the *ad hoc* panel all the powers granted to the Committee by the **Traditional Leadership and Governance Framework Act**, Act 41 of 2003 (the '**Framework Act**'); and
- 2.3 Directing the *ad hoc* panel to investigate the Applicant's claim and issue a report with recommendations within 180 calendar days of its members being appointed.
- [3] The Applicant furthermore claims for an order directing the Premier to make a fresh decision accordingly.
- [4] The review application is opposed by the First, Second, Third (the Premier) and Fourth Respondents (the Committee). The *crux* of their opposition will be dealt with herein in as far as same is relevant to this judgment.

- [5] Suffice to state that this Court is called upon to determine if the administrative actions taken by the Committee and the Premier respectively were lawful, reasonable and procedurally fair.

Factual Synopsis:

- [6] The Applicant has provided quite a substantial historical background to his claim for the restoration of the senior leadership position to the rightful first house of Nwa’Xikhundu I (the first wife of Njhakanjhaka).
- [7] For the sake of completeness, the following historical narrative by the Applicant is relevant for the proceedings before court: In the second half of the nineteenth century, a Vatsonga king or paramount chief named Njhakanjhaka ruled in the area now known as Elim, Limpopo Province. He had several wives, the first of which is Nwa’Xikhundu I, who bore a son named Chavane.
- [8] King Njhakanjhaka appointed Chavane to rule as hosi in the area called Rivolwa. King Njhakanjhaka passed away in 1898 and was succeeded by Chavane as king. King Chavane consequently passed away in 1912 and was succeeded by his first-born son, Mbhoxeni.
- [9] According to the Applicant’s narrative, King Njhakanjhaka also married the sister of Nwa’Xikhundu I, being Nwa’Xikhundu II who also bore him a son, Mungungu. Chavane and Mungungu were therefore half-brothers.

- [10] Upon King Chavane's death, Mbhoxeni became king. Mungungu was however installed as chief through the intervention of the Union Government who did not support Mbhoxeni.
- [11] The Third and Fourth Respondents are the direct descendants of Mungungu and N'wapyanya (the younger brother of Mungungu). According to their narrative, Mungungu and N'wapyanya were the sons of Chavane and thus from the first house.
- [12] It is apposite to note at this junction that this Court is not called upon to determine the merits of the Applicant's claim. It must merely be determined if the decisions referred to herein before are susceptible to review, and if so, if it should be reviewed, set aside or substituted.

The Committee's report:

- [13] After careful consideration of the report, this Court found the following of particular importance for purposes of this judgment:

13.1 The report notes that the Committee could not find records from the National Archives to authenticate the claim of the Applicant. It specifically notes that until such records are made available, the data shall remain 'incredible'. This presupposes that the record, presumably obtained from the National

Archives, and presented by the Applicant, was not considered. Neither was the conflicting record (the origin of which is unknown) presented by the Third and Fourth Respondents, verified at the National Archives.

13.2 The Committee made a finding that there is no substantial evidence to show that Mungungu and N'wapyanya were the sons of Njhakanjhaka from the second house. On this basis the version of the Third and Fourth Respondents was preferred.

13.3 The Committee furthermore found that it is highly questionable that there are 11 (eleven) generations between King Njhakanjhaka, who died in 1898, to the current generation. The Applicant's version is thus unacceptable. The Committee remarked that 'this is typical of concocted work not carefully thought of or properly calculated'.¹ No factual justification is given for the conclusion save for the argument on the typical time frame between generations (which is a highly scientific approach and not substantiated by any corroborating documentation in the record).

13.4 The Applicant was found to have insufficient knowledge of the current generations and thus his knowledge of the historical generations should be questioned. According to the committee there is no 'guarantee' that his information is correct. No indication is provided in the report that any of the historical information provided by the Applicant was verified by the

¹ Paragraph 8.3 of the report on paginated page 227

Committee independently from the information obtained from the Third and Fourth Respondents.

13.3 The claim of the Applicant violates the Mkhari customary law of succession as his brother (who is allegedly mentally disturbed) or his descendants should be considered prior to considering the Applicant.

13.5 Presumably after the public hearing, the Committee obtained further information from the paternal aunt of the Applicant and from the Xikundu Traditional Counsel without affording the Applicant an opportunity to engage these witnesses (or testimony) as well. Eventually, the testimony thus obtained supported a substantial part of the adverse findings of the Committee.

[14] In analyzing the evidence, the Committee gave considerable attention to the number of generations as alleged by the respective parties measured against the normal time frame of approximately 30 years between two generations. No effort was made to determine the veracity of the Applicant's alleged lineages with reference to actual birth dates or verifiable data. Ultimately, the Committee engaged in this exercise to determine the eligibility of the Applicant to descend to the throne. It is evident that this was not the purpose of the investigation, and the Committee was thus misdirected in this regard.

- [15] It is also relevant to note that no reference was made to the historical documents presented by the Applicant or their reliability having regard to the allegation by the Third and Fourth Respondents that certain documents were falsified. One would expect, at the very least, that a report of this nature would include an analysis of historical sources and documents. This has not been done. Save for the documents that presumably formed part of the evidence presented by the Applicant and the Third and Fourth Respondents, the record does not show that external investigations were conducted with specific reference to historical sources. The determination of a lineage is after all an analysis of the recorded and oral history.
- [16] The Committee remarked in the report that the records of the lineage could not be found at National Archives. This alleged endeavor to investigate the position at the National Archives is however not corroborated by the physical record presented in terms of Rule 53. No record could be found of any enquiry made at the National Archives or their response to such an enquiry.
- [17] The Committee's findings are purely premised on the oral testimony of selective witnesses. By means of example, the paternal aunt of the Applicant was questioned whilst his paternal grandmother, which was pertinently identified by the aunt as a more suitable witness, was not questioned at all. This questioning was also conducted after the public hearing and without the knowledge of the Applicant.
- [18] This Court has no difficulty in finding that the procedure adopted by the Committee was vastly inadequate and unfair which resulted in a subjective report being generated filled with unsupported assumptions and conclusions.

- [19] The Committee and the Premier submitted in their Heads of Argument that the report of the Committee does not constitute a 'decision' and is therefore not reviewable. They concede however, that the decision of the Premier is susceptible to review but submit that it has no merits. In opposition to the merits, they submit that the Committee has fulfilled its statutory duty and that their conduct is beyond criticism. This view is likewise shared with the Third and Fourth Respondent although their opposition focuses on the allegations pertaining to the factual position. They reiterate that they are the lawful descendants of the first house and are therefore rightfully the heirs to the throne once established.
- [20] It stands to be noted that the Applicant and the Second and Third Respondents are in agreement that the rightful heirs are the descendants of the first house. It begs the question: where does the report by the Committee leave the Third and Fourth Respondents in so far as it is found that the first house has no claim *vis-à-vis* the second house?

Legal Framework:

- [21] In the case of **Yende v Yende**² a useful and succinct summary is provided of the relevant provisions of the **Framework Act**. The Court summarized as follows³:

² 2020 JDR 2798 (SCA)

³ At [7]

'Section 22(1) of the Framework Act established the Commission on Traditional Leadership Disputes and Claims as a specially constituted body with authority to decide on any traditional leadership disputes and claims contemplated in s 25(2) of the Framework Act. Section 22(2) in turn enjoins the Commission to execute its functions in a manner that is fair, objective and impartial. Section 25(2)(a), inter alia, empowers the Commission to, upon request or of its own accord, decide any traditional dispute or claim in instances where the title or right of the incumbent to a traditional leadership position was contested. In terms of s 25(2)(b), a dispute or claim may be lodged by any person and must be accompanied by information setting out the nature of the dispute or claim and any other relevant information.'

- [22] In the recent decision of ***Sigcau and Another v The President of the Republic of South Africa and Others***⁴ the Supreme Court of Appeal (the SCA) reiterated that an investigation as envisaged in Section 25(2) of the **Framework Act** entailed the Commission listening to tendered evidence, initiating active searches for further evidence and inviting input from relevant persons other than the contenders to the throne.⁵
- [23] In this court's view, the Committee therefore has an 'investigative' function rather than an 'accusatory' function. They must therefore determine the rights of the parties by investigation rather than simply accepting information for the contenders

⁴ 2022 JDR 2645 (SCA)

⁵ At [36]

and deciding on the information provided. Their powers to investigate must be exercised in a manner that is fair, objective and impartial.

Reviewability of the Committee's recommendation:

[24] The Applicants are of the opinion that the recommendations of the Committee are reviewable in terms of the provisions of the **Promotion of Administrative Justice Act**, Act 3 of 2000 ('**PAJA**').

[25] There are numerous notable decisions confirming that the actions of the Commission of Traditional Leadership Disputes and Claims are reviewable in terms of **PAJA**.⁶ The Committee is appointed by the Commission and the provisions of specifically Section 25(2) to (5) applies to these provincial committees. It presupposes that the provincial committees have similar powers and functions as the Commission subject to the provisions of the **Framework Act**.

[26] It is thus undeniable that the actions of the Committee constitute administrative action as contemplated in **PAJA**, and that it is subject to review. The Committee and the Premier's purely technical objection in this regard must therefore fail.

[27] I have already indicated that I find the investigations of the Second Respondent to be inadequate. No historical evidence was included in their report, nor does it

⁶ See for instance *Mamone v Commission of Traditional Leadership Disputes and Claims* 2014 JDR 0615 (SCA) and *Mamone v Commission of Traditional Leadership Disputes and Claims* 2015 JDR 0015 (CC)

appear from the record before court that any evidence was presented as to the veracity of the historical documentation in support of the Applicant's claim.

- [28] Consideration was given to the information obtained in respect of the relationship between the Applicant and Freddy Hasani Xikundu and the Applicant's paternal aunt without allowing the Applicant an opportunity to address this information. This violates the principle of *audi alteram partem* and defies the investigative function of the Committee.
- [29] It follows that the actions of the Committee are reviewable under the provisions of Section 6(2)(c) (procedural unfairness) and 6(2)(e)(iii) (irrelevant considerations were taken into account and relevant considerations were not considered) of **PAJA**.
- [30] In ***Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others***⁷ the following was stated:

'[25] Once a ground of review under PAJA has been established there is no room for shying away from it. Section 172(1)(a) of the Constitution requires the decision to be declared unlawful. The consequences of the declaration of unlawfulness must then be dealt with in a just and equitable order under s 172(1)(b). Section 8 of PAJA gives detailed legislative content to the Constitution's 'just and equitable' remedy.'

⁷ 2014 (1) SA 604 (CC)

- [31] The decision of the Committee taken on the 22nd of December 2017, to recommend that the Applicant's claim be declined, must be reviewed and set aside.

Reviewability of the Premier's decision:

- [32] It is common cause between the parties that the decision of the Premier, taken on the 10th of October 2018, was taken on the premise of the report presented by the Committee.
- [33] In lieu of the earlier finding that the investigation was inadequate and the report therefore insufficient, it follows that the Premier was not apprised of sufficient information to enable him to take an informed decision.
- [34] At the very least, this renders his decision reviewable under the auspices of Section 6(2)(e)(iii) (irrelevant considerations were taken into account and relevant considerations were not considered) of **PAJA**. It is, however, trite law that administrative actions that follow upon an invalid administrative action is also invalid.⁸ This renders the decision of the Premier invalid.
- [35] On this basis, the decision taken by the Premier also stands to be reviewed and set aside.

⁸ See *Seale v Van Rooyen* NO 2008 (4) SA (SCA) at [13] with reference to *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA)

Substitution of the decision:

[36] Having found that both the impugned decisions are reviewable and stands to be set aside, this Court must determine what 'just and equitable' remedy must be afforded to the Applicant.

[37] The Applicant prays for a substitution of the decision, alternatively a referral of the matter to an *ad hoc* panel subsequent whereto the Premier must make a new decision.

[38] Section 8(1)(c) of **PAJA** provides that a court or tribunal, in proceedings for judicial review in terms of Section 6(1) may grant any order that is just and equitable, including an order setting aside the administrative action and, in exceptional cases, substituting or varying the administrative action or correcting a defect resulting from the administrative action.

[39] It is trite that **PAJA** does not pertinently identify circumstances that would constitute 'exceptional circumstances'. In the case of ***Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited and another***⁹ the following was stated by the Constitutional Court at [47]:

[47] To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight.

⁹ 2015 (1) BCLR 1199 (CC); 2015 (5) SA 245 (CC)

The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.'

- [40] The Constitutional Court then specifically analysed the concepts of 'in as good a position' and 'foregone conclusion' and inferred that these aspects are interrelated and interdependent. The nature of the decision may dictate that a court defer to the administrator for instance in respect of policy-laden and polycentric decisions.
- [41] The appropriateness of granting a substituted order will thus depend on a consideration of the fairness to the parties in each individual case.
- [42] Having regard to the factors identified by the Constitutional Court set out herein before, this Court is of the opinion that exceptional circumstances have not been shown to exist for the substitution of the order. The difficulty in substituting the administrator's decision lies with the finding herein before that the investigation of the Committee was inadequate and did not fully consider all relevant information.

Administrative action must be lawful, reasonable and procedurally fair – this entails that a full and apt and thorough investigation be conducted, having regard to all relevant information to determine if the Applicant indeed has merits to his claim.

[43] In the well-known words of Ponnann AJ¹⁰:

'There is no rule of universal application as to what is fair. The fairness envisaged is fairness to both sides. The matter can never be conclusively determined until all of the facts of a particular case are known.'

[44] Fairness to all parties concerned will not be achieved if this Court substitutes the decision in the absence of an adequate enquiry into all the relevant facts.

[45] As to the prayer for the appointment of an *ad hoc* panel to investigate the claim of the Applicant, it is evident from the papers filed on record that the Respondents do not have a pertinent objection in the sense of same being an impossibility for some reason. As such, an independent *ad hoc* panel would serve the purposes of justice and fairness.

Non-Joinder of the Member of the Executive Council for the Department of Co-Operative Governance, Human Settlement and Traditional Affairs (The MEC of COGHTA)

¹⁰ *Louw and Others v Nel* 2011 (2) SA 172 (SCA) at [31]

[46] The First and Second Respondent raised the issue of non-joinder *in limine*. It is submitted that a failure to join the MEC of COGHTA will affect the MEC's effectiveness in administering the affairs of the traditional leadership in Limpopo.¹¹

[47] In the matter of **Bowring NO v Vredendorp Properties CC**¹² the Court confirmed that:

'The substantial test is whether the party that is alleged to be a necessary party for purposes of joinder has a legal interest in the subject-matter of the litigation, which may be affected prejudicially by the judgement of the Court in the proceedings concerned.'

[48] Though it was said in **Morgan v Salisbury Municipality**¹³ that the right of a defendant to demand the joinder of another party is limited to the cases of joint owners, joint contractors and partners, the question as to whether all necessary parties had been joined 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.¹⁴

¹¹ Paragraph 19 of the First and Second Respondent's Opposing affidavit on paginated page 364

¹² 2007 (5) SA 391 (SCA) at [21]

¹³ 1935 AD 167 at 171.

¹⁴ **Amalgamated Engineering Union v Minister of Labour** 1949 (3) SA 637 (A) at 657.

[49] In **SA Riding for the Disabled Association v Regional Land Claims Commissioner**¹⁵ the Constitutional Court enunciated the test for intervention as follows:

[10] If the applicant shows that it has some right which is affected by the order issued, permission to intervene must be granted. For it is a basic principle of our law that no order should be granted against a party without affording such party a predecision hearing. This is so fundamental that an order is generally taken to be binding only on parties to the litigation.

*[11] Once the applicant for intervention shows a direct and substantial interest in the subject matter of the case, the court ought to grant leave to intervene. In Greyvenouw CC*¹⁶ *the principle was formulated in these terms:*

“In addition, when, as in this matter, the applicants base their claim to intervene on a direct and substantial interest in the subject matter of the dispute, the Court has no discretion: it must allow them to intervene because it should not proceed in the absence of such parties having such legally recognised interests.”

[50] The MEC of COGHTA has no interest in the relief granted in these proceedings. This does not relate to the recognition of an individual as King or Traditional Leader, but rather determining the correct blood line that should be recognized in due

¹⁵ 2017 (5) SA 1 (CC) at [10] and [11]

¹⁶ **Nelson Mandela Metropolitan Municipality v Greyvenouw CC** 2004 (2) SA 81 (SE) at 89B – C

course. It therefore does not concern the MEC of COGHTA at this stage and there is no need to join him in these proceedings. No rights will be affected prejudicially by the outcome of this review application.

- [51] Having regard to the authorities stated herein before, there is therefore no need to join the MEC of COGHTA to these proceedings and the objection in this regard is consequently dismissed.

Conclusion:

- [52] The Applicant is substantially successful in its claim. There is no reason why the costs should not follow the outcome of the proceedings.

- [53] Having regard to *inter alia* the complexity of the matter, the extent of the papers filed on record and the importance of the matter to Applicant, costs to two counsels on Scale C is warranted.

Order:

- [54] **In the result the following order is made:**

54.1 The decision of the Second Respondent (the 'Committee'), taken on 22 December 2017, to recommend that the Applicant's claim for the restoration of senior traditional leadership positions from the second

house of Nwa’Xikundu II to the alleged rightful house of Nwa’Xikhundu I (the ‘Applicant’s Claim’, is declined is hereby reviewed and set aside;

54.2 The decision of the First Respondent (the ‘Premier’), taken on 10 October 2018 to decline the Applicant’s Claim is hereby reviewed and set aside;

54.3 The Premier is directed, within 60 (sixty) calendar days from date of service of this order, and after consultation with the Department of Cooperative Governance, Human Settlements and Traditional Affairs in the Limpopo Provincial Government, to appoint suitably qualified persons to form an *ad hoc* panel solely for the purposes of reconsidering the Applicant’s claim.

54.4 The *ad hoc* panel shall have all the powers granted to the Committee as envisioned by the Traditional Leadership and Governance Framework Act, Act 41 of 2003 (the ‘Framework Act’);

54.5 The *ad hoc* panel is accordingly directed to investigate the Applicant’s claim anew, and to issue a report with a recommendation within 180 (one hundred and eighty) calendar days of its members being appointed.

54.6 The Premier is directed to make a fresh decision in terms of Section 26(3) of the Framework Act within 30 (thirty) calendar days from receipt of the *ad hoc* panel’s recommendation.

54.7 The First, Second, Third and Fourth Respondents, jointly and severally, the one paying the other to be absolved, is ordered to pay the costs of the Applicant on party and party scale, including the costs to two counsels (where so employed) on Scale C.



**M BRESLER
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE**

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DATE OF HEARING : 15 August 2024
DATE OF JUDGMENT : 16 January 2025

POLOKWANE HIGH COURT