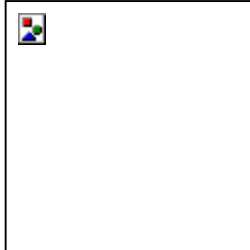


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REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: HCAA07/2025

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.

G.C MULLER

DATE 15/5/26

SIGNATURE.....

In the matter between:

MATOME CHARLES MALATJI

APPELLANT

and

THE CHAIRMAN: KGATLA COMMISSION

FIRST RESPONDENT

MOSIBUTJANE SHAYI

SECOND RESPONDENT

MEC: CO-OPERATIVE GOVERNANCE, HUMAN

SETTLEMENT AND TRADITIONAL AFFAIRS

THIRD RESPONDENT

THE COMMISSION ON TRADITIONAL AFFAIRS,

LEADERSHIP DISPUTES AND CLAIMS: LIMPOPO

FIFTH RESPONDENT

JUDGMENT

MULLER J:

[1] The appellant instituted proceedings to review and set aside the recommendation dated 11 February 2015 of the Commission on Traditional Affairs Leadership Disputes and Claims: Limpopo.¹ The appellant also sought an order to review and set aside the decision by the Commission not to restore the chieftaincy of the Ba-Phalaborwa. In addition, an order was sought that condonation for non-compliance with section 9 of the Promotion of Administrative Justice Act² be granted. The prayer that the chieftaincy of the Ba-Phalaborwa be restored to the appellant was abandoned in the court *a quo*. The appellant, nevertheless, persisted with an alternative claim that the Commission be re-constituted to investigate the factual disputes of the traditional leadership dispute.

[2] Makoti AJ having found that the recommendation made by the Commission is not administrative action and thus not reviewable in terms of PAJA, dismissed the application with costs. He, however, granted leave to the appellant to appeal to the full court of this division.

¹ Established in terms of section 22 of the Traditional Leadership and Governance Framework Act, Act 41 of 2003. (Hereinafter called "the Framework Act").

² Act 3 of Act 2000. (Hereinafter called PAJA").

[3] At the commencement of the arguments before us, counsel for the appellant confirmed that the cause of action of the appellant, on the papers, is that the recommendation made by the Commission is reviewable in terms of PAJA, notwithstanding the fact that a decision by the Premier³ to decline the claim of the appellant, based on the recommendation by the Commission, surprisingly, was not impugned and remain undisturbed. The appellant's case, therefore, rests squarely on the categorisation of the recommendation of the Commission as "administrative action" as defined by PAJA.⁴

[4] The institution, status and the role of traditional leaders in terms of customary law are recognised in terms of section 211 and 212 of the Constitution. The legislative framework envisaged by section 212(1) of the Constitution is provided by the Framework Act.⁵ The Framework Act made provision in Chapter 6 for dispute and claim resolution and for the establishment of a Commission on traditional leadership disputes and claims.⁶ The Commission must carry out its functions in a manner that is fair, objective and impartial.⁷ The functions of the Commission are described in section 25. The Commission must be guided by customary law and customs relevant to the claim at the time the claim arose.⁸

[5] A provincial committee of the Commission was established in terms of section 26A. The committee investigated the claim of the appellant.⁹ Section 2, 3, 4, 5 and 6 of the

³ The fourth respondent.

⁴ The appellant does not rely on legality as a basis to review the recommendation by the Commission.

⁵ The Framework Act was repealed by the Traditional and Khoi-San Leadership Act, Act 3 of 2019 which commenced on 1 April 2021. Section 63(10)(b) states that: "Any recommendation made by the CTLDC remains valid notwithstanding the repeal of the Framework Act" and section 63(11) provides that: "Any dispute or claim that has not been disposed of by the CTLDC by the expiry of its term of office must be dealt with in accordance with the provisions of section 59 of this Act or any relevant provisions provided for in provincial legislation."

⁶ Section 22(1) of the Framework Act.

⁷ Section 22(2) of the Framework Act.

⁸ Section 25(3)(a) of the Framework Act.

⁹ Section 25(6) of the Framework Act.

Commissions Act applied with the necessary changes to the provincial committee of the Commission.¹⁰ Section 25(1) provides that:

“The Commission operates national in plenary and provincially in committees and has authority to investigate and make *recommendations* on any traditional leadership dispute and claim contemplated in subsection (2).¹¹

[6] Section 26(2)(b) and (3) provides:

(2) A recommendation of the Commission must, within two weeks of the recommendation having been made, be conveyed to-

(a)...

(b) the relevant provincial government and any other relevant functionary to which the recommendation of the Commission applies in accordance with applicable provincial legislation in so far as the consideration of the recommendation does not relate to the recognition or removal of a king or queen in terms of section 9, 9A, or 10.

(3) The President or the other relevant functionary to which the recommendations have been conveyed in terms of subsection (2) must, within a period of 60 days make a decision on the recommendation.”

[7] It is common cause that the Commission made the following recommendation on 11 February 2015:

“The Commission recommends that the claim of Malatji Matome Charles (ID no:6[...]) for the restoration of the Ba-Phalaborwa traditional Authority be declined.”

[8] On 22 February 2016 the Premier made the following decision:

“1. The above-mentioned matter refers.

¹⁰ Section 25(7) read with section 26A(4) of the Framework Act. (Hereinafter called “the Committee.”)

¹¹ My emphasis.

2. I hereby inform you that the Limpopo Provincial Committee on Traditional Leadership Disputes and Claims has considered your claim.

2. I have considered the findings and recommendations of the said Committee in terms of provisions of the Traditional Leadership and Governance Framework Act. (Act No 41 of 2003), as amended.

3. I, in my capacity as Premier, therefore inform you that the claim is declined.”

[9] It bears repetition that the appellant applied to review and set aside the recommendation of the Commission and not to review and set aside the decision of the Premier.

[10] It must be determined if the recommendation is administrative action, as defined by section 1 of PAJA. Administrative action is a decision taken by an organ of state when exercising a public power in terms of legislation, which adversely affects the rights of any person and which has a direct, external legal effect. It was held in *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty)Ltd*,¹² with reference to the definition of administrative action that the words ‘direct, external legal effect’ must be interpreted as:

“The phrase ‘direct, external legal effect’ was borrowed from German federal law. The allusion to the word ‘direct’ refers to decisions that are final; the word ‘external’ to those that affect not only the decision-maker but also other parties, and the word ‘legal’ overlaps with the requirements that rights must be affected. There can be no doubt that the decision to conclude the agreement met all these requirements. The decision was final; it had the capacity to adversely affect Gijima’s rights and those of the Defence Department, which counsel for Sita conceded during his argument.”

[11] The recommendation by the Commission, as an organ of state, is final and has the capacity to adversely affect the rights of the appellant. The recommendation on the one

¹² 2017 (2) SA 63 (SCA) par 20.

hand, and the decision by the Premier, on the other, each constitute administrative action in terms of PAJA.¹³ It is, accordingly, open to the appellant to attack the recommendation of the Commission in terms of PAJA.¹⁴

[12] In *Premier of the Eastern Cape and Others v Hebe and Others*,¹⁵ the appellant sought an interdict, *inter alia*, to prevent the Premier and the MEC from implementing the decision of the Premier, pending the determination of an application to review and to set aside the recommendation of the Commission and the decision of the Premier. The full court of that division held that:

“The Committee is a statutorily constituted body. It exercises a public power under an empowering provision in the Framework Act. That the Committee makes a recommendation and not a binding decision must be considered in the context of the nature of the function that it performs. The dispute resolution mechanism in Chapter 6 of the Framework Act envisages a two-stage process that is continuous and interlinked. It commences with an investigation and recommendation of the Committee, and it concluded with the decision of the Premier.”

[13] The Commission is a functionary in terms of section 26(2)(a), with the authority to investigate and make recommendations to the Premier, who in turn, is a functionary who is empowered by section 26(2)(b) to make decisions on the recommendations of the Commission, separately and independently from the Commission. Because the process is interlinked a party is obliged to review and set aside both the decision of the Premier, and the recommendation of the Commission. The full court in *Tsajoa Royal Family and Another*

¹³ *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) par 23; *Oosthuizen's Transport (Pty) Ltd and Others v MRC Road Traffic Matters, Mpumalanga, and Others* 2008 (2) SA 570 (T) par 28 and 30; *Mahonisi Royal Family and Others v Premier of Limpopo Province and Others* (1366/2017) [2020] ZALMPHHC (26 May 2020) par 56.

¹⁴ *Mamone v Commission of Traditional Leadership Dispute and Claims and Others* [2014] 3 All SA 1 (SCA) par 1 and 17.

¹⁵ [2018] 1 All SA 194 (ECB) par 62.

*v Premier North West Province and Others*¹⁶ held in respect of a decision by the Premier (the first respondent in that case), based on the recommendation by the Commission (the second respondent in that case) that:

“The mere fact that the court *a quo* made findings against the second respondent does not in law translate in wrongdoing on the part of the first respondent. The implication of the judgment of the court *a quo* is that the finding against the second respondent automatically disqualifies the decision of the first respondent. This is incorrect. The findings and recommendations of the second respondent does not automatically translate into the fact of a material error of fact or law against the first respondent, unless he in his or her decision is found to have acted irrationally in the decision he took.”¹⁷

[14] Makoti AJ, held that the report and its conclusions could not be impugned in terms of PAJA, but that it could more appropriately be attacked through the doctrine of legality. In so holding, he erred. The recommendation of the Commission is administrative action as defined by PAJA, and, therefore, reviewable in terms of PAJA, for reasons already alluded to *supra*.

[15] The question arose, in this case, whether an order to review and set aside the recommendation of the Commission without reviewing and setting aside the decision of the Premier, will have any practical effect. Section 2(a)(i) of the Superior Courts Act¹⁸ provides that:

“When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.”

¹⁶ [2016] ZANWHC 46 (2 December 2016) par 46.

¹⁷ *Lion and Others v Premier of the North West Province and Others* [2019] ZANWHC 43 (22 August 2019) par 32-33.

¹⁸ Act 10 of 2013.

[16] It was pointed out in *MEC For Health, Eastern Cape and Another v Kirkland and Investments (Pty) Ltd t/a Lazer Institute*¹⁹ that:

“Pertinent to this case, PAJA provides that decisions taken because of the unauthorised or unwarranted dictates of another person or body constitute administrative action that is reviewable. If this court were to hold that a decision taken under dictation is not a decision at all, and has no effect even before it is set aside, then there would be no need for PAJA. This provision of PAJA exists precisely because a decision taken under dictation is nevertheless a decision, and must be reviewed and set aside just like any other unjust administrative action.”

[17] The decision of the Premier that followed on the recommendation of the Commission has legal consequences and will remain unaffected and valid until set aside by proper process. This decision, like a decision taken under dictation, cannot simply be ignored, as stated *supra*.²⁰ It exists, in fact, and is ultimately determinative of the outcome of the claim lodged by the appellant. The decision of the Premier, also has final adverse legal effect of the rights of the appellant, until set aside. The following statement in *Camps Bay Ratepayers' & Residents' Association and Another v Harrison and Another*²¹ is apposite:

“As was explained in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [para 31] administrative decisions are often built on the supposition that previous decisions were validly taken and, unless that previous decision is challenged and set aside by a competent court, its substantive validity is accepted as a fact. Whether or not it was indeed valid is of no consequence.”

[18] No purpose will possibly be served if only the recommendation is reviewed and set aside without reviewing and setting aside the decision by the Premier.

¹⁹ 2014 (3) SA 481 (CC) par 96.

²⁰ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) par 26.

²¹ 2011 (4) SA 42 CC par 62.

[19] Makoti AJ has pointed out in his judgment that the applicability of PAJA was raised by the court as a result of the inclusion of a prayer for condonation in terms of section 9 of PAJA, in the amended notice of motion. The appellant, by inclusion of the said prayer was, no doubt, aware from the outset, that condonation was necessary. In *Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Ltd and Others*²² it was held that:

“At common law application of the undue delay rule required a two stage enquiry. First, whether there was an unreasonable delay and, second, if so, whether the delay should in all the circumstances be condoned (see eg *Associated Institutions Pension Fund and others v Van Zyl and others* 2005 (2) SA 302 (SCA) para 47). Up to a point, I think, s 7(1) of PAJA requires the same two stage approach. The difference lies, as I see it, in the legislature’s determination of a delay exceeding 180 days as *per se* unreasonable. Before the effluxion of 180 days, the first enquiry in applying s 7(1) is still whether the delay (if any) was unreasonable. But after the 180 day period the issue of unreasonableness is pre-determined by the legislature; it is unreasonable *per se*. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of s 9. Absent such extension the court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters. The decision has been ‘validated’ by the delay (see eg *Associated Institutions Pension Fund* para 46). That of course does not mean that, after the 180 day period, an enquiry into the reasonableness of the applicant’s conduct becomes entirely irrelevant. Whether or not the delay was unreasonable and, if so, the extent of that unreasonableness is still a factor to be taken into account in determining whether an extension should be granted or not.”

[20] In the opposing affidavit, the second respondent, indicated that no issue is taken with the condonation application, as such. It was, however, pointed out that new information is introduced and that the steps that were taken by the appellant to investigate the claim *ex post facto*, should have been conducted prior to the commission having heard evidence.

²² [2013] 4 All SA 639 (SCA) par 26.

[21] The learned judge, however, failed to consider the issue of condonation.²³ The lack of condonation being granted, where condonation was clearly required, and an extension of the 180 days period was sought by the appellant, was raised with the parties at the commencement of the arguments.²⁴ It is open to this court to raise the issue of inordinate delay in bringing a review application, *mero motu* when the question should have been dealt with at the hearing.²⁵ Counsel for the appellant accepted that the issue of unreasonableness of the delay should have been dealt with by the court *a quo* as an extension of the period of 180 days is a necessary prerequisite for the review to be successful as a delay longer than the 180 day period is pre-determined by the legislature as unreasonable *per se*.

[22] The decision of the Premier was made on 22 February 2016. The founding affidavit of the appellant was commissioned on 21 November 2017. The unamended notice of motion was issued on 01 December 2017. The notice of motion was amended on 05 April 2018 and again on 08 October 2020.

[23] The factors to be considered by a court when called upon to grant an extension were set out in *Cape Tn City v Aurecon SA (Pty) Ltd*:²⁶

“The relevant factors in that enquiry generally include the nature of the relief sought; the extent and cause of the delay; its effect on the administration of justice and other litigants; the reasonableness of the explanation for the delay, which must cover the whole period of delay; the importance of the issue to be raised; and the prospects of success.”

²³ Probably due to the respondent's failure to pertinently taking issue with the failure to do so.

²⁴ Counsel for the appellant properly dealt with condonation in his heads of argument.

²⁵ *Mamabolo v Rustenburg Regional Local Council* 2001 (1) SA 135 (SCA) par 10. Also *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another supra* par 53-54.

²⁶ 2017 (4) SA 223 (CC) par 46.

[24] The appellant stated that the Public Protector was approached on 14 March 2016 when no response was received from the Commission to obtain the report. The appellant after receipt of the report the next day consulted his attorneys. His attorneys requested additional documents from him apart from the documents presented to the Commission. Once they were in a position to gather all the documents requested, an expert (professor Prinsloo) was consulted to assess the necessary documentation. (No date was provided when all the documents were obtained, or when the said consultation took place). The appellant stated that it was only realised at that consultation (whenever it was) that all the records are not correct. In January 2017, a manual search was conducted at the National Archives in Pretoria. It was during that visit to the archives that it was discovered from manuscripts where the allegation that the Malatji fled and sought refuge from the Shai may have originated. They instructed an anthropologist to investigate their claim and to advise them accordingly. (this date is also not provided) They were able to draft the application during September 2017.

[25] The delay from 15 March 2016, according to the appellant, is attributable to their attempt to gather all the information and also to consult numerous experts. (Who they were and when they were consulted is not mentioned). The appellant mentioned, that his father was only two years old when the Shai usurped the chieftaincy. When his father was of sound mind the Shai have been in control of the area for more than 10 years.

[26] It must be accepted that the investigation that was undertaken must have been completed for the application to have been drafted in September 2017. It took another 2 months to sign the founding affidavit, with no explanation proffered at all for that period of delay.

[27] The appellant, again, in his supplementary founding affidavit, referred to condonation and explained that the nature of the relief is to restore the dignity of traditional leadership and to correct an injustice perpetrated approximately eighty years ago. He, once again, reiterated that the delay was caused by the consideration of literature studies contained in the report of the Commission of which they had no knowledge. Once again, without supplying any detail with regard to cause and reasons for the delay.

[28] The appellant averred that the delay has not affected the administration of justice and the prospect of success is strong. To the contrary, the interests of justice suffer because finality cannot be achieved as a direct result of the delay. The application is launched close to 2 years after the decision of the Premier has been communicated to the appellant. The appellant has taken an indolent approach to preparing for and launching of the application and advanced a vague and incomplete explanation. Without any adequate and acceptable evidence setting out in full, the reasons for the inordinate long delay that covers the entire period, the delay can hardly be regarded as reasonable. The issues are without doubt important for the appellant on the one hand, but also for the Shai respondent, in particular. Finality, is of utmost importance. The administration of justice suffers when the recommendation of the Commission is impugned many years after it has been made and has been accepted by the Premier. The prospects of success seem to be slight. No convincing and meaningful evidence was adduced at the Commission to show that the Shai's "stole" the senior traditional leadership from the Malatji by manipulation of the native commissioner at the time. Makoti AJ correctly rejected the submissions made by the appellant. It is not in the interest of justice that the appellant be granted an extension of the 180 days period, as prayed for.

[29] In the result, I am of the considered view that the order of Makoti AJ is correct, albeit for different reasons.

ORDER

The appeal is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel, where applicable.

G.C MULLER

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, POLOKWANE

I, concur

M. NAUDE-ODENDAAL

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, POLOKWANE

I, concur

K. PILLAY
JUDGE OF THE HIGH COURT
LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

FOR THE APPELLANT : **Adv A.C Diamond**

INSTRUCTED BY : **HAMMANN-MOOSA INC**

FOR THE FIRST RESPONDENT : **Adv M.R Maputha**
Adv K Rammai

INSTRUCTED BY : **TC PILUSA ATTORNEYS**

DATE HEARD : **17 APRIL 2026**

DATE DELIVERED : **15 MAY 2026**