

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION: MTHATHA

Case no. 1296/12

In the matter between:

HLATIKHULU SITHELO

FIRST APPLICANT

NYANDENI KINGDOM

SECOND APPLICANT

And

MEC FOR LOCAL GOVERNMENT

AND TRADITIONAL AFFAIRS

FIRST RESPONDENT

PREMIER OF THE EASTERN CAPE

SECOND RESPONDENT

KHONJWAYO TRADITIONAL COUNCIL

THIRD RESPONDENT

CHAIRMAN OF THE HOUSE OF

TRADITIONAL LEADERS

FOURTH RESPONDENT

JUDGMENT

STRETCH J:

1. This is an opposed application for the following relief:
 - (a) Declaring the second decision taken by the erstwhile member of the executive council (Mr Gqobana) which had the effect of reinstating the third respondent to substitute the Vulindlela Traditional Council at the district of Ngqeleni district, to be invalid *ab initio*, to be unlawful and to be of no force and effect.

- (b) Directing the first respondent to implement the first decision taken by Mr Gqobana to appoint Chief Sithelo as head of the Vulindlela Traditional Council.
- (c) Declaring that the third respondent's recommendation which was the cause of the aforesaid complaints to be invalid and unlawful *ab initio*.
- (d) Directing that the first and second respondents pay the costs of this application, and that the third and fourth respondents also be directed to pay costs only in the event of them opposing (presumably unsuccessfully) the relief sought.

The Applicants' case

- 2. The first applicant has deposed to an affidavit in support of this application. I shall hereinafter refer to the first applicant as the applicant. I say so because there is nothing legally acceptable before me which has the effect (either with respect to *locus standi* or with respect to jurisdiction) of properly conferring upon the second applicant (apparently the Nyandeni Kingdom) any position as a party to these proceeding, and as far as I am concerned there is no application before me on the part of the second applicant. In broad outline this affidavit tells the following story:
 - 3. The applicant is a headman/prince in the Lwandile administrative area.
 - 4. Deep within the Kingdom of Western Pondoland is an area called KwaKhonjawo, under the chieftainship of one Mapiki Gwadiso. At some stage the applicant's deceased father was also a chief/inkosi of this area, but handed over this position to Mapiki Gwadiso when he joined the Allied forces during the Second World War. Upon his return his father

discovered that Mapiki Gwadiso and his nephew (Gobizitwana Gwadiso) had moved “the great place” to Mapiki Gwadiso’s house in the Nkanunu administrative area. His father unsuccessfully tried to reclaim the chieftainship which he had briefly relinquished, which resulted in turn in the applicant losing his chieftainship as well.

5. His father died in 1957. Thereafter Mapiki Gwadiso handed the chieftainship over to Gobizitwana advising this nephew that he was acting on the applicant’s behalf, as the applicant was still at school. Instead of acting in good faith, Gobizitwana told King Poto at the Nyandeni Royal Palace that the applicant was dead and that he was the next chief in line. This is how the chieftainship was “illegally” transferred from the applicant’s house (the House of Sithelo) to the House of Gwadiso.
6. Upon the applicant’s return home after completing his scholastic career, Gobizitwana, instead of stepping down, forced the applicant to be a headman instead. This is then how the applicant ended up holding this comparatively inferior position, as opposed to having succeeded his father as a chief.
7. It was difficult for the applicant to challenge what had transpired. Gobizitwana was a member of the ruling party under the leadership of KD Matanzima. His son, Chief Dumisani Gwadiso became a minister of the then Transkei government.
8. During 1988 the Sithelo Royal Family eventually identified the applicant as a chief. A delegation was sent to Chief Gwadiso to apply for the creation of the applicant’s own traditional council, but he refused.
9. He approached King Ndamase (who was a state president of the Transkei) at Nyandeni who confirmed that according to the records of chieftainship in Western Poland, the applicant was indeed the only chief of

AmaKhonjwayo, and accordingly approved his application. Unfortunately for the applicant, what transpired then is that Ndamase handed over to Chief Boklein who was an acting king. Boklein did nothing to process the application.

10. Steeped in this series of unfortunate events, the applicant approached Queen Regent Ndamase in 2007. Her Royal Highness advised him to launch a fresh application whereafter he was eventually appointed as chief at a meeting of the Sithelo royal family. In March 2010 the third respondent was shown the minutes of this meeting and it was requested that the applicant should have his own traditional council.
11. One Gcinikaya Gwadiso who was an acting chief threatened him and chased him away. However King Ndamase who had succeeded his mother approved his application and ensured that it reached the first respondent's department. There it was discovered that Dumisani Gwadiso had exercised some influence to block the application once again. They complained of this to King Ndamase who invited the first respondent to meet with him. At this meeting in July 2010 the erstwhile first respondent (Mr Gqobhana) announced that the applicant's application had been approved. This had indeed been confirmed in a government notice dated 25 June 2010 which notice confirmed that the tribes concerned and the Nyandeni Regional Authority had been consulted and that this Regional Authority had agreed that there would be two traditional councils in the Ngqeleni district (one called Khonjwayo and the other called Vulindlela) and that the previous government notice dated 14 May 1971 referring to the Khonjwayo Traditional Council only, was withdrawn.

12. At the same time the applicant received another letter informing him that his appointment as a chief had been withdrawn, because it was the view of the House of Traditional Leaders that the Gwadiso Royal Family had not been approached before this decision had been taken.
13. In response to this the minutes of the meeting held by the third respondent were forwarded to the House of Traditional Leaders.
14. The applicant points out in his affidavit that the recognition of a traditional leader is regulated by section 18 of the Eastern Cape Traditional Leadership and Governance Act 4 of 2005 ("the Act"). In terms of this section, the first applicant contends, the member of the executive council acting for the premier is entrusted with authority to recognise traditional leaders (iNkosi and iNkosana), and that the House of Traditional Leaders has no authority or power to approve or disapprove such applications. So the first applicant contends, the decision taken by the erstwhile first respondent to withdraw his approval of the establishment of the Vulindlela Traditional Council, was based on the instruction of the fourth respondent and it must accordingly be set aside.
15. Despite this having been raised at various levels, nothing further transpired until the present first respondent (Mr Qoboshiyani) invited them to a meeting during March 2011, where he stated that the directors of his department had advised him either to approve applications or to refer them to the commission for claims and disputes. As this commission had not yet been appointed, so Applicant contends, the present first respondent approved the application unconditionally promising that a confirmation letter would follow.

16. However, the very next week the applicant received a letter from the superintendent-general for local government and traditional affairs advising him that the first respondent had directed that his application for the establishment of the Vulindlela Traditional Council in the district of Ngqelene had been referred for determination to the provincial committee of the commission on traditional leadership disputes and claims and that the establishment of a new traditional council would be considered by the first respondent's department on receipt of this commission's final determination. This, despite the fact that the first respondent's assistant had informed him that the first respondent bore no knowledge of this.
17. The applicant again smelt a rat in the person of none other than Dumisani Gwadiso, particularly in that, as far as the applicant was concerned, this superintendent-general had no authority to decide this matter.
18. In the premises the applicant contends that this decision is fraudulent, illegal and has no basis and should be set aside for lack of authority on the first respondent's part, contending further that the commission would deal with his matter of its own accord.
19. As he had been advised that "senior officials" were adamant to implement this decision, he appealed to King Ndamase once again. The king invited the present first respondent for the second time in the presence of the Queen Mother and other members of the Royal House.
20. At this meeting the first respondent said nothing about the referral of the applicant's application to the commission. Instead he requested the minutes of the applicant's meeting with the Gwadiso Traditional Council stating that it is no longer a part of the Nyandeni Kingdom. Having been

furnished with this information, the first respondent promised that he would finalise the applicant's application. However, not having been able to make telephonic contact with the first respondent "since then", the applicant decided to launch the application which is currently before me.

The Respondents' case

21. The respondents are opposing this application. In support of this opposition, they have delivered the affidavit of one Nodumo Vuba, who is a senior manager in the office of the deputy director general of local government and traditional affairs in the Eastern Cape.
22. Vuba contends that the application is *sans* foundation both in fact and in law.
23. She refers to sections 5 and 6 of the Act dealing with the recognition of traditional communities and the establishment and recognition of traditional councils. What is required firstly, she says, is that the relevant community should be recognised by the Premier as a traditional community. Once this has happened, that community must establish itself as a traditional council in line with the provisions set forth in section 6(2).
24. Secondly, she contends that the identification of the person who should be the iNkosi or iNkosana of the traditional council is, in terms of section 18 of the Act, the prerogative of the royal family under whose jurisdiction that traditional community falls. The person so identified must qualify in terms of customary law to assume this position.

25. As there is no indication on the papers that the localities have been recognised as traditional communities they fall under the Khonjwayo Traditional Council. Attempts at forming a new traditional council (that of Vulindlela) have been abandoned by the first respondent.
26. Ms Vuba states that according to the department's records there is no indication that the people of the areas in question have applied to the premier for recognition of these areas as a separate traditional community from the larger Khonjwayo tribe. As this was not done, and is the first step towards the attainment of the status of a traditional community, the first applicant's application cannot succeed. She says that the localities over which the first applicant claims authority form an integral part of the land belonging to the Khonjway tribe, which is a traditional community which has been recognised for a very long time, and whose genealogy points to the royal Gwadiso family. It is then this family, and not the Nyandeni Kingdom, which has the prerogative to decide who should become a traditional leader.
27. In traversing the applicant's affidavit, she raises the following:
- (a) That the applicant's father was not a chief but a headman. In support of this contention, she attaches to her statement a letter reporting the death of the applicant's father, wherein he is referred to as a headman. She further contends that Mapiki Gwadiso could not therefore have been asked to act as chief instead of the applicant's father, as the applicant's father was never a chief. Instead, she says, the person who was asked to act in the place of the applicant's father as headman was the applicant's aunt, one Nongqawuse. The person in whose stead Mapiki Gwadiso acted as chief was Zwelidumile Gwadiso who was still at school (this is apparently the

same person as the Gobizitwana referred to by Applicant as mentioned hereinbefore). Thus, when the applicant's father returned from the war Nongqawuse relinquished his position and he resumed his duties as headman up until he died.

- (b) Her records do not reflect that the applicant's father ever made a claim to chieftainship of the Khonjwayo people.
- (c) Insofar as the applicant's grievance is an historical one and his claim is hotly disputed by the royal family of the Khonjwayo tribe (the Gwadisos), Vuba contends that the correct forum to deal with it in terms of the Traditional Leadership and Governance Framework Act 41 of 2003 ("the Framework Act") is the Commission on Traditional Leadership Dispute Claims which has a provincial committee in the Eastern Cape, and that the Superintendent-General of the Eastern Cape Department of Local Government and Traditional Affairs has already taken steps to refer this claim to the committee. In this regard she refers to the same letter which the applicant attached to his affidavit, which confirms (as at 12 April 2011) that the matter had in fact been referred as such.
- (d) King Ndamase and the erstwhile first respondent, in approving the first applicant's application were (in terms of sections 5, 6 and 18 of the Act) acting *ultra vires*. This is the sole prerogative of the Khonjwayo royal family. According to the most recent records of the first respondent's department, there is only one royal family in respect of the Khonjwayo territory, and that is the Gwadiso family. This is supported by the Government Gazette of 14 May 1971 which establishes the Khonjwayo tribal authority and its jurisdiction. Included in this geographical jurisdiction are all the areas over which

the applicant claims authority. The third respondent's head who is also head of this royal family is Chief (Nkosi) Mpumalanga Arthur Gwadiso. I digress to mention that Chief Gwadiso, as head of the third respondent has deposed to an affidavit contending that throughout the periods of colonial administration through to apartheid rule, there has never been a challenge to the legitimacy of the line of succession of the chiefs of this tribe. As such, and because the present challenge is the first of its kind, thorough ventilation and investigation is required. Accordingly the third respondent, whilst *opposing* (my emphasis) the relief sought by the applicant, supports the referral of the applicant's claim to the provincial committee of the Commission on Traditional Leadership Disputes and Claims. Chief Gwadiso further confirms that the opposition to the application is not only based on historical reasons but also on the fact that the third respondent was not consulted when the erstwhile first respondent gave recognition to the applicant's claims, and that the third respondent has a direct and substantial interest in the outcome of a claim which may have the effect of "hiving off vast chunks of territory of the Khonjwayo tribe".

- (e) Whilst it is admitted that the erstwhile first respondent approved the applicant's application, this was a grave mistake on his part resulting in the subsequent withdrawal of this approval.
- (f) The House of Traditional Leaders could only advise the erstwhile incumbent of the position of First Respondent, it could not give instructions. Section 18 of the Act empowers the first respondent to give recognition to the identification by the royal family of an appropriate incumbent for the position of traditional leader, and that

this is the prerogative of the royal family acting in accordance with custom.

- (g) In this matter the Khonjwayo royal family had not been consulted and it had not identified the applicant as a chief.
- (h) In the absence of such a *resolution* (my emphasis) on the part of the royal family any recognition of the applicant as a chief and purported subsequent establishment of the Vulindlela Traditional Council is void *ab initio*, because an invalid decision or act cannot have valid consequences.

The Applicant's response

- 28. The applicant has responded to all of the aforesaid by, in a nutshell claiming that Khonjwayo is a clan name and not the name of a tribe, and that they fall under the Nyandeni Kingdom and pay allegiance to king Ndamase. He admits that his father was a headman before he went to war, but contends that this headmanship was elevated to chieftainship.
- 29. In commenting on the suggestion that this matter be dealt with by the Commission on Traditional Leadership Disputes and Claims, he disputes that the problem can be resolved at this level because it was approved by the second respondent and the member of the executive council of the first respondent. He does not dispute that the third respondent is a traditional council but contends that it pays allegiance to the Nyandeni Kingdom.

Discussion

- 30. In essence what is before me is an application seeking the following intervention by this court:

- (a) To set aside an administrative decision taken by a member of the executive arm of government.
- (b) To direct the same arm of government to appoint the applicant as head of a traditional council.

31. In a nutshell the applicant is of the view that this Court ought to make these orders because he, the applicant, has sought to address his grievances with the current member of the executive council for local government and traditional affairs (Mr Qoboshiyani) who apparently promised the applicant (significantly it is not known when) that he would finalise the applicant's application for the very relief which he now seeks from this court, but that he has not done so. The final paragraph of the first applicant's affidavit reads thus:

"Since then I never found Mr Qoboshiyane on the telephone again since I decided to approach this Honourable Court for the relief prayed for in the Notice of motion."

32. The respondents' attitude to this averment is that the applicant's efforts in the past are all an exercise in futility as "none of these people" are repositories of power to identify chiefs in the Khonjwayo but that this is the sole prerogative of the Khonjawo royal family.

33. In reply the applicant does not deny this contention but reiterates what he said in his founding papers which is the following:

"I tried to put pressure on officials by phoning on a regular basis. Sometime in March 2010 we visited Mr Mathetha one of senior managers of the Department of Traditional Affairs with a view to making a follow up to my application. We were shocked when inter alia Mr Mathetha told us that Gwadiso had written him a letter persuading him from processing my

application stating that if my application can be approved his chieftainship will be in trouble....

This was amazing and confusing to us and we remained wondering if why Dumisano Gwadiso could have a conversation with a senior manager whose actions can have a detrimental effect to my application, moreover the same Dumisani Gwadiso wrote a letter of emancipation from Kingdom of Western Pondoland stating that, he cannot be ruled by King Ndamase.”

34. The Applicant has not prevailed upon this Court to direct that his application should be dealt with properly. What he has done is to rely on an inordinate amount of hearsay (and in my view both sides to this dispute are guilty of this) creating substantial factual disputes to re-argue an historical argument before this Court before exhausting his internal remedies and without prevailing upon this Court to assist him to close off all internal avenues available to him before seeking such drastic relief from this Court.
35. In my view the existence of, or the absence of authority and power on behalf of certain parties to make or withdraw decisions is neither here nor there at this stage of the proceedings and I am not impressed with the emotionally charged and irrelevant submissions which have been made with impunity on behalf of all the role-players in this application.

Applicable legislation

36. The applicant's representative has alluded in argument before me to section 3 of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”), which states that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. The applicant contends (and this is a question which

may well have to be decided in due course) that he has been the victim of procedural unfairness.

37. What the applicant's legal representative has not addressed (and nor has the representative for the respondents for that matter), is the steps which ought to be taken, or ought to have been taken in terms of section 3 of PAJA to give effect to the right to procedurally fair administrative action. Nor do the parties apply their minds to section 5 of PAJA which states that any person whose rights have been materially affected by administrative action and who has not been given reasons for the action (as in the case before me), may within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned *furnish written reasons* (my emphasis) for the action.
38. It is only in the circumstances where an administrator fails to furnish adequate reasons for administrative action that it can be presumed (subject to certain qualifications and in the absence of proof to the contrary), in any proceedings for judicial review (which in my view is what these proceedings were intended to be as they can be nothing else) that the administrative action was taken without good reason.
39. I do not intend repeating *verbatim* the clear steps set forth in sections 3, 5, 6, 7 and 8 of PAJA dealing with procedurally fair administrative action, reasons for administrative action and the need to request such reasons, the judicial review of administrative action which is a function which this court has when all the steps referred to have been taken, the procedure on review and the remedies in proceedings for judicial review.
40. Suffice it to say that the applicant has not followed the correct procedure in launching this application, nor has he sought directions from this court

as to the way forward. On the contrary, the effect of this application is to demand drastic and far reaching intervention from this court when he himself has properly exhausted all internal remedies and avenues before approaching this court for relief. The papers before me are an example of what ought to have been, or at least ought to have been attempted to resolve before seeking the intervention of this court to the extent which the applicant has done. This is particularly so because section 8(1)(c)(ii) clearly states that this court should only in *exceptional cases* (my emphasis) substitute or vary administrative action or correct a defect resulting from such action or direct the administrator or any other party to the proceedings to pay compensation.

41. In the light of the history of these proceedings and the failure of the applicant to properly exhaust his internal remedies (an avenue which the respondents seem to have suggested; alternatively, are now suggesting) I cannot even begin to find that this is an exceptional case, particularly in that what is before me is nothing less than a maze of hearsay upon hearsay, contradictions, material factual disputes, opinion and speculation.
42. In the premises there are no prayers before me which make out a case for the granting of relief in terms of those prayers, and the application falls to be dismissed.

Costs

43. As I have mentioned, there is nothing in the papers which makes out a case for the existence of a second applicant before me. There is also nothing before me to suggest that costs should not follow the result. I accordingly make the following order:

ORDER:

- 1. The application is dismissed.**
- 2. The Applicant Hlatikhulu Sithelo is directed to pay the costs of this application.**

STRETCH J

Judge of the High Court

DATE HEARD: 03 DECEMBER 2013

DATE DELIVERED: 18 MARCH 2014

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