IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MTHATHA)

CASE NO.: 3603/2021

Reportable	**YES/ NO**

In the matter between:

SAZISO MKONO **First Applicant**

GIBISELA TRADITIONAL COUNCIL **Second Applicant**

and

MEC FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS, EASTERN CAPE **First Respondent**

PREMIER OF THE EASTERN CAPE **Second Respondent**

NTSIKA MKONO **Third Respondent**

LWAZI MKONO **Fourth Respondent**

JUDGMENT

CENGANI-MBAKAZA AJ

Introduction

[1] To address the principle of finality in litigation, Chacklason P (as he then was) stated that legal disputes must come to an end to caution against uncertainty

and prejudice if courts could be approached to reconsider final orders made[1]. Although the court was seized with an application for the variation of a court order in that matter, I find these remarks pertinent in the present instance and agree with the principle raised.

[2] This matter involves a history of litigation from a dispute over the headmanship of the Ndanya Administrative area in Ngqeleni district('AmaNdanya community'). The dispute had originated following the death of Velile Mkono('Nkosana Velile'). In the papers filed, the parties' legal representatives referred to previous court cases and orders. The relevance thereto will be demonstrated during the course of this judgment.

The parties

[3] The first applicant is an adult male person, of Mpindweni location, Ndanya Administrative Area in the district of Ngqeleni.

[4] The second applicant is the Gibisela Traditional Council, a traditional structure formed and recognised in accordance with section 6 of the Eastern Cape Traditional Leadership and Governance Act 2017 ('the Act'). Mr Mdodana appeared on behalf of both applicants.

[5] The first respondent is a Member of the Executive Council for Cooperative Governance and Traditional Affairs in the Province of the Eastern Cape ('the MEC').

[1] The Minister of Justice v v Nicko Ntuli, Case No CCT 17/95;CCT 15/97 heard on 22 May 1997 and delivered on 5 June 1997; see also MEC for the Department of Public Works and Others v Ikamva Achitects (PTY) Ltd(596/2008) [2024]ZAECBHC 6(25 April 2024) para 1.

[6] The second respondent is the Premier of the Eastern Cape ('the Premier') cited in his capacity as a person entrusted with the responsibility to recognise traditional leaders in the Province of the Eastern Cape. Mr Ngumle appeared on behalf of the first and second respondents.

[7] The third and fourth respondents are cited as interested parties in the proceedings. No relief is sought against them. Mr Mtshabe appeared on behalf of the third and fourth respondents.

The factual matrix

[8] In the era of the former Republic of Transkei, the late Nkosana Velile occupied the position of the headman of the amaNdanya community. After leaving his position as a headman, he stayed with the first applicant's mother who was his second wife.

[9] Preceding his death he signed a will *('umyolelo'*) where he bequeathed the headmanship and the land of the amaNdanya Tribal Authority to the first applicant. However, when it came to the issue of the land the master of the High Court declined to administer the will stating that he has no jurisdiction and authority to administer a land that falls under the Tribal Authority. Subsequently, some members of the amaNdanya community held a meeting where they identified the third respondent as their headman. For the purposes of fulfilling the wishes of the late Nkosana Velile, on 02 April 2018, the first applicant and his siblings from the second wife's lineage held a meeting where they identified the first applicant as the headman of the

amaNdanya. The meeting was held under the chairpersonship of one of the aunts Nomawonga Mapipa ('udadobawo Nomawonga').

[10] The third respondent approached the court under case number 3067/2019 challenging *umyolelo*, the matter of which is still pending before court. Despite this, the MEC under provincial gazette No. 4483/2020 dated 26/11/2020[2] expressed his intention to recognize the first applicant as the headman of the amaNdanya community.

[11] Consequently, the third respondent launched an application under case No. 4048/2020 against the MEC. By way of summation, the third respondent sought to interdict the MEC from identifying the first applicant as the headman of the amaNdanya community. Around February 2021, the parties were ad idem that the issue of the suitable headman should be investigated by the MEC.

[12] On 09 February 2021, the parties obtained an order by consent under case No.4048/2020. The order reads thus,

> "Having considered the documents filed of record and hearing Mr Mtshabe, for the applicant:

[2] The government gazette was published by the Department of Cooperative Gorvenance and Tradition Affairs. It reads, **THE INTENDED RECOGNISION OF THE PERSONS IDENTIFIED BY THE ROYAL FAMILIES AS TRADITIONAL LEADERS IN THE EASTERN CAPE.** 'I, Xolile Nqatha, Member of the Executive Council responsible for the Co-operative Governance and Traditional Affairs in the Eastern Cape Province under the power delegated to me by Section 23 (1)(b)(i) of the Traditional Leadership and Governance Act, 2017 (Act No. 1 of 2017) and affetr having informed the Provincial House of Traditional Leaders of such intended recognitions,hereby make known for general information the intended recognition of persons identified by the royal families as traditional leaders in the Eastern Cape per attached schedule. Comments (if any) must be submitted within 21 days of the date of the publication of the notice as contemplated in subsection (b)(i) of the same act'. In terms of the annexure, SAZISO MKONO (the 1st applicant) is identified as such.

IT IS ORDERED BY CONSENT THAT:

1. The application, in respect of both PART A and PART B, is stayed pending the investigation by the 1st Respondent, the MEC for Co-operate Governance and Traditional Affairs, on the suitable candidate for the Headmanship of AmaNdanya Administrative Area, Ngqeleni, between the Applicant and the 7th Respondent;
2. That costs of the application are hereby reserved."

[13] In the court order dated 09 February 2021, Ntsika Mkono was cited as the first applicant and amaNdanya royal family as the second applicant, Saziso Mkono was cited as the seventh respondent. Around March 2021, the MEC appointed a panel which concluded its investigation into the suitable candidate to be recognised as the headman of the Amandanya community[3]. The MEC jotted its findings in a letter dated 14 July 2021. The letter which was addressed to the first applicant demonstrates the following extracts:

"FINDINGS

The findings by the panel are based on presentations received from parties to the dispute and historical evidence from the archive consulted by the panel.

Finding 1

1. The headmanship of Ndanya location is hereditary as it has been evidently passed from one heir to another over generations for over a century.

Finding 2

2. With regard to the meeting of the Ndanya Royal Family to nominate a successor, the findings are:

(a) The meeting was not properly convened as Mrs Nomawonga Mapipa was not qualified to convene such a meeting in terms of the custom applicable to amaNdanya, although she qualifies to be a full participant and that the senior

[3] In a letter dated 23/03/2021, the MEC notified the first applicant that a panel was appointed. Further to that, he was advised to prepare for an interview and focused on the following area: the geneology of Amandanya headmanship, Customary law of succession(the houses and their seniorities; history of succession;houses of the late headman, precedence of a will.

house of Velile Mkono and their paternal uncles were not involved in convening the meeting as per the custom.

(b) The composition of the meeting was not adequately representative of amaNdanya as a family as it was held exclusive of other houses of amaNdanya which used to be included before.

(c) The venue of the meeting was not in terms of custom as it was not held at the Great Place that is, Bertie's homestead at Mconco Location or the senior house of Velile Mkono. The custom does not permit the holding of such a crucial meeting in the junior house of Inkosi or headman.

Finding 3

3. With regard to the nomination of a successor to Velile Mkono:

(a) The nomination of anyone for permanent recognition other than Lwazi Mkono, who is currently *inkulu*- the great son- of Velile upon the death of Mcoseleli, is at variance with applicable customary law of practice of succession among the amaNdanya as a sub-tribe of AmaMpondo. **Neither Ntsika nor Saziso Mkono have a legitimate claim to succession so far in terms of the customary law and practice applicable to amaNdanya.** (accentuation added)

(b) Either of them can only be appointed on an acting capacity for Lwazi as long as Lwazi is still alive or Lwazi's son in the unfortunate event he dies, of course, such appointment would be on the recommendation by the legitimate royal family with active involvement of Lwazi and amaNdanya royal family.

(c) The person who qualifies to succeed Velile Mkono or Mcoseleli Mkono in terms of the applicable custom is Lwazi as inkulu of velile upon the death of Mcoseleli.

Upon the above findings and its recommendations that the rightful heir to the position is Mr Lwazi Mkono, I therefore communicate that the Department will process a resolution as per the findings which the rightful royal family is to take into account."

[14] On 27 July 2021, the royal family consisting of thirty-two members held a meeting where they identified the fourth respondent as the headman of the amaNdanya community. On 15 October 2021, the Premier through the government

gazette No.4053/2021 expressed his intention to recognise the fourth respondent as the headman.

[15] Aggrieved by the findings of the MEC, the first and second applicants approached this court for an order in terms of Uniform Rule 53 of the Uniform Rules of Court. The relief sought by the applicants in the amended notice of motion reads as follows:

> "Reviewing and setting aside the First Respondent's decision conveyed in a letter dated 14 July 2021 addressed to the First Applicant and annexed to the First Applicant's founding affidavit as 'SM 14'.
>
> Declaring the First Respondent's act of appointing a panel to investigate the headmanship of Ndanya Administrative Area, Ngqeleni between the First Applicant and the Third Respondent to be unlawful and of no legal force and effect whatsoever.
>
> Declaring that the resolution of Ndanya Administrative Area Headmanship dispute by the Second Applicant on the 3rd April 2018 remains the lawful determination of who should be the headman of Ndanya Administrative Area between the First Applicant and the Third Respondent.
>
> Declaring unlawful the Second Respondent's stated intention to recognise the Fourth Respondent as headman of Ndanya Administrative Area published in the Provincial Gazette No. 4653 dated 25 November 2021 being Provincial Notice 176/2021.
>
> Directing the Second Respondent or the First Respondent to recognise the First Applicant as the Headman of Ndanya Administrative Area in the district of Ngqeleni.
>
> That the First and Second Respondent be directed to pay the costs of the application jointly and severally with the Third and Fourth Respondent to pay the costs of the application in the event of them opposing same, in which event they will be liable together with the First and Second Respondent jointly severally the one paying each other to be absolved.
>
> Granting the Applicants such further and/or alternative relief as the Honourable court deems meet*(sic)*'"

[16] In opposing the application, the third and fourth respondents filed affidavits. The third respondent's affidavit and the confirmatory affidavit of Dickson Mkono, a member of the royal family, demonstrate that all the erstwhile headmen of the amaNdanya community had been the first sons of the great house which were identified by the royal family. They contended that the royal family that identified the first applicant as the headman was not properly constituted. The second applicant, so they averred, failed to resolve the dispute arising from the headmanship of the amaNdanya community. On 06 June 2021, the MEC and the Premier filed the notice to oppose the application but filed no opposing papers.

The legal framework

[17] Section 211 of the Constitution[4] protects the institutions that are unique to customary law. Within customary law, the institution, status and the role of traditional leadership are duly recognised subject to the provisions of the Constitution[5]. In terms of the Constitution, the national[6] and provincial legislation may provide for the establishment of houses of traditional leaders[7]. Pertaining to the issue of headmanship, as in the present case, the provincial legislation applicable is the Eastern Cape and Traditional Affairs Act 1 of 2017. The Act aims, *inter alia*, to consolidate the laws governing traditional institutions in the Eastern Cape Province ('the Province'), including the recognition of traditional communities as well as the

[4] The Constitution of the Repuoblic of South Africa, Act 108 of 1996, (the 'Constitution')

[5] Section 211(1) of the Constitution.

[6] The national legislation is the Traditional Leadership and Government Framework Act, 2003.

[7] Section 211(2) of the Constitution provides, 'To deal with the matters relating to traditional leadership, the role of the traditional leaders, customary law and the customs of communities observing a system of customary law- (a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and (b) national legislation may establish a council of traditional leaders.

establishment and recognition of principal traditional councils. The Act further aims at providing for the recognition of traditional leaders, their functions and their removal from the office.

[18] Section 23 of the Act provides,

> "Whenever the position of a traditional leader is to be filled-
>
> (a) The relevant royal family must within 14 days after the position becomes vacant-
>
> (i) Identify a person who qualifies in terms of the customs of the relevant traditional community to assume the position in question after taking into account whether any grounds referred to in section 24 (1) apply to that person; and
>
> (ii) Through the relevant customary structure, inform the Premier of the particulars of the person identified to fill the position and of the reasons for the identification of that person; and
>
> (b) (i) the Premier must subject to subsection (5) by notice in the Provincial Gazette, invite comments on the intended recognition of the person identified by the royal family as a traditional leader and;
>
> (iii) Comments as contemplated in subsection (b)(i), must be submitted within 21 days of the date of the publication of the notice."

[19] The conflict resolution procedures are governed by section 36 (2) of the Act which empowers the king or queen's council or principal traditional council to refer the dispute to the Provincial House of Traditional Leaders. If for whatever reason the Provincial House of Traditional Leaders is unable to resolve the dispute, such must be referred to the Premier. The Premier must seek to resolve the dispute after having consulted the parties involved in the dispute; the king or queen's council; the

principal traditional council; the provincial traditional council and the Provincial House of Traditional Leaders[8].

The preliminary issues

[20] Before I traverse to the main issues, it is imperative to dispose of a crisp question of procedure that was raised by Mr Ngumle on behalf of the MEC and the Premier. Mr Ngumle, although failing to file affidavits sought leave to file heads of argument which I granted. Relying, in part, on the impugned Rule 53 record, he argued that the matter must be referred for oral evidence in terms of the Uniform Rule 6(5)(g) of the Uniform Rules of Court[9]. The issue of customary practise, so he contended, cannot be resolved on the papers filed. Messrs Mdodana and Mtshabe held a contrary view and argued that in the spirit of the expeditious resolution of this matter, the court is empowered by the Plascon Evans Rule[10] to adjudicate and resolve the disputes through the affidavits. Mr Mdodana went on further and argued that the issue of customary practice was settled by the Traditional Council.

[21] The principle is that a real, genuine and accentuated dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has

[8] Section 36(2)(d)(i),(ii) and (iii) of the Act.

[9] Uniform Rule 6(5)(g) of the Uniform Rules of court provides that where an application cannot properly be decided on affidavit, the court may dismiss the application or make such order as it deems fit with a view of ensuring a just and expeditious decision.

[10] Plascon- Evans Paints Limited v Van Riebeeck Paints Pty Ltd (53/84 [1984] ZASCA). The Rule is provided at para as follows,' where there is a dispute as to the factsa final interdict should only be granted in the notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order….where it is clear that facts, though not formally admitted cannot be denied, they must be regarded as admitted..''see also Stelenbosch Winery (Pty)Ltd 1957(4) SA 234 (C)

in his affidavit seriously and unambiguously addressed the fact said to be disputed. In *Frank v Ohlsson's Cape Breweries Ltd*[11]. Innes C.J (as he then was), said:

> *"But where the facts are really not in dispute, where the rights of the parties depend upon a question of law, there can be no objection, but on the contrary a manifest advantage in dealing with the matter by the speedier and less expensive method of motion".*

[22] The approach of relying on the defied Rule 53 record in support of the application for the referral of the matter for oral evidence with no affidavits filed is impermissible. Messrs Mdodana and Mtshabe were in agreement that this matter could be disposed of through the motion proceedings. It is also worth mentioning that, considering the circumstances of this particular matter, it would even be undesirable for the court to *mero motu* raise a question of the dispute of fact, especially because there is no basis to do so[12]. In my opinion, the facts are a common cause and largely necessitate a finding on the question of law. If necessary, the application of the Plascon-Evans Rule will apply. For the reasons set out above, and with respect, there is no cogency in the argument raised by Mr Ngumle in this regard.

[23] It is gleaned from the fourth respondent's answering affidavits that certain points of law were raised namely, misjoinder and non-joinder. These issues were not seriously pursued in the written and oral arguments presented before the court. To avoid prolixity, no finding will be made since these issues are not the essential ingredients of the case.

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[11] 1924 AD 289 at. 294

[12] Santini Publishers CC v Waylite Marketing CC 2010(2) SA p.53.

The impugned record

[24] It is well-established that the primary purpose of Uniform Rule 53 is to facilitate and regulate review applications[13]. In terms of Uniform Rule 53 (b) the party seeking a review shall call upon the Chairperson or the Presiding officer to dispatch within 15 days of receipt of the notice of motion, to the Registrar, the record of the proceedings sought to be reviewed. The record enables the court to fully assess the lawfulness or otherwise of the decision-making process.

[25] In the matter under consideration, the record titled **'NDANYA HEADMANSHIP SUCCESSION DISPUTE INVESTIGATION REPORT BY THE PANEL OF THE MEMBER OF THE EXECUTIVE COUNCIL FOR THE DEPARTMENT OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS (EASTERN CAPE) 2021'** is found on pages 92-167 of the court's bundle(the Rule 53 record/ the record). The record is accompanied by certain attachments that were submitted by the interviewees during the consultation and or investigation process.

[26] It is common cause that the record is a result of the court order that was obtained by consent on 09 February 2021. On 24 February 2021, the MEC appointed a panel comprising of Mr Malibongwe L.Ngcai ('the Chairperson of the panel'), Mrs Nomsa Mabanga and Mr Vuyo Stofile. Various meetings between the members of the panel appointed by the MEC('the panel'), the first applicant, the third and fourth respondents, Chief Bokleni, the Gibisela traditional council's representative, King Ndamase Ndamase and many other relevant parties were held.

[13] Jockey Club of South Africa v Forbes 1993 (1) SA 649 (AD) at 661 E.

[27] Gathering from the record and the affidavits filed, the genealogy of the amaNdanya is uncontroverted. The AmaNdanya is a traditional community at the level of headmanship which is a branch of the AmaKhonjwa sub-tribe. Administratively, the community is under Gibisela Traditional Council in the magisterial district of Ngqeleni. The AmaNdanya's Traditional Council is under the Nyandeni Kingship an area which used to be called Western Pondoland.

[28] The last incumbent in the position of headmanship was Celuxolo Mkono(Nkosana Celuxolo) who succeeded Mcoseleli after their father Nkosana Velile left the office. Nkosana Velile had two wives, Noncedile Mildred Mkono of the Great House ('the Great wife') and Nonzwakazi Elizabeth Mkono of the Right-Hand House('the Right-Hand wife').

[29] The Great wife bore four children: a daughter named Nonkosazana followed by three sons: Mcoseleli(deceased), Lwazi, Ntsika and Celuxolo. Conversely, the Right-Hand wife bore three sons Silulami, Saziso, and Likhona and three daughters Khuthala, Kholiswa(deceased) and Mfusikazi.

[30] During the consultation, the first applicant informed the panel that amaNdanya adheres to the distinct law of succession that differs from that of amaKhonjwa and amaFaku. According to the record, udadobawo Nomawonga and the first applicant were agreeable that the succession position of amaNdanya is always through *umyolelo* of *inkosi*. When asked to explain whether the customary procedure to nominate the first applicant as a headman of the amaNdanya was followed, the first applicant asserted that all the elders of the great house which

included Nonkosazana, Lwazi and Ntsika were invited but did not attend the meeting.

[31] When consulted by the panel, the third and fourth respondents gave insight on the customary practice of amaNdanya. They expressed that when Inkosi/Nkosana dies, the royal family convenes a meeting and identifies anyone from the Great wife as a headman. The elder son-*inkulu* is by default the successor unless his character is deemed unfit for the role. The sons of the Right-Hand wife could only be nominated in circumstances where there were no suitable heirs from the Great wife's lineage.

[32] Chief Bokleni who represented the second applicant informed the panel that the amaNdanya headmanship was a gift from amaFaku. He asserted that the identification of the first applicant as a headman was not based on *umyolelo* but rather on the decision of the right-hand wife's sons and daughters. According to Chief Zuzekile Bokleni who was also interviewed, Silulami, although he was an elder son of the Right-Hand wife could not be nominated because he does not have a strong character. He further stated that it was not customary for a Great wife to birth an heir or a successor.

[33] King Ndamase Ndamase informed the panel that he is not familiar with the custom of *umyolelo* among amaMpondo. Nkosazana Malahle also indicated that in traditional leadership, *umyolelo* is not applied; instead*, inkulu* is nominated as the successor. He stated that the *inkulu* is *intlabamkhonto*- the one who is the custodian of the customary spear and must always reside at the Great Place. Inkosi Gxaba added that *inkulu* automatically assumes the position from birth, the identification is

only a formality. King Ndlovuyezwa informed the panel that the son from the junior house could only be appointed as a headman in an acting capacity. The Kingship advised the panel that the aunt- *u dadobawo* is permitted to attend the meetings where a headman is nominated even if she is married, but has no authority to convene and chair a meeting.

The grounds of review

[34] In his founding affidavit, the first applicant raised the following grounds of review:

> "34.1 The headmanship dispute of Ndanya Administrative Area was resolved at the Gibisela Traditional Council on 03 April 2018 in Nyandeni Kingdom in accordance with the provisions of Section 31(1) of Act No 1 of 2017 read with the provisions of the Traditional Leadership and Governance Framework Act No. 41 of 2003(as amended).
>
> 34.2 There was no basis in law, to act in terms of Section 36(2) of Act No 1 of 2017 once the second applicant had resolved the dispute as it did.
>
> 34.3 There was lacking jurisdictional facts for the first respondent to exercise power conferred on the second respondent (the Premier) by section 36(2)(d) of Act No 1 of 2017.
>
> 34.4 The court order dated 9 February 2021 confined the investigation to suitability between the adversaries at the time. It did not open an investigation to include the fourth respondent."

[35] In his answering affidavit, the fourth respondent contended that the investigation was unanimously approved by all the parties involved in the litigation. The investigation traced the hereditary status of headmanship and concluded that neither the first applicant nor the third respondent is eligible to be recognised as the

headman. Furthermore, the fourth respondent maintained that the protocol preceding his identification as the headman of the amaNdanya was procedurally followed.

Discussion and analysis

[36] In the amended notice of motion which is accompanied by the founding affidavit, the first applicant did not specify whether the proceedings ought to be reviewed in terms of the common law[14] or the Promotion of Administration of Justice Act (the PAJA)[15]. However, reference to the PAJA was correctly made in the applicants' supplementary heads of argument. The PAJA is the most significant source of judicial review by the court, drawing its own legitimacy from section 33 of the Constitution which provides,

> "Just administrative action
>
> (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
>
> (2) Everyone whose rights have been adversely affected by the administrative action has the right to be given reasons.
>
> (3) National legislation must be enacted to give effect to these rights, and must- (a) provide for the review of administrative action by the court or, where appropriate an independent and impartial tribunal……"

[37] In his body of work, Cora Hoexter[16] says,

[14] At common law, the the three well established grounds of review which are now missing from the list expounded by PAJA were: vagueness, rigidity, and fettering.

[15] Promotion of Just Administrative Justice Act 3, 2000. The Act gives effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action as contemplated in section 33 of the Contitution.

[16] Administrative law in South Africa, Cora Hoexter page 114 at para b.

"…..however PAJA is now the primary or default pathway to review. (accentuation added). This follows logically from its main purpose, which is to give effect to the constitutional rights in s 33". (footnote omitted)

[38] In *Batho Star Fishing (Pty) Ltd v Minister of Environmental Affairs*[17], O'Regan J confirmed that the PAJA provides the foundation for the cause of action for judicial review of administrative action and not from the common law as it was previously. In paragraph 25 of the judgment she provided the summary of the post-PAJA position as follows:

"The provisions of s 6 divulge a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA. The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past".

[39] In this matter, it is common cause that the decision taken by the MEC is an administrative action[18]. Furthermore, the applicant's case falls within the realm of the PAJA. Considering the pronouncement made by the Constitutional Court[19], as highlighted at paragraph 38 of this judgment, section 6[20] of the PAJA sheds light on

[17] 2004(4) SA 490 CC at para 25.

[18] Administrative action means a decision taken or any failure to take a decision by by –(a) any organ of the state when-(i) exercising a power in terms of the Constitution or a provincial Constitution, or(ii) exercising a power in terms of any legislation.

[19] See above fn 17.

[20] Section 6 of the PAJA provides, '1. Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

2. A court or tribunal has the power to judicially review an administrative action if-(a) the administrator who took it-(i) was not authorised to do so by the empowering provisions;(ii) acted under the delegation of power which was not authorised by the empowering provision; or(iii) was biased or reasonably suspected of bias;(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;(c) the action was procedurally unfair;(d) the action was materially influenced by an error of law;(e) the action was taken-(i) for a reason not authorised by the empowering provision;(ii) for an ulterior purpose or motive; (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;(iv) because of an unauthorised or

how I should approach these review proceedings. Section 8 of the PAJA deals with the remedies that are applicable in proceedings for judicial review. I shall now proceed to deal with the grounds of review.

Was the administrative action lawful and reasonable?

[40] The most significant principle of administrative law is that the exercise of the power must be authorised by the law. The question is whether the dispute which arose from the headmanship of the Ndanya Administrative Area was resolved by the Gibisela Traditional Council. One must also examine whether the MEC was authorised to act in accordance with section (36) (2) of the Act as he did. I am acutely aware that the court's responsibility does not entail a thorough analysis of the administrative action's merits. The court cannot usurp the function of the administrative agency[21]. This notwithstanding, it is worth mentioning that the administrative action has the substantial and procedural ingredients. For that reason, *inter alia,* the highlighted grounds of review require a consideration of the brief historical background of this dispute.

[41] From time immemorial, there has been a dispute over the headmanship of amaNdaya. Upon consideration of the papers filed, it was known by Chief Bokleni,

unwarranted dictates of another person or body;(v) in bad failt;or (vi) arbitrarily or capriously;(f) the action itself (i) contravens the law or is not authorised by the empowering provision; or (ii) is not rationally connected to-(aa) the purpose for which it was taken;(bb) the purpose of the empowering provision;(cc) the information before the administrator;or(dd) the reasons given for it by the administrator;…….

[21] See above fn.17.

the representative of the Gibisela Traditional Council and others that Nkosana Velile's sons are uncontrollable and the dynamics of polygamy are the core cause of the family feud. It was expected of Nkosana Velile's sons including the sons and daughter of the Great wife to form part of the meeting when the first applicant was identified as a headman. It has been established that the fourth respondent and his siblings were not present in the meeting where the first applicant was identified as the headman. It was further acknowledged by Dickson Mkono (a royal member),the third and fourth respondents that contrary to the customary practice udadobawo Nomawonga chaired the meeting which identified the first applicant as the headman of the amaNdanya.

[42] The whole procedure that was adopted in identifying the first applicant as the headman led to the institution of civil proceedings under case No.4048/2020. The Gibisela Traditional Council was cited as the fifth respondent in the proceedings.

[43] Undisputedly, the parties' legal representatives constituted a meeting where it was agreed that the MEC must be given an opportunity to investigate and determine who should be the headman of kwaNdanya. This settlement was approved by the court and is legally binding between the parties. Considering the above, it is axiomatic that in retrospect the Gibisela Traditional Council under the leadership of Chief Blokleni doubted its own recommendations and was therefore unable to resolve the dispute hence it entered into the legally binding settlement which led to the investigation by the MEC. If the dispute was resolved, there would be no basis for the Gibisela Traditional Council under the leadership of Chief Bokleni to enter into a legally binding agreement authorising MEC to investigate the dispute in terms of section 36(2) (d) of the Act. In the circumstances, the argument positing

that the dispute was resolved by the Gibisela Traditional Council is implausible. The recommendations of the Gibisela Tribal Council where the first applicant was identified as the headman were overtaken by the events. In this regard the horse has bolted and with respect, the applicants are grasping at straws.

[44] Section 6(2) (a) (i) of the PAJA envisions judicial review where the administrator was not authorised by the empowering provision to take administrative action. The general rule is that powers given to one administrator must be exercised by that administrator and not by some other unauthorised person or body *(delegatus delegare non-potest).* The next question is whether the first respondent was authorised by any empowering provision to act in terms of Section 32(2)(d) of the Act as he did. Referring to the case of *Fedsure Life Assurance Ltd and Others v Great Johannesburg MetropolitanCouncil and Others*[22], Mr Mdodana correctly argued that in every sphere, the legislature and the executive are constrained by the principle that they may exercise no power and perform no function beyond that which is conferred upon them by the law. It is trite that the exercise of public power must strictly comply with the principle of legality[23].

[45] To answer the question raised, it is apposite to pass through the provisions of section 88 of the Act. This provision empowers the Premier to delegate any powers conferred on him to the MEC excluding the powers to make regulations. Therefore, by investigating this dispute the MEC acted within the scope of his powers as delegated to him by the Premier. It was always known through the exchange of letters between the MEC and the parties involved in this matter that his delegated authority is statutorily prescribed.

[22] 1999 (1) SA 374 (CC) at para 58.
[23] Merifon (Pty) Limited v Greater Letaba Municipality &Another [2022] ZACC 25 at para 1.

[46] Upon proper examination of the objective facts, it is my view that it was incumbent upon the MEC to investigate because: the dispute could not be resolved by the amaNdanya community, the traditional leaders, the king and the Provincial House of Traditional leaders. It is common cause that the Provincial House of Traditional Leaders recused itself in the matter since it was already pending before the court[24]; the issues relating to customary practice and the dispute on who should take over the headmanship were intertwined; and further, the MEC was authorised to investigate and determine a candidate through a legally binding document, the court order. The argument postulating that the report and its findings should be set aside is tantamount to an application for the revocation of the very same court order dated 03 February 2021 through a backdoor.

[47] There was a contention that the MEC acted beyond his powers by recognising the fourth respondent as the headman of the amaNdanya. Mr Mdodana argued that the court order limited the MEC to investigate and determine a headman between the first applicant and the third respondent. Respectfully, this argument has no merit. In the erstwhile proceedings, case No. 4048/2020 the amaNdanya royal family was cited as the second applicant. Another entity called amaNdanya royal family chaired by udadobawo was also cited as the fifth respondent. Although no names of the royal family were specified in the papers filed, it was obligatory upon the MEC to include the royal family in its consultation and make a determination as authorised by the court. The Act defines the royal family as follows:

[24] In a letter dated 14/07/2021 addressed to the first applicant, the MEC notified the him that on 16 May 2019 the House of Traditional Leaders attended a claim lodged by Ntsika Mkono for the Ndanya Adiminstrative Area. The MEC further advised the first applicant that the House of Traditional Leaders resolved that it had no power to adjudicate over a matter that had a court judgment. 'SM 14' at page 62 of the index bundle.

> "Royal family means the core customary institution or structure consisting of immediate relatives of the ruling family within a traditional community who have been identified in terms of the custom, and includes, where applicable other family members who are close relatives of the ruling family."

[48] The fact that the fourth respondent was birthed by the Great wife is undisputed. The seniority of the Great wife in the family remains uncontroverted. In terms of the definition of the royal family, the offspring of the great-wife are immediate relatives who qualify to be part of the investigation and the determination process as authorised by the court. In my opinion, there is no shred of evidence to suggest that the MEC acted arbitrarily or capriciously.

[49] Mr Mdodana further challenged a document that was completed in the identification of the fourth respondent as Inkosana of the amaNdanya[25]. The nub of his complaint is that such a document is clearly a nullity on the basis that a repealed legislation was quoted in the document. The Act applicable in these proceedings is Act No.1 of 2017 and not the Traditional Leadership and Governance Act No.4 of 2005 as reflected in the document. The question is whether the form that was completed which reflects a repealed law nullifies the entire process of identification as prescribed by Section 23 of Act 1 of 2017.

[50] Mr Mtshabe submitted that the members of the royal family may not be legal experts and educated people. For that reason, he argued, they may not have had a

[25] The document is annxed at page 239 of the bundle and is titled: **ROYAL FAMILY RESOLUTION FORMS. IDENTIFICATION OF A PERSON TO ASSUME THE POSITION OF INKOSANA/ACTING INKOSANA/REGENT**. The following are the extracts of the document: The amaNdanya in a meeting held on 27 July 2021 identified Lennox Lwazi Mkono of Mchonco Administrative Area id number : ……. as Inkosana of Gibisela Traditional Council/ administrativeArea in the district of Ngqeleni. In terms of the Traditional Leaders and Governance Act, 2005 (Act no.4 of 2005)…….

clear knowledge of the legal provisions that were applicable in the identification process. This argument was never advanced in the affidavits filed. To settle this issue, it should be observed that section 23 of the Act and the regulations applicable thereto, do not prescribe the paper work that needs to be filled out in the identification process. In my considered view, the goal of the identification of the headman was achieved. Despite the fact that a repealed legislation is quoted in the document that was completed to identify the fourth respondent as the headman, there is nothing to fault in the route that was followed in achieving such a goal. I, therefore, conclude that the decision of the MEC fell within the ambit of reasonableness as required by the PAJA and the Constitution.

Was the administrative action procedurally fair?

[51] It is well settled that in every administrative action, the rules of natural justice ought to be followed. Procedural fairness in the form of *Audi alterm partem* affords the participants an opportunity to state their case and participate in the decisions that will affect them. In the bulky record of the administrative action proceedings, the applicants have failed to identify which of the areas in the record were procedurally unfair. Undisputedly, all the relevant role-players including the applicants were: notified of the prepared administrative action[26]; given an opportunity to be heard and given an opportunity to prepare and submit all the relevant information and or documents that would assist in the investigation process. They all participated and played their key roles in the administrative action proceedings.

[52] Despite the fact that the panel noted intricacies in the cultural practice of amaNdanya, the evidence presented did not establish any unfairness, bias, or

[26] Fn. 3 *supra.*

perceived bias in the administrative action proceedings. Consequently, the applicants have failed to make up a case for the relief sought.

Order

[53] The following order is issued:

1. **The application is dismissed.**

2. **The first and second applicants are ordered to pay the costs of the third and fourth respondents jointly and severally, the one paying the other to be absolved.**

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N CENGANI-MBAKAZA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

APPEARANCES:

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Date Heard	:	01 February 2024
Date Delivered	:	30 April 2024