IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, BHISHO

Case no. 169/14
Date heard: 7/8/15
Date delivered: 18/8/15
Reportable

In the matter between:

PREMIER OF THE EASTERN CAPE	**First Appellant**
CHIEF GECELO	**Second Appellant**
THE GCINA TRADITIONAL COUNCIL	**Third Appellant**
MEC FOR LOCAL GOVERNMENT AND TRADITIONAL AFFAIRS	**Fourth Appellant**

and

PENROSE NTAMO	**First Respondent**
NOMVUZO NOPHOTE	**Second Respondent**
DUNGUZA CUBA	**Third Respondent**
ZOYISILE TYANDELA	**Fourth Respondent**
LOCAL PLANNING COMMITTEE, CALA RESERVE	**Fifth Respondent**

JUDGMENT

PLASKET, J

[1] It is the constitutional function of the judicial arm of government to determine and resolve justiciable disputes between parties. That function includes deciding disputes as to whether the executive or legislative arms of government, or other

organs of state, have acted within or beyond the powers conferred on them by law. This is a function that has, in the jurisprudential tradition of which our Constitution is part, always been entrusted to the courts since the landmark case of *Marbury v Madison*.[1] No other branch of government is institutionally able to perform this function[2] and, to the extent that it may be suggested that this jurisdiction offends the doctrine of the separation of powers, it is an intrusion into the terrain of the other branches of government that is permitted, expressly, by the Constitution.[3]

[2] This appeal concerns the limits of administrative power, exercised by the fourth respondent, the MEC for Local Government and Traditional Affairs in the Eastern Cape provincial government (the MEC), acting on the delegated authority of the first appellant, the Premier of the province, to recognise (ie appoint) a headman. The respondents – the applicants in the court below – brought an application to review and set aside the appointment of Mr NJ Yolelo (the fifth respondent in the court below, who is not party to this appeal) as headman for the Cala Reserve in the Xhalanga district of the Transkei region of the Eastern Cape.

[3] In the court below, Nhlangulela ADJP, in granting the application, made an order:

'1. That the decision of the fourth and/or first respondent to recognise the fifth respondent as the headman of the Cala Reserve, taken on or about 04 July 2013, be and is hereby reviewed and set aside.

2. That the first respondent be and is hereby directed to refer the matter back to the Royal Family in terms of sections 18(3) and 18(4) of the Traditional Leadership and Governance Act 4 of 2005.

3. That it be and is hereby declared that the customary law of the Cala Reserve requires its headmen to be elected by members of the community, in accordance with custom and customary law.

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[1] *Marbury v Madison* (1803) 1 Cranch 137. See too Tribe *American Constitutional Law* (2 ed) at 24-25.

[2] Mahomed 'The Independence of the Judiciary' (1998) 115 *SALJ* 658 at 660: 'Some credible body must be vested with the power to blow the whistle when the constitutional covenant is transgressed. Without such power, that covenant has no teeth. The body armed with that power cannot be the alleged transgressor itself. It cannot be the state agency accused of the transgression. In a credible democracy it can therefore *only* be the judiciary. It, and it alone, must have the final power to decide whether the impugned enactment or decree of a powerful legislature, or the action of an equally powerful executive, or administration, has transgressed the constitutional covenant.' See too Mahomed 'The Role of the Judiciary in a Constitutional State' (1998) 115 *SALJ* 111 at 111.

[3] *Minister of Health & others v Treatment Action Campaign & others (No. 2)* 2002 (5) SA 721 (CC), para 99. See too ss 34 and 172 of the Constitution.

4. That the first, third and fourth respondents pay the costs of ths application, the one paying and others being absolved from liability.'

[4] That order is appealed against, with the leave of the court below, by the first to fourth respondents, the Premier, Chief Gecelo, the amaGcina Traditional Council and the MEC.

The facts

[5] The material facts are, when the principles set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[4] are applied, not in dispute. This is a classic case for which the application procedure was designed: it involves undisputed facts and, a number of technical points aside, a crisp legal issue.[5]

[6] As stated, the dispute between the parties concerns the validity of the decision taken by the MEC to appoint Yolelo as headman of the Cala Reserve. That, in turn, raises whether the MEC and the amaGcina royal family acted in compliance with the Traditional Leadership and Governance Act 4 of 2005 (EC), the legislation that empowers royal families to 'identify' candidates for headmanship and the Premier to 'recognise' headmen in the province.[6] I shall refer to this Act as the Governance Act.

[7] Mr JH Fani was appointed as headman of the Cala Reserve in 1979. In late 2012, he indicated to the amaGcina Traditional Council that he wished to retire. He later informed the fifth respondent, the local planning committee appointed by him as an advisory body, that the amaGcina Traditional Council had acceded to his request that he be allowed to retire.

[8] The planning committee convened a community meeting to discuss the issue. As residents of the Cala Reserve have always elected their headmen, debate

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[4] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C.
[5] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA), para 26.
[6] The term 'royal family' is defined in s 1 of the Governance Act as '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 custom, and includes, where applicable, other family members who are close relatives of the ruling family'.

developed as to a suitable successor to Fani. Mr Gideon Sitwayi, a sub-headman and Fani's de facto deputy, emerged as the favoured candidate.

[9] On 25 February 2013, a community meeting was held at which Sitwayi was elected as headman by the majority of those present. Fani and Mr Penrose Ntamo, the deponent to the founding affidavit and a member of the planning committee, were given the task of reporting the result of the election to the amaGcina Traditional Council. When they tried to do so, on 27 February 2013,Chief Gecelo, the head of the Council, was not available so their report was left with the Council's secretary who informed them that the community had acted unlawfully by conducting an election in the absence of the Council.

[10] When the Council met on 4 March 2013, it was critical of Fani for allowing the community meeting to take place without Council members being present. He was informed that the Council would go to the Cala Reserve on 11 March 2013 to 'introduce' the new headman. He was also told, strangely, that arrangements would be made for the police to be present. It became clear from the Council's meeting that it did not accept the election of Sitwayi because he was not a member of the royal family.

[11] The meeting only took place on 27 March 2013. The Council's representatives included Gecelo. A Mr Jentile, a councillor, informed those present that the delegation had no intention of having a meeting with the community: it was there to introduce the person chosen by the royal family to be the new headman for the Cala Reserve. Gecelo said that the delegation would not answer any questions. He then announced that the new headman was Yolelo.

[12] Unhappiness was expressed about the community being 'silenced' both as to the election of the headman and in having a headman imposed on it. Ntamo, in the founding affidavit, set out the Council's response as follows – and this captures the nub of the issue in this appeal:

'Jentile proceeded to explain that while it is true that the Cala Reserve always elected its headmen, the new law had stopped that practice and instructs the royal family to elect the headman. We understood the reference to the "new law" to be a reference to the Eastern

Cape Act. Chief Gecelo took the opportunity to tell the crowd: "*nokuba niyathanda okanye anithandi na, yiroyal family ethatha izigqibo ngokubekwa kwenkosana*" (whether you like it or not, it is the royal family that decides on the headman").'

[13] The planning committee then commenced with a process of engagement with various bodies and functionaries. Letters were sent, over a period of time, to the Council, the Regional Traditional Council at Qamata, the Department of Local Government and Traditional Affairs and the Premier of the province. The central theme of all of the correspondence was that 'the royal family did not follow procedure as laid out in the Eastern Cape Act which indicates that it must consider the customary law of the area in replacing a headman'. All of these efforts of the planning committee, and later, of its attorneys, came to naught. In the meantime, it emerged that Yolelo was already receiving an official salary and that plans were afoot for his installation as headman.

[14] The applicants in the court below launched an urgent application in which they claimed two forms of relief. In part A of the notice of motion, they sought to interdict Yolelo 'from continuing with his planned inauguration as headman of the Cala Reserve, scheduled for 25 March 2014, pending the determination of the relief sought in **Part B** of this application'. Part B of the notice of motion embodied prayers for the review and setting aside of the decision to appoint Yolelo and for a related declaratory order.

[15] The interdict was granted, unopposed, by Mjali J. Despite that, however, Yolelo proceeded with his inauguration. Apparently, contempt of court proceedings were instituted against him because of his disregard of Mjali J's order.

[16] The basis for the decision to identify and recognise Yolelo was given in the answering affidavit, deposed to by Mr JS Mateta, the Acting Director-General of the Department of Local Government and Traditional Affairs. He stated that, at the meeting at which Yolelo was introduced to the community as its headman, it was explained to those present that in identifying Yolelo, 'the Royal Family took into account existing customary practice in identifying the fifth respondent as he is a member of the Royal Family by virtue of being and belonging to the "Gcina" clan'.

[17] A more detailed explanation is contained in a letter, dated 25 November 2013, written by the Superintendent-General: Local Government and Traditional Affairs to the Chief State Law Advisor in the office of the Premier, and also given to the respondents' attorneys. It states:

'1. . . .

2. It is the prerogative of the Gcina Royal Family to identify a suitable person to occupy a Traditional Leadership position as inkosana of Cala Reserve Administrative Area.

3. The department received one resolution from the royal family and as such the Honourable MEC recognised Ndodenkulu (Ndodenkulu) Yolelo as inkosana of Cala Reserve Administrative Area in the district of Cala.

4. In terms of the repealed Transkei Authorities Act, 1965 (Act 4 of 1965) the then tribal authority had the power to appoint a headman of the particular administrative area and as such that person was not necessarily required to have royal blood in his or her veins.

5. However, the Transkei Authorities Act had a provision which required the consultation of the registered voters before the appointment could be confirmed by the then office of the Prime Minister of the Transkei homeland administration.

6. In terms of the National & Provincial legislations it is the prerogative of the royal family just to identify a person who will be an inkosana or headman with no provision stipulating the involvement of the respective community of that particular administrative area.

7. In the light of the foregoing, the identification and recognition of Mr N Yolelo as inkosana of Cala Reserve Administrative Area in the district of Cala had been done in accordance with the provisions of the legislation.'

The legislation

[18] The Cala Reserve falls within the Transkei region of the Eastern Cape. It was formerly a so-called independent homeland. Its road to 'independence', as part of the implementation of grand apartheid, commenced with the Black Authorities Act 68 of 1951, included the grant of self-governing status in terms of the Transkei Constitution Act 44 of 1963 and ended with the promulgation of the Status of the Transkei Act 100 of 1976 in terms of which it, supposedly, ceased to be part of the Republic of South Africa and became an independent country.[7] It then adopted its own Constitution, the

[7] This 'independence' was not recognised by any country apart from South Africa, leading Streek and Wicksteed to comment in *Render Unto Kaiser: A Transkei Dossier*, 199: 'If the proof of Transkei's national independence is whether or not other independent countries recognise it, then Matanzima's

Republic of Transkei Constitution Act 15 of 1976. Its model of local government in the rural areas was based on tribal institutions created by the Black Authorities Act, essentially tribal and regional authorities.

[19] Prior to the promulgation of the Governance Act by the Eastern Cape legislature, a Transkei statute governed the appointment of chiefs and headmen in that region. That was the Transkei Authorities Act 4 of 1965. I shall say more of this Act later. It was, in truth, nothing more than the Transkeian version of the Black Authorities Act. The system that has replaced it consists of an interlocking complex of constitutional provisions, national legislation and provincial legislation.

[20] In the first place, s 211 of the Constitution provides:

'(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.

(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.

(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.'

[21] The national legislation that applies is the Traditional Leadership and Governance Framework Act 41 of 2003 (the Framework Act). It serves, as its name suggests, as the framework for detailed and context-specific provincial legislation. The preamble of the Framework Act sets out both its purpose and the values upon which it is based. It states:

'WHEREAS the State, in accordance with the Constitution, seeks-

* to set out a national framework and norms and standards that will define the place and role of traditional leadership within the new system of democratic governance;
* to transform the institution in line with constitutional imperatives; and
* to restore the integrity and legitimacy of the institution of traditional leadership in line with customary law and practices;

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state has been an ignominious failure from the start. Attempting to gain credence in the capitals of a disbelieving world, it has only succeeded in converting stony silence into derisive laughter.'

AND WHEREAS the South African indigenous people consist of a diversity of cultural communities;

AND WHEREAS the Constitution recognises-

* the institution, status and role of traditional leadership according to customary law; and
* a traditional authority that observes a system of customary law;

AND WHEREAS-

* the State must respect, protect and promote the institution of traditional leadership in accordance with the dictates of democracy in South Africa;
* the State recognises the need to provide appropriate support and capacity building to the institution of traditional leadership;
* the institution of traditional leadership must be transformed to be in harmony with the Constitution and the Bill of Rights so that-
  - democratic governance and the values of an open and democratic society may be promoted; and
  - gender equality within the institution of traditional leadership may progressively be advanced; and
* the institution of traditional leadership must-
  - promote freedom, human dignity and the achievement of equality and non-sexism;
  - derive its mandate and primary authority from applicable customary law and practices;
  - strive to enhance tradition and culture;
  - promote nation building and harmony and peace amongst people;
  - promote the principles of co-operative governance in its interaction with all spheres of government and organs of state; and
  - promote an efficient, effective and fair dispute-resolution system, and a fair system of administration of justice, as envisaged in applicable legislation,

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:-'

[22] The Governance Act is the provincial legislation that concerns traditional leadership in the Eastern Cape province. It, in other words, is intended to give effect to s 211 of the Constitution consistent with the framework created by the Framework

Act and in accordance with its norms and standards. Its preamble makes this clear. It states:

'**WHEREAS** the National Government has, in the White Paper on Traditional Leadership and Governance, set out the norms and standards for transformation in line with constitutional imperatives and restoration of the integrity and legitimacy of the institution of traditional leadership in accordance with custom and customary practices;

AND WHEREAS the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003) was enacted to set norms and standards for traditional leadership and governance throughout the Republic of South Africa;

AND WHEREAS there is need for the Government of the Province of the Eastern Cape to enact Provincial legislation within the framework of the Traditional Leadership and Governance Framework Act, 2003 to provide for matters which are peculiar to the Province;

BE IT THEREFORE ENACTED by the Legislature of the Province of the Eastern Cape, as follows:-'

[23] Section 3 contains guiding principles. Section 3(1) places an obligation on the State to 'respect, protect and promote the institution of traditional leadership in accordance with the dictates of democracy in South Africa'. Section 3(2) provides:

'The institution of traditional leadership must be transformed to be in harmony with the Constitution and the Bill of Rights so that:-

(a) democratic governance and the values of an open and democratic society may be promoted; and

(b) gender equality within the institution of traditional leadership may progressively be advanced.'

Sections 3(3)(a) and (b) provide that the institution of traditional leadership must 'promote freedom, human dignity and the achievement of equality and non-sexism' and 'derive its mandate and primary authority from applicable customary law and practice'.

[24] Section 18 provides for the procedure for the appointment of a headman (iNkosana in isiXhosa). It states:

'(1) Whenever the position of an iNkosi or iNkosana is to be filled –

(a) The royal family concerned must subject to such conditions and procedure as prescribed, within sixty days after the position becomes vacant, and with due regard to applicable customary law –

(i) identify a person who qualifies in terms of customary law to assume the position in question, after taking into account whether any of the grounds referred to in section 6(3) apply to that person; and

(ii) through the relevant customary structure, inform the Premier of the particulars of the person so identified to fill the position and of the reasons for the identification of that person; and

(b) the Premier must, subject to subsection (5), by notice in the *Gazette*, recognise the person so identified by the royal family as an iNkosi or iNkosana, as the case may be.

(2) Before a notice recognising an iNkosi or iNkosana is published in the *Gazette*, the Premier must inform the Provincial House of Traditional Leaders of such recognition.

(3) The Premier must, within a period of thirty days after the date of publication of the notice recognising an iNkosi or iNkosana issue to the person who is identified in terms of paragraph (*a*)(i), a certificate of recognition.

(4) Where the Premier has received evidence or an allegation that the identification of a person referred to in subsection (1) was not done in accordance with the provisions of this Act, customary law or custom the Premier –

(a) may refer the matter to the Provincial House of Traditional Leaders for its recommendation; or

(b) may refuse to issue a certificate of recognition; and

(c) must refer the matter back to the royal family for consideration and resolution where the certificate of recognition has been refused.

(5) Where a matter, which has been referred back to the royal family for reconsideration and resolution in terms of subsection 4(*a*), has been reconsidered and resolved, the Premier must recognise the person identified by the royal family if the Premier is satisfied that the reconsideration and resolution by the royal family has been done in accordance with customary law.'

[25] Section 6(3) of the Governance Act specifies five qualities that a person must possess in order to be a member of a traditional council and, in terms of s 18(1)(a)(i), in order to be identified as a headman. They are that the person:

'(a) is above the age of 21;

(b) has not been convicted of an offence and sentenced to more than 12 months imprisonment without the option of a fine;

(c) is not an unrehabilitated insolvent;

(d) is a South African Citizen; and

(e) is ordinarily resident within the jurisdiction of the traditional council.'

[26] It is evident from s 18 of the Governance Act that customary law plays a role in the identification of a headman: when the royal family identifies a person to fill the position of a headman, it must have 'due regard to applicable customary law' and the person so identified must be a person who 'qualifies in terms of customary law to assume the position in question'. It is therefore necessary to turn to the question of what the applicable customary law is in this matter. (I do so mindful of the argument advanced by Mr Sishuba who, together with Mr Poswa, appeared for the appellants, that the Transkei Authorities Act abolished the applicable customary law and that there is now a customary law void in respect of the appointment of headmen in the Transkei region. I shall return to this argument in due course.)

The applicable customary law

[27] Sections 1(1) and (2) of the Law of Evidence Amendment Act 45 of 1988 provides:

'(1) Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy and natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles.

(2) The provisions of subsection (1) shall not preclude any party from adducing evidence of the substance of a legal rule contemplated in that subsection which is in issue at the proceedings concerned.'

[28] It is not possible for judicial notice to be taken of the customary law that applies in the Cala Reserve to the appointment of headmen. It cannot 'be ascertained readily and with sufficient certainty'. That being so, it must be proved.[8]

[29] The requirements for the recognition of a custom as a binding rule of common law or customary law have been held to be four-fold: the custom must be long established, reasonable and certain and be uniformly observed.[9] In *Shilubana &*

[8] *Mabena v Letsoala* 1998 (2) SA 1068 (T), 1075A-B.

[9] *Van Breda & others v Jacobs & others* 1921 AD 330, 334; *Ex parte Minister of Native Affairs: In re Yako v Beyi* 1948 (1) SA 388 (A), 384-395. See too Bennett *A Sourcebook of African Customary Law for Southern Africa*, 138.

others v Nwamitwa[10] this formulation was criticised and modified because it was held not to be capable of accommodating changes to customs and the development of customary practices: as Van der Westhuizen J said, 'while change annihilates custom as a source of law, change is intrinsic to and can be invigorating of customary law'.[11]

[30] As I understand the judgment, it adapts *Van Breda & others v Jacobs & others*[12] in order to factor in recognition of developing practices and the altered constitutional framework. It does so in two ways. In the first place, it recognises that the requirement of the reasonableness of a custom must be 'applied in a way compliant with the Constitution'.[13] Secondly, the court formulated the rest of the requirements as follows:[14]

'To sum up: where there is a dispute over the legal position under customary law, a court must consider both the traditions and the present practice of the community. If development happens within the community, the court must strive to recognise and give effect to that development, to the extent consistent with adequately upholding the protection of rights. In addition, the imperative of s 39(2) must be acted on when necessary, and deference should be paid to the development by a customary community of its own laws and customs where this is possible, consistent with the continuing effective operation of the law.'

[31] The Constitutional Court has, on a number of occasions now, dealt with the place of customary law in the South African legal order. In *Bhe & others v Magistrate, Khayalitsha & others (Commission for Gender Equality as amicus curiae); Shibi v Sithole & others; South African Human Rights Commission & another v President of the Republic of South Africa & another*,[15] Langa DCJ observed that 'the Constitution itself envisages a place for customary law in our legal system' and that particular provisions 'put it beyond doubt that our basic law specifically requires that customary law should be accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the

[10] *Shilubana & others v Nwamitwa* 2009 (2) SA 66 (CC).
[11] Note 10, para 54.
[12] Note 9.
[13] Note 10, para 52.
[14] Note 10, para 49.
[15] *Bhe & others v Magistrate, Khayalitsha & others (Commission for Gender Equality as amicus curiae); Shibi v Sithole & others; South African Human Rights Commission & another v President of the Republic of South Africa & another* 2005 (1) SA 580 (CC), para 41.

Constitution'. In *Alexkor Ltd & another v The Richtersveld Community & others*,[16] the following was said:

'While in the past indigenous law was seen through the common-law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution. The courts are obliged by s 211(3) of the Constitution to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law. In doing so the courts must have regard to the spirit, purport and objects of the Bill of Rights. Our Constitution

". . . does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill (of Rights)".

It is clear, therefore, that the Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system. At the same time the Constitution, while giving force to indigenous law, makes it clear that such law is subject to the Constitution and has to be interpreted in the light of its values. Furthermore, like the common law, indigenous law is subject to any legislation, consistent with the Constitution, that specifically deals with it. In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.'

[32] Evidence as to the customary law that applies to the appointment of headmen in the Cala Reserve was tendered in the affidavit of Professor Lungisile Ntsebeza who occupies the NRF Research Chair in Land Reform and Democracy in South Africa as well as the AC Jordan Chair in African Studies at the University of Cape Town and who is the director of the Centre for African Studies at the same university. His expertise, which is unchallenged, stems from his research, including his doctoral research, over the last 20 years into 'the political implications of Constitutional recognition of the hereditary institution of traditional leadership in post-1994 South Africa for the democratisation process in the rural areas of the former Bantustans', with a focus on 'the sphere of rural local government in the Xhalanga District', within which the Cala Reserve falls.

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[16] *Alexkor Ltd & another v The Richtersveld Community & others* 2004 (5) SA 460 (CC), para 51. See too *Bhe's* case (note 15), paras 42-46; *MM v MN & another* 2013 (4) SA 415 (CC), paras 23-25; *Shilubana's* case (note 10), paras 42-43.

[33] Professor Ntsebeza's evidence is to the following effect. The districts of Xhalanga and Southeyville formed what was termed Emigrant Thembuland (now referred to as Western Thembuland) when amaThembu people who had moved to the Glen Grey area in the 1830s were persuaded by the colonial authorities to move from there in 1865. These districts were allocated to four chiefs who had agreed to move from Glen Grey, namely Matanzima, Ndarala, Gecelo and Stokwe. According to Professor Ntsebeza, all of these chiefs apart from Ndarala, had 'lacked legitimacy and authority at the time for various reasons and saw the relocation as an opportunity to strengthen their chieftaincies'.

[34] In addition to the amaThembu people who now occupied these districts, a number of amaMfengu people were also invited by the four chiefs. They, unlike the amaThembu, 'did not have chiefs and owed allegiance to no chiefs'. Professor Ntsebeza states that chieftaincies were 'imposed upon them – with greater and lesser success'. Importantly, he states that the amaMfengu, 'together with the so-called "school people" of the area did not regard chieftaincy as part of their custom and even actively undermined the institution'. In this, they were supported by the local colonial administrators, with the result that 'the chieftaincies of Xhalanga and Stokwe's Southeyville were far weaker than in other areas around them'.

[35] After the Gun War of 1880 to 1881, a select committee of the Cape Parliament recommended that Gecelo be dispossessed of his land and stripped of his title.[17] This ended the chieftaincy in Xhalanga until the 1950s following the implementation of the Black Authorities Act 68 of 1951, the National Party government's initial building block for grand apartheid and the homeland system.[18]

[36] Professor Ntsebeza describes that resultant system of local government in the district from the 1890s until the 1950s as follows:

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[17] The Gun War was a localised rebellion in Basutoland, led by a chief, aimed at resistance to the attempts by the colonial authorities to disarm African people of their firearms. The impact of this and other similar incidents in other parts of the country was 'to make the chiefs suspect in the eyes of the Cape government'. Laurence *The Transkei: South Africa's Politics of Transition*, 18. See too Davenport and Saunders *South Africa: A Modern History* (5 ed), 160-161.

[18] See Carter, Karis and Stultz *South Africa's Transkei*, 46. Although this observation is not part of Professor Ntsebeza's affidavit, the legal process by which the apartheid system and the homelands in particular were created is well known, and that legislative history is not contentious.

‘The new system of governance that emerged towards the 1890s was one where a magistrate was directly responsible to the chief magistrate who was put in charge of each of the districts. Districts were divided into “wards” or “locations”. Government appointed a headman in each location. The latter was not necessarily from a chiefly background, and was accountable to the magistrate. The headman served as an important link between government and rural people.’

[37] The Glen Grey Act of 1894 introduced a system of local district councils but the establishment of these structures was resisted in the Xhalanga district for a number of years. It was only in 1924 that the Union Government succeeded in imposing a local district council on the Xhalanga community.

[38] A dual system of administration developed. The local district councils functioned at district level, while headmen administered at location level. They were, in effect, the link between magistrates (who then performed a range of administrative functions, as well as their judicial functions) and local communities. They were elected by members of the community in the Xhalanga district, including the Cala Reserve.

[39] The Black Authorities Act, which made provision for tribal, regional and territorial authorities, was premised on administration by chiefs.[19] The imposition of chiefs in Xhalanga in the late 1950s gave rise to resistance. The Act was used by KD Matanzima, who later became the first prime minister, and later, president, of the Transkei after so-called self-government and then independence, to entrench himself in power in Emigrant Thembuland and to revive the chieftainships of Gecelo and Stokwe that had been abolished in the late 19th century.

[40] Even as the authorities sought to impose the Act on the people of Xhalanga, the latter continued to insist ‘on their democratic right to elect their leaders, to which they were, by then accustomed’. Despite this, four tribal authorities – kwaGcina, emaQwathini, aHlathini and eQolombeni – were created in Xhalanga in 1957.

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[19] Horrell *Laws Affecting Race Relations in South Africa: 1948 to 1976*, 36.

[41] On 12 August 1958, KD Matanzima was to be introduced as paramount chief of Emigrant Thembuland and Gecelo and Stokwe were to be introduced as sub-chiefs to administer Xhalanga. Matters spiralled out of control when paramount chief Sabata introduced Matanzima to the gathering, with extremely strong views being expressed against both Matanzima and chiefly rule.

[42] Professor Ntsebeza says of this incident:

'There are various contrasting accounts of what happened that day but that the meeting was disrupted and that unhappiness with chieftaincy was expressed is beyond doubt. The installation only went ahead in the afternoon and under heavy police guard.'

[43] Ten men were later charged with contravening a provision of the Black Administration Act 38 of 1927 on the basis of their forthright and colourful utterances that made it clear that they were opposed to Matanzima and chiefly rule in Xhalanga. They made these views clear in their trial as well, contributing, no doubt, to their conviction.

[44] As a result of resistance such as this, increasingly repressive measures were used against the people of Xhalanga and, according to Professor Ntsebeza, rule by chiefs and headmen 'became decidedly authoritarian and despotic', with Matanzima going out of his way to 'persecute and humiliate the people of Xhalanga'.

[45] In 1963, the South African Parliament enacted the Transkei Constitution Act 44 of 1963 which conferred self-governing status on the Transkei homeland. It was able to pass legislation in certain, limited, fields only.[20] One piece of legislation that it passed was the Transkei Authorities Act 4 of 1965, which replaced the Black Authorities Act for the Transkei.

[46] The Transkei Authorities Act's procedure for the appointment of headmen was set out in s 41(3) which provided:

'The appointment of a headman or an acting headman shall be made after consultation, free of any tribute, fee, reward or present, with the paramount chief concerned and with the

[20] Horrell (note 19), 44.

registered voters of the particular administrative area at a meeting convened for this purpose.'

[47] Professor Ntsebeza says of the application of this procedure in the Xhalanga district:

'56. In the case of Cala, this clause was interpreted to provide registered voters with the opportunity to identify candidates of their choice for election by them. There may well be other parts of Transkei where a different practice is followed, especially in places such as Mpondoland, where headmen were drawn from the relatives of chiefs. However, the appointment of chiefly relatives was not the general practice in Cala. There was one administrative area in Xhalanga called Mbenge, where consultation of registered voters did not take place, but this was under specific and unusual circumstances that are explained below. The general practice in Xhalanga, including Cala, was that registered voters identified and elected candidates.

57 The Transkei administration may have followed the tradition that had been established in parts of Transkei. Indeed, the case Xhalanga shows that even a dictator and despot such as Chief KD Matanzima failed in his attempt to change established practices and tradition, including the election of headmen.'

[48] Professor Ntsebeza's affidavit establishes that the practice in Xhalanga (with one limited exception with its own peculiar history) has been, for more than 100 years, that the community elects its headmen. He also states that from his study of rural local government in Xhalanga, 'headmanship in Xhalanga changed hands across various families in the same administrative area'.

[49] The facts set out in Professor Ntsebeza's affidavit establish a practice of long duration. That practice, judging from the community of the Cala Reserve's response to the retirement of Fani, is the current practice. It is a reasonable practice in that it is not in conflict with legislation or the Constitution. Indeed, it is a practice that is consonant with the value of democratic governance, aimed at the achievement of accountability, responsiveness and openness, that is one of the Constitution's founding values.[21] It is also consistent with various fundamental rights, such as the

[21] Constitution, s 1(d).

right to dignity,[22] the right to freedom of opinion,[23] the right to freedom of association[24] and the right to make political choices.[25] It is, furthermore, certain in its content. In other words, the practice of electing headmen in the Xhalanga district is part of the customary law of the Xhalanga community.

The issues

[50] The appellants have taken a number of preliminary, technical, points which I shall deal with before turning to the central issue, which ultimately concerns the interpretation of s 18 of the Governance Act.

The preliminary points

[51] The first point taken was that the declarator that was issued by Nhlangulela ADJP was never applied for and so should not have been granted. That point was wisely abandoned because paragraph 4 of Part B of the notice of motion contains a prayer for a declarator in the precise terms in which it was granted.

[52] It was also argued that this was not a proper case for a declarator to be issued, but no reason was advanced for this submission except perhaps that 'there are other specific statutory remedies in existence namely section 18 of the Governance Act'. This refers to the discretionary power of the Premier to refer a matter to the Provincial House of Traditional Leaders for a recommendation where a person may not have been identified as a candidate for headmanship in accordance with customary law. The short answer is that the Premier did not refer this matter to that House when she had the opportunity. Later, when the application to review the decision to recognise Yolelo was brought, the court below had before it a live, justiciable dispute as to what the applicable customary law was. The issue of a declaratory order was justified to clarify that dispute.

[22] Constitution, s 10.
[23] Constitution, s 15.
[24] Constitution, s 18.
[25] Constitution, s 19.

[53] Reference was also made to *National Director of Public Prosecutions & another v Mohammed NO & others*.[26] I do not understand how this case assists the appellants. It concerned s 172(1)(a) of the Constitution which provides that a court 'must declare' a law inconsistent with the Constitution to be 'invalid to the extent of the inconsistency'. Ackermann J said in this respect:[27]

'The Constitution thus makes provision in s 172(1)(a) for its own special form of declaratory order, and allows no room for a declaratory order as envisaged by the common law or s 19(1)(a)(iii) of the Supreme Court Act.'

[54] This case does not concern s 172 of the Constitution but s 8 of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA). It provides for the award of just and equitable remedies in proceedings for the review of administrative action and includes an order 'declaring the rights of the parties in respect of any matter to which the administrative action relates'.[28]

[55] As for whether the respondents have an existing, future or contingent right or obligation (for purposes of s 21(1)(c) of the Superior Courts Act 10 of 2013), the answer is clearly that they do for the reasons advanced above as to why the issue of a declaratory order is appropriate. In any event, save to say that 'the present case was not a proper case and the court *a quo* erred in granting the declaratory order', there is no specific attack on the exercise of the court below's discretion. This point accordingly has no merit.

[56] Secondly, it was argued that the court below erred in paragraph 2 of its order by directing the Premier to refer the matter back to the royal family. Once the decision to appoint Yolelo was set aside on account of the applicable customary law not having been applied, the only course of action that was available to the Premier (or the MEC acting in terms of delegated authority) was to refer the matter back to the royal family. The order simply gives effect to the inevitable and, in doing so, avoids delay in the process of appointing a headman for the Cala Reserve.

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[26] *National Director of Public Prosecutions & another v Mohammed NO & others* 2003 (4) SA 1 (CC).
[27] Para 56.
[28] Section 8(1)(d).

[57] To the extent that the order amounts to a substitution for purposes of s 8(1)(c)(ii) of the PAJA,[29] I am of the view that exceptional circumstances, as contemplated by the section, were present. First, the court below was in as good a position as the Premier to decide the issue. Secondly, as indicated above, the course the matter had to take once the decision had been set aside was a foregone conclusion. Thirdly, it contributed to efficient administration in the sense that it avoided further delay in the finalisation of a matter of importance for the Cala Reserve community and the public interest.[30] In any event, I cannot see what practical effect a setting aside of this order would have if the decision of the court below to review and set aside the decision to recognise Yolelo was correct.

[58] It was argued that the order interfered with the Premier's discretion in terms of s 18(4) of the Governance Act to either refer the matter to the Provincial House of Traditional Leaders for a recommendation or refuse to issue a certificate of recognition. Once the court below decided and declared what the applicable customary law was, and that it had not been applied by the royal family, no purpose could be served in referring the matter to the Provincial House of Traditional Leaders for a recommendation because the process of identification and recognition had to commence afresh. The Premier has been ordered to take the only course of action that is open to him. There is, accordingly, no merit in this point.

[59] The third point raised is that the court below's review and setting aside of the MEC's decision to recognise Yolelo as headman for the Cala Reserve was not

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[29] Section 8(1)(c) of the PAJA provides:
'The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders –

. . .

(c) setting aside the administrative action and –

(i) remitting the matter for reconsideration by the administrator, with or without directions; or

(ii) in exceptional cases –

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action.'

[30] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd & another* [2015] ZACC 22, para 47; *Tripartite Steering Committee & another v Minister of Education & others* ECG 26 June 2015 (case no. 1830/15) unreported, paras 50-52.

competent as Yolelo's recognition had not been gazetted and his certificate of recognition had not been issued when the application was launched. In other words, the argument is that the decision was not ripe for challenge because it was not a final decision.

[60] Mr Mateta, in the answering affidavit, stated that 'a new headman has since been recognised and appointed and has subsequently appointed his own planning committee'. This appears to be consistent with the allegation made by Ntamo in the founding affidavit, which is not denied by Mateta, that Yolela has 'already started operating as if he had been inaugurated as headman'. Mateta also admitted that Yolelo had been introduced as the new headman of the Cala Reserve at the meeting of 27 March 2013. He did not dispute that Yolelo had accepted the nomination: indeed, Mateta stated that the sole purpose of the meeting 'was not to consult the community about the identification of the headman but rather to inform and introduce to the community the new headman after his identification and recognition aforementioned'. He admitted too that Yolelo is receiving a salary, a fact that is borne out by the rule 53 record.

[61] Mateta stated that Yolelo's name will be published in the *Gazette* 'as soon as this Honourable Court which is seized with the matter makes its ruling'. And later, he stated that 'the certificate of recognition has not been issued as yet and the name of the new headman has not been published in the government gazette' but that the delay in doing both 'is occasioned by the instant proceedings'.

[62] In *Chairman, State Tender Board v Digital Voice Processing (Pty) Ltd*; *Chairman, State Tender Board v Sneller Digital (Pty) Ltd & others*[31] it was held that 'whether an administrative action is ripe for challenge depends on its impact and not whether the decision-maker has formalistically notified the affected party of the decision or even on whether the decision is a preliminary one or the ultimate decision in a layered process'. It is clear from the appellants' own evidence that the decision to recognise Yolelo has been taken, communicated to both himself and to the people of the Cala Reserve and that he is performing the functions of a headman

[31] *Chairman, State Tender Board v Digital Voice Processing (Pty) Ltd: Chairman, State Tender Board v Sneller Digital (Pty) Ltd & others* 2012 (2) SA 16 (SCA), para 20.

and being paid by the government to do so. There can be no doubt that the decision has had an impact – it has had, in the words of the PAJA, an adverse effect on rights, in the sense of having the capacity to affect rights adversely, and a direct, external legal effect.[32] It is thus ripe for challenge even if two formalities have not been complied with yet. Furthermore, because, even in the absence of the formalities, it is a final decision, having been made public, the MEC is *functus officio* and cannot alter his decision even if he wished to.[33] There is accordingly no merit in this point.

[63] The fourth point is that the court below erred in reviewing the decision despite the fact that the respondents had not exhausted their internal remedies as required by s 7(2) of the PAJA. This section provides:

'(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has not been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.'

[64] It was argued that the internal remedy that had not been exhausted was the referral of the matter to the Provincial House of Traditional Leaders 'for its recommendation', in terms of s 18(4)(a) of the Governance Act. There is no merit in this point for two reasons.

[65] First, it is not a procedure available to the respondents. The Governance Act grants the Premier the discretion to refer the matter to the Provincial House of Traditional Leaders. It is, in other words, not an avenue for possible redress in the hands of the respondents: they are not able to utilise it, even if they wished to.

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[32] *Greys Marine Hout Bay (Pty) Ltd & others v Minister of Public Works & others* 2005 (6) SA 313 (SCA), para 23.

[33] *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute* 2014 (3) SA 219 (SCA), para 15.

Secondly, it is not an internal remedy as envisaged by s 7(2) of the PAJA – an internal appeal or internal review – but a process in terms of which the Provincial House of Traditional Leaders may make a 'recommendation', not a binding decision.[34]

[66] The fifth point taken is that the court below erred in holding that there was no dispute of fact on the papers. The dispute of fact that is alleged is that Professor Ntsebeza's evidence as to the customary law applicable to the identification of a new headman is in conflict with the provisions of s 18 of the Governance Act. This is not a dispute of fact but a legal point that turns ultimately on an interpretation of s 18. This point is also without merit.

The central issues

[67] Three arguments were advanced on the central issue, which boils down to what s 18 of the Governance Act means and how it was applied. They are interlinked. The first is that the court below erred in finding that the appellants acted in breach of s 18. The second is that the court below erred in not accepting that the royal family took into account customary law when identifying Yolelo. The third is that the court below erred 'in requiring the appellants to adduce "evidence of a living customary practice in support of the conclusion made in (their) papers that the existing customary practice in Cala Reserve is that the Royal Family can identify a headman outside an election process and without involving members of the community"'. In addition, a new argument, inconsistent with the argument that the royal family did have regard to the applicable customary law, and with the papers, was advanced before us. It was that s 41(3) of the Transkei Authorities Act had abolished whatever customary law applied previously to the identification of headmen in the Transkei region.

[68] In what follows, I shall first consider the evidential point, then the new argument and finally the nub of this appeal, namely the interpretation of s 18 of the Governance Act and how the royal family and the MEC applied their minds to the identification and recognition of a headman for the Cala Reserve.

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[34] *Reed & others v Master of the High Court of SA & others* [2005] 2 All SA 429 (E), paras 20-25.

[69] The first point can be disposed of speedily. The only evidence as to the customary law in the Cala Reserve concerning the identification of headmen is that tendered on behalf of the respondents by Professor Ntsebeza. His evidence stands unchallenged. It is the only admissible evidence on the issue. No reason was advanced as to why it ought not to be accepted.

[70] If the appellants contended that the customary law was something other than that stated by Professor Ntsebeza, they should have adduced evidence to that effect. They did not. They are in the same position as any other litigant who does not challenge evidence properly adduced by an opposing party. They are not able to rebut it and are bound by it if it is properly accepted by the court. They chose not to adduce this evidence at their peril.[35]

[71] Section 41(3) of the Transkei Authorities Act vested the power to appoint headmen in tribal authorities after consultation with the paramount chief concerned and 'the registered voters of the particular administrative area at a meeting convened for the purpose'.

[72] Three initial points arise. The first is that the section did not expressly or impliedly affect any customary law rules or practices that may have informed the consultation process. It did not, in other words, abolish (or to use the word preferred by Mr Sishuba – euphemistically, in the context – 'vary') any customary law practices unless, perhaps, they were inconsistent with the consultation requirement (which is not the case in this matter). Instead, I can see no reason why customary law rules or practices that give substance to the consultation requirement would not have continued to exist and apply.

[73] Secondly, the implications of this argument are far-reaching: Mr Sishuba submitted that s 41(3) abolished, permanently, all customary law rules in relation to the identification and appointment of headmen in the entire Transkei region from the

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[35] See, for a similar situation, *Umndeni (Clan) of Amantungwa & others v MEC, Housing and Traditional Affairs, KwaZulu-Natal & another* [2011] 2 All SA 548 (SCA), para 21 in which Mpati P held that as the appellants had not disputed the evidence adduced as to the applicable customary law rules of hereditary succession, that evidence was to be accepted as correct.

moment the Transkei Authorities Act came into force. Similar far-reaching effects may also apply if this argument is correct. So for instance, the customary law rules relating to the appointment of chiefs and paramount chiefs may, on this argument, have been destroyed in the same way.

[74] Thirdly, on Mr Sishuba's argument, the relevant rules of customary law have been abolished permanently and did not come into effect again after the repeal of the Transkei Authorities Act (by the Governance Act) and the demise of the Transkei homeland with the advent of democratic rule. This makes reference to 'applicable customary law' where it appears in s 18 of the Governance Act meaningless. Furthermore, it is a strange outcome given that one of the purposes of the Governance Act is to restore 'the integrity and legitimacy of the institutions of traditional leadership in accordance with custom and customary practice'.

[75] Professor Ntsebeza has given evidence as to how the relevant customary law rules of the Xhalanga district, including the Cala Reserve, were applied during the currency of the Transkei Authorities Act. He stated that s 41(3) 'was interpreted to provide registered voters with the opportunity to identify candidates of their choice by election by them' and he concluded that 'the case of Xhalanga shows that even a dictator and despot such as Chief KD Matanzima failed in his attempt to change established practices and tradition, including the election of headmen'.

[76] I conclude in respect of this argument that the customary law practice of electing headmen in Xhalanga, for purposes of the consultation process in terms of s 41(3), is not inconsistent with that section, with the result that the argument that the section abolishes the relevant customary law rules is not sound and must be rejected. Secondly, the evidence establishes that the practice of electing headmen – more than 60 years old by the time the Transkei Authorities Act came into force – continued without interruption during the years of homeland rule.

[77] I turn now to s 18 of the Governance Act and whether the royal family and the MEC applied their minds to the identification and appointment of Yolelo in accordance with the behests of the Governance Act.

[78] The argument advanced by Mr Sishuba is that while the royal family is given the power to identify a person who qualifies to be appointed with due regard to customary law, it is not a requirement that the royal family 'must take into account the popular views of the community' and no 'community consultation is envisaged by s 18 of the Governance Act'. Mr Sishuba conceded that the effect of this argument was that the people of the Transkei region enjoyed greater democratic rights in respect of the identification and appointment of headmen under homeland rule than they do under a democratically elected government.

[79] Whether he is correct relies on the interpretation of s 18 and its application to the facts. Section 18(1) provides that when a headman is to be appointed the royal family concerned must have 'due regard to applicable customary law' when it identifies 'a person who qualifies in terms of customary law', having also considered whether there are any grounds of disqualification (in terms of s 6(3)). Having performed this function, the royal family then has the task of informing the Premier of the name of the person so identified, and this is done 'through the relevant customary structure'. When this has been done, the Premier, by notice in the *Gazette*, must (subject to s 18(5)) recognise 'the person so identified by the royal family' and issue a certificate of recognition.

[80] In other words, the way in which a candidate is identified by the royal family concerned is dependent on 'the applicable customary law' and the nominee qualifying for appointment 'in terms of customary law'. That, in turn, makes the applicable customary law, in each case, a relevant consideration (to put it at its lowest) and raises the question of what the customary law is whenever a particular candidate for appointment as a headman is to be identified. From this, it is clear that a royal family's power to identify a candidate for headmanship is constrained in at least two respects: first, in identifying a candidate, it must 'have due regard to the applicable customary law'; and secondly, its power of identification is limited to persons who qualify for appointment 'in terms of customary law'.

[81] The practical implementation of s 18 may differ across the province, from place to place, according to the customary law that is applicable in each. That may mean that in identifying candidates for headmanship, royal families may enjoy

varying degrees of discretion: how much discretion a royal family will have to identify candidates will depend on the applicable customary law and the customary law requirements for qualification as a headman in each case.

[82] This interpretation of s 18 is in accordance with the plain meaning of the words of the section, read in context. It is, furthermore, an interpretation that is consistent with, and furthers, s 211 of the Constitution as well as the purposes of the Framework Act and Governance Act. It also advances, rather than retards, the promotion of democratic governance and the values of an open and democratic society by recognising the customary law of local communities in the identification of those who will govern them on the local, and most intimate, level. This, in turn, is a recipe for legitimacy of local government.

[83] What this means in the specific case of the Cala Reserve is that the royal family's discretion is limited in the following way. In identifying a candidate for headmanship, it has to have due regard to the fact that, in terms of the applicable customary law, headmen are elected by the community and do not have to be drawn from any particular family. Then, it has to consider who qualifies in terms of customary law to be identified for appointment. That person is the person who has been elected by the community. It is then obliged to inform the Premier of the particulars of the person so identified and the reason for his or her identification – that he or she was elected by the community in terms of the applicable customary law. When this has been done, the Premier (or, as in this case, the MEC acting in terms of delegated authority) 'must, subject to subsection (5), by notice in the *Gazette*, recognise the person so identified by the royal family . . .'.

[84] In my view, the decision of the court below that the MEC's decision to recognise Yolelo was invalid was correct. If the MEC took a decision to recognise Yolelo despite the fact that someone else qualified in terms of customary law, the MEC's decision was vitiated by an error of fact.[36] If the MEC took the decision in the belief that the royal family had an unfettered power to identify a new headman for the Cala Reserve (which, given what is said in the answering affidavit and the letter of 25

[36] *Chairpersons' Association v Minister of Arts and Culture & others* 2007 (5) SA 226 (SCA), para 48; *Chairman, State Tender Board* (note 31), paras 34-36.

November 2013, is more probable), then his decision is vitiated by a material error of law.[37] In either event, the decision was correctly set aside by Nhlangulela ADJP in the court below, and the appeal must fail.

[85] Before turning to the order that has to be made, it is necessary to say something of the point made by the appellants that the community of the Cala Reserve cannot be expected to be treated differently to other communities. The provincial legislature clearly, in my view, contemplated that the process for the identification of candidates for headmanship could differ from community to community. That is why it opted for the 'applicable customary law' as the touchstone by which candidates are to be identified. The intention of the legislature was that the customary practices of each community would guide each royal family in the exercise of its powers. Professor Ntsebeza has made this very point in his affidavit: that the practice in Mpondoland is that headmen are drawn from the 'relatives of chiefs' and that, for unique historical reasons, in the Mbenge administrative area of Xhalanga, headmen are not elected but appointed from within the royal family. This is consistent with the very nature of customary law – that it 'derives from the practices of particular communities' and that not only do 'these practices differ considerably from place to place' but they may also change over time.[38]

Conclusion and order

[86] I have found that there is no merit in any of the preliminary points raised by the appellants. That means, in particular, that the application to review the decision of the MEC is not premature and that the declaratory order was an appropriate order for the court below to have made. I have also found that the decision of the MEC to recognise Yolelo as headman of the Cala Reserve was tainted by irregularity and was correctly set aside by the court below. That being so, the appeal must fail and costs should follow the result. Counsel were agreed, and justifiably so, that the successful party on appeal is entitled to the costs of two counsel.

[87] I make the following order.

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[37] *Hira & another v Booysen & another* 1992 (4) SA 69 (A).
[38] Bennett *Customary Law in South Africa*, 44.

The appeal is dismissed with costs, including the costs of two counsel.

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C Plasket

Judge of the High Court

I agree.

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JD Pickering

Judge of the High Court

I agree.

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B Sandi

Judge of the High Court

APPEARANCES

For the appellants: MH Sishuba and SG Poswa instructed by the State Attorney, King Williams Town

For the respondents: M Bishop and L Siyo instructed by the Legal Resources, Cape Town and Gordon McCune Attorneys, King Williams Town