IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, BHISHO)

CASE NO. 55/2015

Reportable	**Yes / No**

In the matter between:

ENOCH LUNGILE GWAYI **Applicant**

and

THE MEMBER OF THE EXECUTIVE COUNCIL, RESPONSIBLE FOR LOCAL GOVERNMENT AND TRADITIONAL AFFAIRS **First Respondent**

THE SUPERINTENDENT - GENERAL, FOR THE DEPARTMENT OF LOCAL GOVERNMENT AND TRADITIONAL AFFAIRS **Second Respondent**

CHIEF LANGA MAVUSO **Third Respondent**

DIBANDLELA MAVUSO **Fourth Respondent**

JUDGMENT

D VAN ZYL ADJP:

[1] This matter is concerned with the appointment of, and the removal from office of an iNkosana.[1] The applicant brought an application wherein he *inter alia* seeks an order reviewing and setting aside (a) the decision of the first and second respondents **(the MEC for Local Government and Traditional Affairs in the Eastern Cape Government, and the Superintendent of the Department of Local Government and Traditional Affairs respectively)** to remove him from his position as an iNkosana for the kwa Mavuso Village in the district of Alice, and to terminate payment of his salary; and (b), the decision of the third respondent **(Chief Langa Mavuso)** to appoint the fourth respondent **(Dibandlela Mavuso)** as iNkosana in the applicant's stead.

[2] The material facts are, on an application of the principles in *Plascon – Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[2] the following: the father of the third respondent, the late Phakamile Augustus Mavuso **(the late Chief Mavuso)**, died in Alice on 18 November 2007. At the time of his death he was the head of the Mavuso Royal Family,[3] and the head of the Gaga Traditional Council.[4] Following

[1] A headman in isiXhosa.

[2] 1984 (3) SA 623 (A) at 634A to 635C. In summary it means that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent, unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or *bona fide* dispute of fact, or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.

[3] The term **"Royal Family"** is defined in section 1 of the Eastern Cape Traditional Leadership and Governance Act 4 of 2005 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."**

[4] A Traditional Council is established in terms of section 6(2) of the Governance Act in respect of a Traditional Community as defined in section 5(1) of the Act.

Chief Mavuso's death, the Mavuso Royal Family met on 20 November 2007 and resolved that the third respondent's younger brother, Sanqa Mavuso, would be nominated as acting chief and head of the Gaga Traditional Council. As it appears from the resolution, a copy of which was annexed to the answering papers, the rightful heir to the Mavuso Chieftainship was the third respondent. However, due to the fact that he was employed as a public servant by the provincial government, his duties precluded him from immediately assuming his traditional role in the Mavuso Royal Family.

[3] On 2 January 2008 the secretary of the Gaga Traditional Council wrote to the King of the amaRharhabe, King Zanesizwe Sandi VI, advising him of the Mavuso Royal Family's decision and seeking his approval thereof. On 7 January 2008 the office of the King addressed a letter to the first respondent requesting that the appointment of the third respondent's younger brother as acting chief of the Gaga Traditional Council be approved and processed by the department in terms of the Eastern Cape Traditional Leadership and Governance Act.[5] The appointment was approved by the House of Traditional Leaders on 29 April 2008 and by the first respondent on 13 June 2008.

[5] 4 of 2005 (Governance Act).

[4] Following his resignation from the position which he held in the public service, the third respondent was eventually installed on 21 November 2009 as chief of the Mavuso Royal Family, and Head of the Gaga Traditional Council. In September 2013 a meeting of the Mavuso Royal Family took place to discuss matters relating to the Mavuso Chieftainship. At that meeting a report was received that the applicant and a certain Mthimkhulu, the iNkosana of the Lenge village, were irregularly appointed to their respective positions. At the same meeting resolutions were also taken with regard to the appointment of iNkosana, including that of the fourth respondent. It is common cause that the fourth respondent, who is ten years of age and is still a minor, is the son of the third respondent.

[5] In February 2014 the third respondent addressed a letter to the Department of Local Government and Traditional Affairs wherein he brought to its attention the ostensible irregular appointment of the applicant and of the said Mthimkulu as iNkosana. The irregularity was said to be that **"on their files at the Office of the Rharhabe Regional Co-ordinator in your Department that they have appointed themselves as iNkosana and appended their signatures thereto, a role only the Chairperson and Secretary of the Royal Family can do."**

[6] In March 2014 the first respondent wrote a letter to the applicant advising him, with reference to the third respondent's letter, that the Mavuso Royal Family

had resolved to remove him from his position as headman as he was wrongfully appointed. He was given 14 days to make representations indicating why that decision should not be given effect to. The applicant responded by saying that he was appointed an iNkosana by the third respondent's father, the late Chief Mavuso and that in **"early 2008, all the paper work was done by EL Gwayi** [the applicant] **and signed by the Chairman (Mr Masiza) as per Chief Mavuso's instructions. All the appointments were made permanent. There were no guidelines given. There was no Royal Family at that time. The decisions were made by the Chief alone."**

[7] In response the Department informed the applicant that his allegation that he was appointed by the Late Chief Mavuso was unfounded as the resolution and the minutes of the meeting on which he relied were dated and said to have been signed some five months after the death of the Late Chief Mavuso; that the minutes of the meeting were not those of the Royal Family; and that the applicant's appointment was not endorsed by the Royal Family **"but rather by yourself."** The applicant's appointment was thereafter terminated.

[8] The legislative framework for the appointment and removal of iNkosana is found in section 211 of the Constitution, [6] the Traditional Leadership and

[6]It reads: **"(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."**

Governance Framework Act[7] **(the Framework Act)** and the Governance Act. Section 11 of the Framework Act deals with the appointment of an iNkosana. Relevant to the present proceedings are subsections (1) and (2) which reads:

> **"(1) Whenever the position of senior traditional leader, headman or headwoman is to be filled –**
>
> **(a) the royal family concerned must, within a reasonable time after the need arises for any of those positions to be filled, 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 12(1)(a), (b) and (d) apply to that person; and**
>
> **(ii) through the relevant customary structure, inform the Premier of the province concerned 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 concerned must, subject to subsection (3), recognise the person so identified by the royal family in accordance with provincial legislation as senior traditional leader, headman or headwoman, as the case may be.**
>
> **(2)(a) The provincial legislation referred to in subsection (1)(b) must at least provide for –**
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> **(i) a notice in the Provincial Gazette recognising the person identified as senior traditional leader, headman or headwoman in terms of subsection (1);**
>
> **(ii) a certificate of recognition to be issued to the identified person; and**
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> **(iii) the relevant provincial house of traditional leaders to be informed of the recognition off a senior traditional leader, headman or headwoman.**
>
> **(b) Provincial legislation may also provide for –**
>
> **(i) The election or appointment of a headman or headwoman in terms of customary law and customs; and**
>
> **(ii) Consultation by the Premier with the traditional council concerned where the position of a senior traditional leader, headman or headwoman is to be filled."**

[7] 41 of 2003.

[9] These provisions are largely mirrored by section 18 of the Governance Act. Subsections (1) and (3) are relevant:-

> **"(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, recognize the person so identified by the royal family as an iNkosi or iNkosana, as the case may be.**
>
> **(3) The Premier must, within a period of thirty days after the date of publication of the notice recognizing an iNkosi or iNkosana issue to the person who is identified in terms of paragraph (a)(i), a certificate of recognition."**

[10] Sections 12 of the Framework Act and 20 of the Governance Act in turn deal with the removal of an iNkosana. For present purposes it is only necessary to refer to the latter section. It provides:

> **"20(1) An iNkosi or iNkosana may be removed from office on the ground of –**
>
> **(a) conviction of an offence with a sentence of imprisonment for more than 12 months without an option of a fine;**
>
> **(b) physical incapacity or mental infirmity which, based on acceptable medical evidence, makes it impossible or that iNkosi or iNkosana to function as such;**
>
> **(c) wrongful appointment or recognition; or**
>
> **(d) a transgression of a customary rule or principle that warrants removal.**

(2) Whenever any of the grounds referred to in subsection (1)(a), (b) and (d) come to the attention of –

(a) the royal family and the royal family decides to remove an iNkosi or iNkosana, the royal family concerned must, within a reasonable time and through the relevant customary structure –

(i) inform the Premier of the of the particulars of the iNkosi or iNkosana to be removed from office; and

(ii) furnish reasons for such removal;

(b) any person, such a person must inform the Premier and the Premier must –

(i) refer the matter to the royal family under whose jurisdiction the iNkosi or iNkosana falls, for an investigation and a decision, and a report thereon; and

(ii) consider the report and act in terms of subsection (3).

(3) Where it has been decided by a royal family to remove an iNkosi or iNkosana in terms of subsection (2), the Premier must –

(a) advise the iNkosi or iNkosana of such decision and, in writing, call upon such iNkosi or iNkosana to make representations to him or her as to why the decision to remove him or her should not be given effect to;

(b) consider the representations submitted to him or her and withdraw the certificate of recognition with effect from the date of removal if the decision to remove him or her is in accordance with custom;

(c) inform the royal family concerned, the removed iNkosi or iNkosana, and the Provincial House of Traditional Leaders concerned, of such removal;

(d) publish a notice with particulars of the removed iNkosi or iNkosana in the Gazette.

(4) Where an iNkosi or iNkosana is removed from office, a successor in line with custom may assume the position, role and responsibilities, subject to the provisions of this Act."

[11] Proceeding then to deal with the removal of the applicant as iNkosana and the decision of the first and / or second respondents in that regard, there are two difficulties with the order which the applicant seeks. The first is that it is evident

from a reading of section 20 of the Governance Act that the decision to remove an iNkosana is not taken by the Premier[8] or by those to whom he had delegated the functions in section 20 of the Governance Act,[9] but by the Royal Family. The process provided in section 20(2) and (3) involves the following steps: Once a ground for removal comes to the attention of the Royal Family, and it has been decided to remove the particular iNkosana and the Premier was advised as required, the Premier must:

(a) advise the iNkosana of the Royal Family's decision, and call upon him in writing to make representations as to why that decision **"should not be given effect to"**;

(b) consider the representations of the iNkosana, and if the decision to remove him or her **"is in accordance with custom"**, withdraw the iNkosana's certificate of recognition issued in terms of section 18(3) of the Governance Act.

In the context of the present matter, the issue raised is accordingly rather whether the decision of the first, or for that matter, the second respondent to give effect to the decision of the Royal Family to remove the applicant from his position as iNkosana, and to withdraw the certificate of recognition, is reviewable.

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[8] **"Premier"** means the Premier of the Province of the Eastern Cape **(the definition in section 1 of the Governance Act.)**

[9] Section 34 of the Governance Act provides that the Premier may delegate any powers conferred on him or her by the Act, except for the power to make regulations.

[12] The second difficulty is that it is unclear on what grounds the applicant is challenging these decisions. The exercise by the Premier of his powers in sections 18 and 20 of the Governance Act constitutes administrative action.[10] A cause of action for the judicial review of administrative action now ordinarily arises from the provisions of the Promotion of Administrative Justice Act[11] **(PAJA)**. The grounds for review are contained in section 6 of PAJA. It is trite that an applicant in motion proceedings must identify the issues with clarity and set out the necessary averments in support of the case he or she intends to make out. The affidavits in motion proceedings fulfil a dual function: that of the pleadings and providing the essential evidence to be relied upon by the applicant.[12] The applicant must make out his or her case in the founding affidavit so as to alert the respondent to the case he or she is asked to meet.[13]

[13] The applicant has failed to rely on any specific ground of review in section 6 of PAJA. What can be distilled from the papers and counsel's argument is that the applicant seeks to challenge the justification for the decision of the Premier to give effect to the decision of the Royal Family and to withdraw his certificate of recognition. In the context of the grounds in section 6 of PAJA, counsel in

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[10] *Premier of the Eastern Cape and Others v Ntamo and Others* [2015] ZAECBHC 14.
[11] 3 of 2000.
[12] *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 323F – 325C and *Cele v The South African Social Security Agency* 2008 (7) BCLR 734 (D) at para [6].
[13] **Erasmus Superior Court Practice** at pages B1-38 and B1-45, and the authorities referred to.

argument accordingly confined himself to the rationality and reasonableness of that decision as grounds for review.

[14] Rationality review is provided in section 6(2)(f)(ii)(cc) and (dd) of PAJA. It empowers the court to review an administrative action if the action was not rationally connected to the information before the administrator or the reasons given for it. The rationality requirement relates to both the process by which the decision is reached and the decision itself. With regard to the decision, it means **"that the information on which the decision is based and the reasons given for such decision must support and justify the decision taken. If they do not, the decision must be regarded as being arbitrary"**[14]

[15] Reasonableness in section 6(2)(b) of PAJA gives effect to the Constitutional obligation on administrative decision-makers to act **"reasonable"** as entrenched in section 33(1) of the Constitution. Reasonableness must be understood **"to require a single test, namely that an administrative act will be reviewable if it . . . is one that a reasonable decision-maker could not reach."**[15] What will constitute a reasonable decision will depend **"on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case."**[16]

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[14] *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims and Others* at paras [62] and [63].
[15] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) 490 (CC) at para [44].
[16] *Ibid* at para [45].

[16] It is important to bear in mind that the standard of rationality or reasonableness review does not require that the decision of the administrative decision-maker must be perfect or, in the court's estimation, the best decision on the facts.[17] The distinction between appeals and reviews continues to be significant and the court **"should take care not to usurp the functions or administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution."**[18] Rationality review calls for rationality and justification, rather than substitution of the court's opinion for that of the decision-maker on the basis that the decision is substantively incorrect.[19] After all, the primary focus in scrutinising administrative action is on the fairness of the process, not the substantive correctness of the outcome.[20]

[17] As stated, in his representations to the Department the applicant contended that he and others were appointed as iNkosanas by the late Chief Mavuso who instructed them to do all the paperwork. In support of this the applicant put up documentation consisting of a copy of a **"Royal Family Resolution"**, the minutes of a meeting which purportedly took place on 2 April 2008, and an attendance register. From this documentation the first and second respondents concluded that the resolution and the minutes of the meeting were not that of the Royal Family as required by the relevant provisions of the Governance Act. The conclusion that it

[17] *Bapedi Marota Mamone supra* at para [78].
[18] *Bato Star supra* at para [45].
[19] *Bapedi Marota Mamone supra* at para [78].
[20] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC) at para [42].

did not all add up, and that the applicant's contention that he was appointed by the late Chief Mavuso was unfounded, does not in my view fail the test of rationality or reasonableness.

[18] As stated, the late Chief Mavuso died in November 2007. The meeting relied on took place some five months later. The minutes of the meeting which the applicant contended as reflecting a resolution for his appointment as iNkosana, accordingly took place during the period of interregnum when there was no appointed Chief; that is between the death of the Late Chief Mavuso and the finalisation of the acting appointment of the third respondent's brother.

[19] The documentation put up by the applicant also do not in itself reflect a meeting of, and a resolution by the Royal Family. The minutes of the meeting are rather those of what, according to the attendance register, appear to have been a meeting of a committee or of community members. The attendance register shows that the meeting was attended by the applicant as a **"committee member"** and was chaired by a certain Gqokoma and / or Matebeni. The resolution submitted to the Department in consequence of the decision taken at the meeting purports to be a resolution by the Royal Family, and was signed by the applicant as the **"acting secretary of the Royal Family"**, and by a certain Masiza as the **"chairperson of the Royal Family."** However, in the attendance register the said Masiza, similar to the applicant, is identified as being a committee member. This clearly does not lend

support to the capacities in which the applicant and Masiza are said to have signed the **"Royal Family Resolution."**

[20] The affidavits filed by the applicant in support of this application do not assist in clearing-up any of these matters. On the contrary, it rather raises more questions. According to the applicant he was appointed an iNkosana in **"1994 under the Chieftainship of the third respondent's predecessor in title of the tribal chief,"** and that the late Chief Mavuso **"found** [the applicant] **already in the position of being a member of the council under acting Chief Hamilton Mavuso, a brother to Chief Heshangophondo Mavuso, after his death."** This, the applicant says happened long before the installation of the late Chief Mavuso as the Chief of the Gaga Traditional Council. The applicant seems to suggest that he was an iNkosana even before the appointment of the Late Chief Mavuso. When and by whom that appointment was made is not stated, and the respondents denied the allegation. It is further inconsistent with what the applicant told the first and second respondents in his representations to them, namely that he was appointed by the late Chief Mavuso. So too is it inconsistent with the statement in his replying affidavit that it **"is a fact"** that he was appointed by the late Chief Mavuso. Another aspect is that the applicant's unsupported statement that after the death of the late Chief Mavuso he acted as Chief, is inconsistent with the minutes of the meeting and with the capacity in which he signed the aforementioned resolution.

[21] I accordingly find no reason to set aside the first and / or the second respondents' decision. It cannot in my view be said to have been irrational, unreasonable, or for that matter, made in ignorance of relevant facts.

[22] That leaves the decision of the Mavuso Royal Family to identify the fourth respondent as iNkosana of the kwa-Mavuso Village. It would appear that the relief which the applicant claims in this regard was not intended to be substantive relief, but rather consequential relief following upon the setting aside of the decision taken by the first and / or second respondents. The reason for saying this is twofold: Firstly, otherwise than in the case of the first and second respondents, the applicant did not in his notice of motion ask the third respondent to give reasons for the decision to identify the fourth respondent as iNkosana.[21]

[23] Secondly, the applicant has not advanced any independent reason or ground on which that decision falls to be set aside on review. In his founding affidavit the applicant limited himself in saying, on what appears to be hearsay, that he was **"advised that the third respondent now wishes to put in my stead, Dibandlela Mavuso, who is currently not more than 10 years of age, which is on its own is a humiliation for the role that I have played in the traditional leadership that spans over five decades and is in fact a humiliation to the community that we seek to lend. I do not know of the reason that the third respondent might have that have caused him to act unlawfully and wrongfully against me."** In reply and *inter alia* with reference to the age of the fourth respondent he

[21]Rule 53(1)(b) of the Uniform Rules of Court.

added that he **"cannot shake the feeling that the third respondent is making a mockery of the institution of traditional leadership."**

[24] Before dealing with counsel' submissions on this aspect, there is a matter that requires comment. It is that the age of the fourth respondent may raise the question whether he could lawfully have been identified by the Royal Family as a successor to the applicant. The reason for this lies in the provisions of section 6(3) read with section 18(1)(a) of the Governance Act. The latter section provides that an iNkosana may be identified by the Royal Family after taking into account **"whether any of the grounds referred to in section 6(3) applies to that person."** Section 6(3) of the Governance Act determines who may, or who may not be a member of a traditional council.[22] One of the **"requirements"** in section 6(3)(a) is that a member of a traditional council must be above the age of 21. What the Governance Act does is to make the requirements for membership of a Traditional Council applicable to the appointment of iNkosi[23] and iNkosana. In the Framework Act on the other hand, it is the grounds for the removal of an iNkosi or iNkosana that serve as grounds for disqualifying a person from being appointed to that position, which do not include any age limit.[24]

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[22]It reads**: "A member of the traditional council shall be a person who – (a) is above the age of 21; (b) has not been convicted of an offence and sentenced to more than 12 month imprisonment without the option of a fine; (c) is not unrehabilitated insolvent; (d) is a South African Citizen; and € is ordinarily resident within the jurisdiction of the traditional council."**

[23]A Chief in isiXhosa.

[24]See sections 9(1)(a); 10(1); 10A(1); 10B(1); 11(1)(a) and 12(1) thereof.

[25] The introduction of an age limit for the appointment of an iNkosana by the Governance Act is not only inconsistent with its own provisions, but also that of the Framework Act and of the objectives of both Acts. Section 21 of the Governance Act requires the appointment of a regent[25] when the person who has been identified as a successor to the position of *inter alia* an iNkosana, is a minor in terms of applicable customary law or customs. The effect of this provision is that it recognises that someone who is a minor in terms of custom or customary law may be identified as an iNkosana. The question is whether section 18(1)(a) must be interpreted to mean that a person who is below the age of 21, but is regarded by custom to be a major, can never be identified as a successor to the position of iNkosana. However, similar to when it is necessary to appoint a regent, the time for the replacement of the appointed regent by the incumbent iNkosana is not dependent on age, but rather by the point in time when the successor **"ceases to be a minor in terms of customary law,"** at which time the regent is obliged to relinquish his or her position.[26] The process which section 21 creates for the appointment of a regent is accordingly not based on age, but rather minority determined by customary law and custom.

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[25]Its equivalent is section 13 of the Framework Act. A **"regent"** is defined in section 1 of that Act as: **"any person who, in terms of customary la of the traditional community concerned, holds a traditional leadership position in a temporary capacity until a successor to that position who is a minor, is recognised as contemplated in section 13(4)."**

[26]Section 21(6) of the Governance Act. It reads: **"As soon as the successor to the position of iKumkani, iNkosi, iNkosana ceases to be a minor in terms of customary law – (a) the regent recognized in terms of subsection (1) must relinquish his or her position as regent, and (b) in the case of an iNkosi or iNkosana, a certificate of recognition contemplated in section 18(3) must be issued by the Premier after his or her name has been published in the Gazette."**

[26] Generally, age does not play a role in the appointment of traditional leaders, and it is not a criterion for the determination of majority.[27] In customary law the progression is from childhood to manhood and it is not dependent upon chronological age, but is rather determined by events, such as marriage or the advent of puberty and the accompanying rites of passage. The apparent conflict with custom in section 18 of the Governance Act is contrary to its own objectives and that of the Framework Act, namely the **"restoration of the integrity and legitimacy of the institution of traditional leadership in accordance with custom and customary practices."**[28] It is suggested that what is contemplated by this legislation is that subject to the Constitution[29] the appointment of traditional leaders must accord with customs and customary law. The question must be asked whether the notion of an age limit has anything to do with custom, and whether it is not rather a remnant of colonial and homeland legislation which required a headman to be above the statutory age of majority.[30]

[27] Another aspect is that the provincial legislature derives its power to legislate on traditional leadership from the provisions of the Framework Act.[31] The age requirement seems to be in conflict with that Act. Section 11 of the Framework

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[27]See Bennett TW, **Application of Customary Law in South Africa**, JUTA at 87 and Olivier NJJ *et al*, **Indigenous Law**, Butterworths Durban at 4 -6.

[28]See the preamble to both Acts.

[29]**"Customs, traditions or customary laws relating to traditional leadership continue to operate subject to the Constitution."** (Section 2(5) of the Governance Act. See also sections 2(3); 2A(4) and 3B(4) of the Framework Act)

[30]See section 41(2) of the Trankei Authorities Act 4 of 1965 and section 24(3) of the Ciskei Administrative authorities Act 37 of 1984.

[31]Section 2(1) of the Governance Act says that it is **"subject to the Constitution, the Framework Act and the Remuneration Act."**

Act deals with the appointment of iNkosana. It tasks the Royal Family concerned to identify a person who qualifies in terms of customary law to assume the position of iNkosana **"after taking into account whether any of the grounds referred to in section 12(1)(a), (b) and (d) apply to that person."** The relevant paragraphs in section 12 deal with matters which may disqualify a person from holding the position of iNkosana, such as having been convicted of a criminal offence and sentenced to undergo imprisonment of more than twelve months without the option of a fine.[32] It does not refer to any age limit.

[28] Further, section 11 of the Framework Act appears to only allow for provincial legislation dealing with the manner in which the Premier is to recognise the person identified by the Royal Family,[33] and for **"the election or appointment of a headman or headwoman in terms of customary law and customs."**[34] The question raised by this is whether provincial legislation may introduce any requirement not specifically provided for in section 11(1)(a), read with section 12(1)(a), (b) and (d) of the Framework Act, or which is not a requirement in terms of custom or customary law as envisaged in section 11(2)(b)(i) of that Act. If not then the question is whether the introduction of the age limit of 21 years in section 18(1)(a)

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[32]Section 12(1)(a) of the Framework Act reads: **"A senior traditional leader, headman or headwoman may be removed from office on the grounds of – (a) conviction of an offence with a sentence of imprisonment for more than 12 months without an option of a fine; (b) physical incapacity or mental infirmity which, based on acceptable medical evidence, makes it impossible for that senior traditional leader, headman or headwoman to function as such; (c) wrongful appointment or recognition; or (d) a transgression of a customary rule or principle that warrants removal."**

[33]Section 11(1)(b) read with section 11(2).

[34]Section 11(2)(b)(i).

of the Governance Act is not ultra *vires*, which may necessitate an amendment to the Act.

[29] The age of the fourth respondent did however not form part of the *lis* between the parties as it was not pertinently raised or argued. As it involves not only issues of interpretation, but also custom, which may require evidence,[35] it is not a matter which can be dealt with without first having alerted the parties thereof and having afforded them an opportunity to fully deal therewith. Counsel for the applicant instead chose to confine himself to two submissions with regard to the appointment of the fourth respondent. He argued firstly that the first, second and third respondents failed to consider and comply with the prescriptive provisions in section 13 of the Framework Act and section 21 of the Governance Act. These sections provide *inter alia* that where the person who has been identified as the successor to the vacant position of an iNkosana is still a minor in terms of customary law or customs, the Royal Family must identify a regent to assume that position on behalf of the minor, and through the relevant customary structure advise the Premier thereof.[36] The Governance Act in turn places the duty on the Premier to *inter alia* recognise the regent identified by the Royal Family by notice in the Gazette, and to review the recognition of the regent at least once every three years.[37]

[35]See section 1(1) and (2) of the Law of Evidence amendment Act 45 of 1988.
[36]Section 13(1)(a) of the Framework Act.
[37]Section 21(1) and (2) of the Governance Act.

[30] If it is to be accepted in favour of the applicant that he is able to get over the first hurdle, namely that a failure to comply with the provisions dealing with the appointment of a regent would also affect the lawfulness of the separate decision of the Royal Family to identify someone as the successor to a vacant position of an iNkosana, which in my *prima facie* view is unlikely, the difficulty facing the applicant is that he has similarly failed to raise this issue in any of his affidavits, either pertinently or with reference to the relevant statutory provisions on which reliance was placed in argument.[38] The result is that this issue was never dealt with by any of the parties in their papers. In addition, no factual allegations were made in support of that submission. There is accordingly no evidence, for instance, that no one has been identified as a regent as required in section 21(1).

[31] The second argument was that the third respondent's decision to replace him was actuated by malice and an ulterior motive, namely to secure the appointment of his own minor son as iNkosana. Once again, this is an issue which cannot be entertained on these papers. The submission naturally carries with it the suggestion and accusation of dishonesty. It is well established that dishonest conduct will not lightly be inferred by the court.[39] The allegation must not only be

[38]See footnotes 11 and 12 above. Also *Minister of Land Affairs and Agriculture v D e F Wevell Trust* 2008 (2) SA 184 (SCA) at para [43] and *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA) at para [28].
[39]*Gates v Gates* 1939 AD 150 at 155 and *Kelleher v Minister of Defence* 1983 (1) SA 71 (E) at 75D – E.

made expressly, it must have a factual foundation, both of which is lacking in the present matter.

[32] For these reasons the application is dismissed with costs.

[33] The Registrar of this Court is directed to send a copy of this judgment to the:

(a) Premier of the Eastern Cape, and

(b) Eastern Cape House of Traditional Leaders, and to direct their attention to paragraphs [24] – [27] of this judgment.

D VAN ZYL

ACTING DEPUTY JUDGE PRESIDENT

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Date Heard: 05 November 2015

Judgment Delivered: 01 December 2015