



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

NOT REPORTABLE

Case no: 452/2020

In the matter between:

MWELO NONKONYANA

Applicant

and

**THE ACTING CHAIRPERSON OF THE HOUSE
OF TRADITIONAL LEADERS: EASTERN CAPE PROVINCE**

1st Respondent

**THE MEC FOR CO-OPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS: EASTERN CAPE PROVINCE**

2nd Respondent

EX-TEMPORE JUDGMENT

Govindjee J

[1] On 10 August 2020, the first and second respondents ('the MEC' and 'the Acting Chairperson'), together with the Premier of the province, were interdicted and restrained from presiding over proceedings to elect a new chairperson of the Eastern

Cape Provincial House of Traditional Leaders ('the House'), pending the finalisation of a separate application for review.¹

[2] The MEC, acting as Premier at the time, and the Acting Chairperson complied with the order until 9 June 2022. On that day they were party to proceedings to reconstitute the House. Those proceedings and their outcome form the basis of this contempt application.

[3] The applicant seeks, inter alia, the following relief:

- a) Declaring that the MEC and Acting Chairperson are in contempt of part of the court order dated 10 August 2020;
- b) Declaring both the convention of the sitting of the House and presiding over the election on 9 June 2020 to be illegal;
- c) Declaring the election of the third respondent to be illegal and null and void.

[4] In essence, the applicant takes the view that the Court Order dated 10 August 2020 ('the Order') made it premature for the House to be convened to elect a chairperson prior to finalisation of the separate review application, and that the applicant's term of office only expires during September 2022. He avers that the MEC and Acting Chairperson's conduct was contemptuous and warrants appropriate sanction.

[5] The MEC says that he was Acting Premier of the province at the time the House was reconstituted, having been appointed to that position. He argues that the Order, properly interpreted in the context of the application before the Court, did not prohibit the election of another chairperson for as long as the separate application was pending. Instead: 'It is that for as long as the term of office of the members with whom the applicant had constituted the House remained extant, they would not elect another chairperson whilst the main application was still pending'. The term of the House ended from 1 June 2022, so that the protections for which the interdict had been sought were not required.

¹ That application pertains to the allegedly unlawful removal of the applicant as chairperson of the House on 31 July 2020.

[6] In addition, the MEC placed reliance on the repeal of that the Traditional Leadership and Governance Framework Act, 2003² ('the Framework Act') by the Traditional and Khoi-San Leadership Act, 2019³ ('the Act'). The consequence, it was argued, was that traditional leaders who were members of a provincial house of traditional leaders established and constituted in terms of provincial legislation remained members of their provincial houses only until 31 May 2022, regardless of when they had been elected into their positions. That being the case, the applicant was not a member of the House on 1 June 2022 so that the interdict lost its force by operation of law, paving the way for the election on 9 June 2022.

The Traditional and Khoi-San Leadership Act, 2019

[7] The Act came into operation on 1 April 2021. It provides for the recognition of traditional and Khoi-San communities, leadership positions and for the withdrawal of such recognition, amongst various other matters. Recognition of traditional and Khoi-San leaders is dealt with in part two of the Act.

[8] In terms of transitional arrangements:⁴

'Any traditional leader –

- (i) who was appointed or recognised as such in terms of applicable provincial legislation and was still recognised as a traditional leader immediately before 24 September 2004; or
- (ii) who was recognised as such in terms of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003) (hereinafter referred to as the Framework Act), prior to the repeal of that Act, or in terms of any applicable provincial legislation which is not inconsistent with the Framework Act, as the case may be,

is deemed to have been recognised as such in terms of section 8 of this Act, subject to a recommendation of the CTLDC, where applicable.'

[9] Section 63(13) of the Act provides:

² Act 41 of 2003.

³ Act 3 of 2019.

⁴ S 63(1)(a) of the Act.

'Notwithstanding the provisions of section 49, the traditional leaders who, on the date of commencement of this Act were members of a provincial house of traditional leaders established and constituted in terms of provincial legislation, remain members of the provincial house concerned, until 31 May 2022 and any subsequent reconstitution of such a house must comply with the provisions of section 49.'

[10] 'Traditional leader' is defined in the Act to include a person who has been recognised as a principal traditional leader or senior traditional leader and 'provincial house' means a provincial house of traditional and Khoi-San leaders as contemplated in s 49.⁵ Section 49 provides, in part, as follows:

'(1) Provincial houses may be established by provinces in terms of provincial legislation and subject to the provisions of this Act.

(2) The provincial legislation contemplated in subsection (1) must include provisions that provide for – ...

(b) the term of provincial houses to be five years: Provided that, notwithstanding anything to the contrary contained in any law, but subject to section 63(13), the term of a provincial house that was established and constituted in terms of any applicable legislation prior to the commencement of this Act, will expire on 31 May 2022: Provided further that any term of office of provincial houses reconstituted or established after the commencement of this Act, shall expire every five years on 31 May, calculated from 31 May 2022 ...'

[11] The applicant is a traditional leader who, at the date of commencement of the Act was a member of a provincial house of traditional leaders established in terms of s 66 of the Eastern Cape Traditional Leadership and Governance Act, 2017 ('the Eastern Cape Act').⁶ Both the Act and the Eastern Cape Act provide for the term of provincial houses to be five years.⁷ While the applicant's term of office was for a period of five years,⁸ it may be accepted that he was sworn in as a member on 26 September 2017, so that the term was only due to expire on 25 September 2022, rather than at the end of May 2022. As such, and as counsel indicated from the Bar, this is an instance of apparent conflict between national and provincial legislation, not capable of resolution in terms of s 150 of the Constitution.⁹

⁵ S 1 of the Act.

⁶ Act 1 of 2017.

⁷ S 49(2)(b) of the Act and ss 6(2)(b)(ii), 16(3), 48(3) and 68(5) of the Eastern Cape Act.

⁸ S 68(5) of the Eastern Cape Act.

⁹ Cf the judgment of Van Zyl DJP, on behalf of a full bench, in *The Premier of the Eastern Cape and Others v Hebe and Others* [2017] ZAECHC 14; [2018] 1 All SA 194 (ECB) para 38.

[12] Provincial legislatures have authority to pass legislation with regard to the functional areas listed in Schedule 4 and 5 to the Constitution.¹⁰ When considering an apparent conflict between national and provincial legislation, every court must prefer any reasonable interpretation of the legislation that avoids a conflict, over any alternative interpretation that results in a conflict.¹¹

[13] Section 146 of the Constitution of the Republic of South Africa, 1996 ('the Constitution') applies to a conflict between national legislation and provincial legislation falling within a functional area listed in Schedule 4. National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions, amongst others, is met:¹²

- (a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.
- (b) The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing –
 - (i) norms and standards;
 - (ii) frameworks; or
 - (iii) national policies.

[14] Subject to section 211 and 212 of the Constitution, traditional leadership, indigenous law and customary law all fall under schedule 4 of the Constitution of the Republic of South Africa, 1996. This means that national and provincial governments have concurrent legislative authority over traditional leaders.

[15] The Memorandum on the Objects of the Traditional and Khoi-San Leadership Bill, 2015 provides insight as to the timeframes associated with the constitution of provincial houses in the country:¹³

¹⁰ S 104 of the Constitution. See *Premier: Limpopo Province v Speaker: Limpopo Provincial Legislature and Others* [2011] ZACC 25; 2011 (11) BCLR 1181 (CC); 2011 (6) SA 396 (CC).

¹¹ On the appropriate test for interpreting legislation, see *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) para 28.

¹² S 146(2) of the Constitution.

¹³ Para 2.30, dealing with clause 27 of the Traditional and Khoi-San Leadership Bill, 2015.

'It should be noted that while the terms of the National House, provincial houses and local houses should be aligned, a precise alignment has been found to be impractical. For example, before the National House can be constituted, the provincial houses *have to be constituted* to enable them to elect the representatives to the National House. The Bill therefore determines that all the houses will have terms of five years however *such terms are to end on specific dates ... which dates are one month apart. This will allow sufficient time for the provincial houses to be constituted before the National House and for local houses to be constituted before the provincial houses.*' (Own emphasis.)

[16] The link between the constitution and terms of provincial houses and the election of representatives to the National House, as explained in this Memorandum, demonstrates the rationale for the standardisation of dates. The Act deals in this instance with a matter that, to be dealt with effectively, requires uniformity across the country. It provides that uniformity by establishing a standard in respect of provincial houses and determining that the term of those provincial houses established by any legislation prior to the date of commencement of the Act expire on 31 May 2022. Similarly, traditional leaders in the position of the applicant remained members of the provincial house only until that date, as confirmed by the transitional arrangements included in the Act. This satisfies the provisions of s 146(2)(b) of the Constitution, so that the national legislation must prevail over the provincial legislation.

[17] It must therefore be accepted that the term of the House expired on 31 May 2022. In interpreting a judgment, a court's intention is to be ascertained primarily from the language of the judgment or order, as construed according to the usual, well-known rules applicable to documents. As in the case of any document, the judgment or order, and the court's reasons for giving it, must be read as a whole to ascertain its intention.¹⁴ The Order of 10 August 2020, interdicting the election of a new chairperson of the House, could only have been intended to prevail so long as the term of office of the House had not expired. Section 64(1)(a) read with s 69 of the Eastern Cape Act support such an interpretation. The Order could not have intended to afford the applicant protection beyond the expiry of the term of office of the House, purely on the basis that the separate review proceedings had not yet been finalised.

¹⁴ *Van Rensburg and Another NNO v Naidoo and Others NNO; Naidoo and Others NNO v Van Rensburg NO and Others* 2011 (4) SA 149 (SCA) para 42.

[18] That being the case, it follows that the test for contempt cannot be met. In my view the Order, properly interpreted, has not been breached. Even if the opposite was true, deliberate disregard of an Order would be insufficient for purposes of a finding of contempt in this instance. This is because our law accepts that a non-complier may genuinely, albeit mistakenly, believe him- or herself entitled to act in the way claimed to constitute the contempt, and good faith avoids the infraction.¹⁵ Given the wording of the Act, including its transitional provisions, the MEC and Acting Chairperson's conduct would be protected on this basis. Put differently, they have discharged the evidential burden of showing that their refusal to obey the terms of the Order was not both wilful and mala fide.¹⁶ As the SCA held in *Fakie NO*:¹⁷

'... the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent.'

[19] The applicant has failed to satisfy me on a balance of probabilities that he is entitled to the declaratory relief claimed in paragraphs 2.1 and 2.2 of the notice of motion. In particular, it has not been proved that the non-compliance with the Order was wilful and mala fide. Given the legislative framework, as already explained, I am also not convinced that the sitting of the House on 9 June 2020 was illegal and of no consequence. The relief sought in the remainder of the notice of motion also fails in the circumstances.

Order

[20] The following order will issue:

1. The application is dismissed with costs.

¹⁵ *Fakie NO v CII Systems (Pty) Ltd* [2006] SCA 54 (RSA) para 9.

¹⁶ *Fakie NO* ibid para 10.

¹⁷ *Fakie NO* ibid para 10 (footnotes omitted).

A. GOVINDJEE
JUDGE OF THE HIGH COURT

Heard:27 October 2022

Delivered:27 October 2022

Appearances:

For the Applicant:

Adv M Nonkonyana

Instructed by:

Hexana Attorneys
King William's Town
Info@hexanaattorneys.co.za

For the Respondents:

Adv AM Bodlani SC
Mthatha Bar of Advocates

Instructed by:

The State Attorney
East London
043 7065100
ckela@justice.gov.za