



**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE LOCAL DIVISION, BISHO)**

**Not Reportable**

Case no: 665/2015

In the matter between:

**ANDILE J MABELE**

Applicant

and

**DR NOKUZOLA MNDENDE**

First respondent

**THE PREMIER, EASTERN CAPE**

Second respondent

---

**JUDGMENT**

---

**Govindjee J**

[1] The applicant seeks to review and set aside the administrative decision of the second respondent (the Premier) in endorsing the recommendation of a Provincial Committee ('the Committee') of the Commission on Traditional Leadership Disputes and Claims ('the Commission') to dismiss the applicant's claim for chieftainship. If successful in the review, he requests the court to grant an order

substituting the Premier's decision and declaring him to be traditional leader of Mxhelo Administrative Area, Alice ('Mxhelo').<sup>1</sup>

### **Applicant's submissions**

[2] The applicant contends that there was a chieftainship headed by the Mabele family in Mxhelo. He is heir to the Mabele Royal Family and as such entitled to be appointed as a senior traditional leader in terms of the Traditional Leadership and Governance Act, 2003 ('the Act').<sup>2</sup>

[3] The founding affidavit sets out the basis for the applicant's claim, including the history upon which he relies, dating back to the 1830s and the time of the British Settlers. Nkosemntu Mabele laid a claim to the Chieftainship of the Mabele royal family over Mxhelo in terms of s 25 of the Act. An investigation into the Mabele Chieftainship over Mxhelo, discussed below, followed. The third respondent opposed the claim on the basis that the Mxhelo / Ely area fell under his jurisdiction.

[4] The Commission sourced a research report from Mr Peter Garikayi during 2013 (the Garikayi Report). The applicant relies heavily on the last two 'salient findings of (this) research', contained at the end of the executive summary of the Garikayi Report. These findings are repeated in full:

- 'The claimant is a Mfengu and of the Royal House of the AmaMbo in the line of Mtimkhulu: therefore he is eligible in a sense to dispute senior traditional leadership.
- Ncwana is said to have been the first chief in this area who then left for Tsomo, leaving his brother Mabele behind to lead a segment of his people.
- The area under dispute is called Mxelo in Alice in the Gaga Traditional Authority and between two clans of amaHlubi ie amaBele asLenge and amaBele amaNgobizembe.

---

<sup>1</sup> Mxhelo is a village situated in the Alice Magisterial Area, ten kilometres from both Alice and Fort Beaufort City Centres. The people of Mxhelo are also known as Ama-Ngobizembe Ase-Mxhelo.

<sup>2</sup> Act 41 of 2003.

- It is alleged that the amalgamation, known as Gunyaziwe, the amaBele aseNgobizembe were placed under amaBele aseLenge, albeit through their handing over by an acting leader one Mashalaba.
- *The respondent was of the view that there is no record of the rulership of Mabele, let alone his residence in the area in question.*
- *However, the map presented by the respondent during the public hearing shows that Mabele was a resident of this place and at the time of the drafting of the map, Mxelo was not under the leadership of Mavuso.’ (emphasis added).*

[5] It is suggested that this conflicts with the third respondent’s claim, supported by Mr Vuyani Hlati and which was accepted by the Committee, that Mxhelo was under Gaga Tribal Authority as early as 1857. The Committee recommended the dismissal of the applicant’s claim on 9 December 2013. The Premier endorsed the recommendation and made a decision on 27 May 2015. The applicant became aware of the outcome on 8 June 2015.

[6] The applicant takes issue with the delay in the Premier making his decision known, also noting that the third respondent had been informed about the decision a few days prior, on 5 June 2015. There is also a suggestion that the third respondent’s non-opposition to the application is significant.<sup>3</sup> Various grounds of review are advanced:<sup>4</sup>

- a) The Commission was biased against the applicant. It ignored the findings of the commissioned research ‘which found that there was indeed Chieftainship of AmaNgobizembe aseMxhelo under the Mabele royal family and traced the genealogy of the family from Chief Ncwana to Chief Nyandeni’.
- b) There was procedural unfairness. Written submissions prepared by Nkosemntu Mabele, assisted by (the eminent Professor of African Studies) Professor Peires, was not considered by the Commission and not included in its report (‘the missing submission’). By contrast, the third respondent’s submissions had been included, considered and accepted, despite containing factual inaccuracies. ‘Chief Langa Mavuso’s submissions can therefore not be

<sup>3</sup> P 22 of the index.

<sup>4</sup> Pp 10-12 of the index; pp 20-22 of the index.

factually correct but it is clear that the Commission favoured him to the applicant.’

- c) Irrelevant considerations were taken into account by the Commission. Scientific evidence submitted by the researcher was ignored. Instead the Commission made its decision based on contradictions on the parties’ oral submissions.
- d) The Commission had prejudged the matter and the outcome would have been the same irrespective of what evidence had been submitted.
- e) Documentary evidence in the form of a map, presented to the first respondent by the third respondent during the enquiry, was not properly considered.<sup>5</sup> That map, contrary to the third respondent’s oral submissions before the Commission, clearly indicated that the Mabele Royal Family resided in Mxhelo on or about 1857 and were allocated land there. The decision was therefore taken on the basis of irrelevant considerations, whilst relevant matters were ignored. The contradictions in the evidence of the third respondent were, therefore, not considered. The committee also ignored the report of Mr Garakayi, their own researcher.

[7] Two confirmatory affidavits in support of the applicant’s claim were attached. One deponent, Mr Edward Plam, states, inter alia, that he could remember Chief Nyandeni Mabele as the Chief of Amangobizembe aseMxhelo, who passed away in 1933 when the deponent was 11 years of age.

### **The history of the legislation**

[8] For reasons that will become apparent, it is necessary to briefly explain the history of the Act. The Act established a Commission on Traditional Leadership Disputes and Claims (‘the old commission’). The Act was amended by way of the Traditional Leadership and Governance Framework Amendment Act (‘the

---

<sup>5</sup> The applicant submits that the map was drawn by the Surveyor General in 1893, that it clearly states that the Mabele Royal Family resided in Mxhelo, so that there is no basis that Mxhelo could fall under the jurisdiction of the third respondent: p 21 of the index.

Amendment Act'), the amendments coming into operation on 25 January 2010.<sup>6</sup> Importantly, the old commission's term of office ended on 31 January 2010.<sup>7</sup>

### The Committee's report

[9] The Commission must carry out its functions in a manner that is fair, objective and impartial.<sup>8</sup> Its functions are set out in s 25 of the Act, and includes the authority to investigate and make recommendations on a range of matters including traditional leadership, traditional communities, customary law and customs.<sup>9</sup> When considering a claim, the Commission must consider and apply customary law and the customs of the relevant traditional community as they applied when the events occurred that gave rise to the dispute or claim.<sup>10</sup>

[10] The Act authorises the Commission to delegate any of the contemplated functions, barring limited exceptions which are inapplicable in the present instance, to a committee referred to in s 26A of the Act. A provincial committee must perform such functions as delegated to it by the Commission in terms of s 25(6) after a review as contemplated in s 28(10) of the Act.<sup>11</sup> A provincial committee may make final recommendations on all matters delegated to it in terms of s 25(6), other than in exceptional circumstances where the advice of the Commission may be sought.<sup>12</sup>

[11] The Committee was established in terms of s 26A(1) of the Act and comprised four members at the time it made its recommendations in this matter.<sup>13</sup> Its recommendations explains its methodology as follows:<sup>14</sup>

'Extensive research was conducted through:

- Analysis of the written submission of claimant
- Literature review

---

<sup>6</sup> Act 23 of 2009.

<sup>7</sup> See *Nxumalo v President of the Republic of South Africa and Others* [2014] ZACC 27 ('Nxumalo') para 13; *Sigcau v President of the Republic of South Africa and Others* [2013] ZACC 18 ('Sigcau') para 13.

<sup>8</sup> S 22(2) of the Act.

<sup>9</sup> S 25(2) of the Act.

<sup>10</sup> S 25(3)(a) of the Act.

<sup>11</sup> S 26A(5) of the Act.

<sup>12</sup> S 26A(6) of the Act.

<sup>13</sup> The applicant's claim was in terms of s 25(2)(a)(ii) of the Act.

<sup>14</sup> Para 3 of the Committee's Recommendations, p 83 of the index.

- Interviews and
- Public hearings.’

[12] The Committee summarised the background to the applicant’s claim and the customary laws and practices for identifying a leader.<sup>15</sup> Its analysis of the evidence follows:

8.2 The main weakness of the claim immediately appeared from the fact that between 1857 and 1973 eleven people ascended to the seat of chieftancy but only the first one, Ncwana, was a fully-fledged chief (as alleged), 1858 to 1859. He abandoned the chieftainship for quite unclear reasons within the space of one year. Thereafter ten people came on as acting chiefs, one after the other ...

8.3 ... somewhere along the line they asked Langa Mavuso to “keep the chieftainship for them”, and they later on went back to him to give it back to them. However Kondile and his team failed to explain who went to ask for the keeping of the chieftainship, when in time and for what reasons. This casts more and more doubt on the question as to whether that chieftainship ever existed.

8.4 ... Vuyani Hlati responded first to the claim, and said that Mxhelo, formerly Ely military village, was added to the Gaga black ruled area by the British in 1847. It was ruled as part of Mavuso’s land and had a headman at every time since then ... He, Vuyani, is now 80 years old and knows well the history of Gaga and Mxhelo. “Ncwana’s book which is relied upon by claimants is wrong to say Mabele was ever a chief”, Vuyani Hlati concluded.

8.5 The respondent, Langa Mavuso, also testified, showing that there was never a chieftainship of the claimant’s group in Mxhelo. He produced a large map of Ely (Mxhelo) drawn up by John Todd in April 1893. It lists the names of all families resident there at the time and he said no one in the line of Mabele does feature at all. There is also a list of those who had title deeds at Mxhelo but again claims that no one in the line of Mabele features there. Significantly, claimant’s team had no answer to these documentary revelations.

8.6 During question time one of the most difficult things for the claimant’s team was to give a satisfactory explanation about the duration of its chieftainship and its loss. What made matters worse was the somewhat conflicting versions about the chieftainship having been “overthrown” (*sabhukuqwa*) on the one hand, and having been peacefully handed over by them to the Mavuso chieftainship to “keep” for them. Add to this was their opening statement that that first Chief Ncwana had ruled for only one year and then left the chieftainship, to establish himself in Tsomo district and their chieftainship in Mxhelo

---

<sup>15</sup> P 84 of the index.

becomes questionable. As if it was not enough, Kondile said that the land was given to them by King Hintsa in 1857 when in fact, the said King had died in 1835. The change over to say the land was given to them by King Hintsa's brother Buru was patching up ...'

[13] The Committee reached the following conclusion, prior to recommending that the applicant's claim be dismissed:

'On the whole the claimant's submission is full of contradictions and casts doubts about the claim that there was ever a traditional leadership of Mabele in Ely / Mxhelo. The response of Mavuso to the claimant's submission was factual and convincing. In any case even if there was a traditional leadership of Mabele in and around 1973 none of the "chiefs" listed in Annexure A were permanent.'

### **The Premier's decision**

[14] The Premier's decision on the applicant's claim, dated 27 May 2015, was expressed as follows:

'Pursuant to an investigation by the Eastern Cape Provincial Committee of the Commission on Traditional Leadership Disputes and Claims in terms of Sections 25 and 26 of the Traditional Leadership and Governance Framework Act (Act No. 41 of 2003) and, after having considered the circumstances of the recommendations, the Premier took a decision on 27 May 2015 to dismiss the claim of Nkosemntu Melvin Mabele substituted by Andile Mavuso based on the following reasons:

1. The evidence indicates that there was never chieftainship of the Mabele's group in Mxelo Administrative Area which is part of the Gaga Traditional Council under Langa Mavuso.

The above constitutes my decision and reasons therefore.'

### **The answering affidavits**

[15] Both the Premier and the chairperson of the Committee at the time, the first respondent ('the Chairperson'), deposed to affidavits opposing the application. The Chairperson explained the delegation of the claim by the Commission to the Committee, and that Committee operations have since ceased. The Chairperson exercised procedural oversight, including the investigation of the claim until the

recommendation was made. She denied that there is a position of senior traditional leadership of the AmaNgobizembe aseMxhelo in Alice and explained that it was not possible under customary law for a Chief to have settled in Mxhelo, established a Chieftainship and then return to Transkei, leaving his son in charge, as was alleged to have occurred.

'As long as a Chief is alive, his chieftainship resides with him and cannot pass on to his son by reason of him settling elsewhere.'

[16] On this basis, it was submitted that the claim was defeated on the applicant's own version. The Chairperson took issue with the applicant's interpretation of the Garikayi Report and the disputed map. That report did not contain confirmation of a Mabele Chieftainship in Mxhele. The report had merely noted that Mabele was a resident at the time of the drafting of the map. The research findings had not been ignored. The Committee had also not 'agreed' with Mavuso as alleged by the applicant, or 'sang his praises', but merely recorded its observations. Allegations of bias were unsubstantiated and baseless. Importantly, the Committee's mandate was to investigate whether a chieftainship of the Mabele existed and it was not seeking to prove or disprove a person or household's claim. Its conclusion had been based on an appraisal of the facts.

[17] The Chairperson denied that the missing submission had been presented to the Committee. Before concluding its investigations, parties were asked to bring forward any further evidence that should be considered in support of their position. The missing submission, attached to the papers as 'AM 5', was never presented.

[18] The contradictions in the applicant's oral presentation to the Committee were significant. The Chairperson explained as follows:<sup>16</sup>

'To accept a Mabele Chieftainship existed in Mxhelo would be to accept that a single Chief can have two geographically far-flung traditional areas to reign over. This would constitute an untenable state of affairs. Such is not provided for, not under customary law, or under the Act ... No chieftainship is ever handed over to people outside of the royal lineage, even in an acting capacity as happened with the Amabele, according to their own version. According to customary law, royalty is by birth and not by appointment.'

---

<sup>16</sup> P 47 of the index.



[19] The main weakness of the claim was the allegation presented to the Committee that Chief Ncwana left the chieftainship for no apparent reason, and that between 1857 and 1973 eleven people had ascended to the seat of chieftancy, but never as fully-fledged chief.<sup>17</sup> Another version had also been presented to the Committee, namely that the Mabele asked the third respondent to keep their chieftainship for them. Yet they had been unable to provide any details about that arrangement, casting doubt as to whether their alleged chieftainship had ever existed, so that the Committee's recommendations were based on the information before it and properly made.

[20] The Premier's supporting affidavit explained his delay in considering the Committee's recommendation.<sup>18</sup> There had been a change in leadership and the previous Premier, Ms Noxolo Kiviet, had been in office until May 2014. Independent legal advice had been sought following a briefing from the Departmental Legal Advisor's office during September 2013. There were in excess of 100 matters to be considered and processed. Counsel's advice had been received during May 2015, and the Premier had subsequently made his decision. All documentation presented had been considered and the decision had not been taken on the basis of irrelevant considerations. The Committee's recommendations were considered to be well-founded and were considered to be a rational conclusion based on the investigation that had been conducted.

[21] In reply, the applicant suggested that the failure of the respondents to address the affidavits of Mr Bolosha and Mr Plan in support of the founding affidavit was fatal to its opposition, and that administrative justice was defeated by the decision not being provided to the applicant and third respondent on the same day. The Garikayi Report was an official document of the Commission and its findings were binding. The genealogy reflected in this report confirmed the Mabele family as

---

<sup>17</sup> Ibid.

<sup>18</sup> The Premier is the provincial State functionary vested with the executive authority to make final decisions on traditional leadership disputes. The power derives from s 127(1) of the Constitution of the Republic of South Africa, 1996, in terms of which the Premier of a province has the powers and functions entrusted to that office by the Constitution and any legislation. The legislation in this case is the Act, in particular ss 26(2)(b) and (3) thereof in terms of which the Commission's recommendations are to be conveyed to the Premier within two weeks of being made and thereafter decided upon within 60 days.

Chiefs in Mxhelo. The confirmation that the missing submission had not been received or considered demonstrated the inadequacy of the Committee's recommendation. The disputed map should be produced in court for 'inspection in *loco*'. It had not been produced before the Committee or observed. Finally, it was significant that the third respondent was not opposing the application. The crux of the argument in reply was that there was sufficient evidence in the map, which had not been considered, and the Garikayi Report to support the claim, particularly when coupled with the missing submission.

### **The arguments**

[22] Many of the above-mentioned challenges were, correctly in my view, dispensed with during argument. Neither party placed further reliance on the disputed map and both counsel were satisfied that the matter required a decision on the papers as they stood. The argument that 'the history books' definitely provided for the applicant's claim was unsubstantiated – in fact the one passage that counsel pointed me to, on an ordinary reading, appears to support the exact opposite of what is claimed: '*Ucwana* resides on the left bank of the Kei, his people are called Amaqobizembi ... They were destroyed by the Amahlubi about 20 years since.'

[23] The thrust of the applicant's argument was based on *Nxumalo* which drew upon *Sigcau*,<sup>19</sup> and proceeded on the following basis. The decision had been taken in terms of 2003 legislation, instead of in terms of the 2009 amendment act. As such, the functionary had exercised power not conferred by the (2003) act and acted unlawfully, so that the decision had to be set aside. This argument will be addressed, below.

### **The legal position**

---

<sup>19</sup> *Supra* fn 7.

[24] The constitutional right to just administrative action and the Promotion of Administrative Justice Act, 2000 ('PAJA')<sup>20</sup> require rigorous scrutiny of administrative decisions without requiring courts to take the place of administrative bodies making decisions. It is not required that a decision of an administrative body be perfect or, in the court's estimation, the best decision on the facts.<sup>21</sup> A rational connection test has been described as 'relatively deferential', calling for 'rationality and justification rather than the substitution of the Court's opinion for that of the tribunal on the basis that it finds the decision ... substantively incorrect.'<sup>22</sup> Judges entering into the merits must do not do so in order to substitute their opinion of the correctness thereof, but to determine whether the outcome is rationally justifiable. As the Constitutional Court held in *Mamone v Commission on Traditional Leadership Disputes and Claims and Others*,<sup>23</sup> a level of deference is necessary, particularly in cases where matters fall within the special expertise of a particular decision-making body. Due weight and appropriate respect must be given to findings of fact made by those with special expertise and experience. In respect of the Commission, the Court said the following:

'The Commission is a specialist body constituted by experts "who are knowledgeable regarding customs and the institution of traditional leadership ... This Court may not neglect its duty to scrutinise the rationality of the Commission's decision. But, in doing so, it must be cognisant of the Commission's special expertise as well as the wealth and complexity of the factual evidence it considered in its wide-ranging enquiry. The fairness of that process, where representations were solicited from interested parties, was not challenged."<sup>24</sup>

[25] In the case of rationality review, even though a court might interpret facts differently to the Commission or its Committee, this does not entitle the decision to be set aside if the decision was rational, bearing in mind the respect that must be shown to its findings.<sup>25</sup> In general terms, review is concerned with whether a

---

<sup>20</sup> Act 3 of 2000.

<sup>21</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15 paras 45-49.

<sup>22</sup> *Niewoudt v Chairman, Amnesty Subcommittee, Truth and Reconciliation Commission* 2002 (3) SA 143 (C) at 155G-H and 164G-H.

<sup>23</sup> [2014] ZACC 36 para 79.

<sup>24</sup> *Mamone* ibid paras 80, 82.

<sup>25</sup> *Mamone* ibid para 92.

decision was regular or irregular, not with whether it was 'right' or wrong'. As the SCA held in *Mgijima v The Premier of the Eastern Cape Province and others*,<sup>26</sup> that is the province of appeals and no provision is made in the legislation in this case for an appeal:<sup>27</sup>

'In other words, whether the decision is a correct decision is not open for determination on review ... Except in a narrow band of cases, of which this case is not one, error of fact is not a ground of review. The result is that even if it could be said that the Commission's factual conclusions were wrong, that is not a ground of review.'

[26] Sections 211 and 212 of the Constitution deal with the recognition of traditional leadership and matters related thereto. The legislative framework is provided by the Act, as amended, and finds application in the recommendation of the Committee and the decision of the Premier.<sup>28</sup> That recommendation is authorised by s 26A(7) read with s 26(2)(b) of the Act. The functionary assigned the function of making a decision on the recommendation of the Commission or a Committee is the Premier.<sup>29</sup> That decision is preceded by an investigation and recommendation of the Commission or one of its committees, deriving its authority to investigate from the lodgment of a claim or dispute in respect of a matter as defined in s 25(2) of the Act.<sup>30</sup> The decision of the Premier is discretionary in the sense that it may differ from the recommendation received, in which event reasons for departing from the recommendation must be given.<sup>31</sup> As will be illustrated, this process is different to the way in which disputes were managed prior to the 2009 amendment to the Act.

[27] It is correctly not disputed that the recommendation and the decision constituted administrative action which is subject to judicial review.<sup>32</sup> As Van Zyl DJP held on behalf of a full bench of this court in *Hebe*:<sup>33</sup>

---

<sup>26</sup> [2020] ZASCA 139 para 29.

<sup>27</sup> *Mgijima* supra paras 29-30. The only other basis upon which wrong factual conclusions may afford a ground of review is if the Commission's / Committee's factual findings were so out of kilter with the evidence that they were irrational: para 31.

<sup>28</sup> *Premier of the Eastern Cape and Others v Hebe and Others* [2017] ZAECBHC 14 para 23.

<sup>29</sup> See *Hebe* ibid para 36.

<sup>30</sup> The claim or dispute raised further serves to define the ambit of the authority of the Commission or a committee: *Hebe* ibid para 51.

<sup>31</sup> *Hebe* ibid para 34; S 26(4) of the Act.

<sup>32</sup> S 1 of PAJA. See *Hebe* ibid para 62.

<sup>33</sup> *Hebe* ibid para 62, 63.

'The Committee is a statutorily constituted body. It exercises a public power under an empowering provision in the Framework Act. That the Committee makes a recommendation and not a binding decision must be considered in the context of the nature of the function that it performs. The dispute resolution mechanism in chapter 6 of the Framework Act envisages a two-stage process that is continuous and interlinked. It commences with an investigation and recommendation of the Committee, and is concluded with the decision of the Premier ... The recommendation is accordingly a jurisdictional fact and a prerequisite for the exercise by the Premier of his authority as contemplated in section 26 of the Framework Act.'

[28] It must be accepted that where the Premier decides to accept the recommendation of the Committee in circumstances where the Committee's role in the decision-making process was flawed, the entire process will be tainted.<sup>34</sup> The recommendation and the decision constitute administrative action within the meaning of PAJA.

## **Analysis**

[29] It is apparent that the Premier failed to make a decision on the Committee's recommendation within the 60-day period allowed for this in terms of s 26(3) of the Act. The delay is excessive. Nevertheless, the reasons for the delay have, in my view, been adequately explained given the change in premier, the volume of cases to be considered and the process embarked upon by the Premier to obtain independent legal advice prior to making a decision on the Committee's recommendations. No prejudice to the applicant has been demonstrated and, in the circumstances of this case, including the subsequent lengthy passing of time, it would be untenable for the decision to be reviewed only on this basis.

[30] The significance and materiality of the three-day delay in providing the contents of the decision to the applicant, as opposed to the third respondent, is unclear. The suggestion appears to be that this is indicative of bias on the part of the Premier in favour of the third respondent. Unsurprisingly, counsel for the applicant did not pursue this line of argument. That suggestion is speculative at

---

<sup>34</sup> *Hebe* ibid para 64.

best and unsubstantiated on the papers. There is no basis for finding that this discrepancy operated to the prejudice of the applicant so as to warrant the review and setting aside of the decision itself.

[31] The non-opposition on the part of the third respondent in these proceedings (the third respondent opposed the referral to the Committee and appears to have participated in those proceedings in full) is equally unhelpful to the applicant's cause, and was also not mentioned during argument. The relief sought in the amended notice of motion attacks the decision of the Premier based on the recommendations of the Committee and prays for that decision to be reviewed and set aside, together with an order of substitution of the applicant as traditional leader of Mxhelo in the event of success. While it was open for the third respondent to oppose the application, his failure to do so cannot, in these circumstances, and on its own, support the applicant's claim that the decision must be reviewed and set aside.

[32] It is, furthermore, opportunistic to suggest that the first and second respondents' failure to address the brief confirmatory affidavits of the deponents who supported the applicant's founding affidavit must result in the review succeeding. Those affidavits do nothing more than confirm the applicant's version of the historical underpinnings of his claim. The first respondent, as chairperson of the Committee, makes it clear that the Committee rejected that version for various reasons, as is evident from the Committee's recommendations at the time. The failure to explicitly refute any of the contents of the confirmatory affidavits in the answering affidavits cannot negate this position. The authority cited by applicant's counsel, concerned with detailed supplementary affidavits detailing the 'living customary law' of the amaRharhabe, is distinguishable. In any event, I do not consider that case to lay down an immutable principle that binds this court to elevate the non-response to the brief confirmatory affidavits filed in such a fashion that the applicant is able to succeed in the application for review. The one case cited by the applicant in support of this position, *Freedom Under Law v Minister v Minister of Social Development and Others*<sup>35</sup> is completely distinguishable. In that

---

<sup>35</sup> [2021] ZACC 5 para 12.

case, the bulk of the *relief* sought by the appellant was not opposed so that the matter was decided without hearing oral argument. That is certainly not the position in this instance.

[33] These peripheral challenges aside, the crux of the application rests on the claims of bias and the absence of procedural fairness. The allegation of bias rests mainly on the Committee's treatment of the Garikayi Report, and its failure to find in favour of the applicant based on a few points contained in that Report's executive summary. In fact, it is clear that the Garikayi Report does not arrive at the conclusion that the applicant seems to see. The applicant appears to misinterpret its findings, when read in their totality, and elevates the points raised by the report to a conclusion that is without justification.

[34] In any event, and as the Garikayi Report itself notes, this was part of an information gathering exercise, including a literature review, in loco inspection, face to face interviews and public hearings which were recorded and filed, guided by a structured questionnaire.<sup>36</sup>

'All information collected from the first phase is then synthesised by data analysis into recommendations of the Committee to the Premier of the Province ... The findings of the entire process (including literature review, purposive sampling, in loco inspection, face to face interviews and public hearings) were then subjected to analysis by the Committee in the light of the empowering legislation for the purposes of making recommendations to the Premier.'

[35] This limited contribution is a far cry from an all-encompassing investigative report that would be binding on the Committee and influence the Premier. The Garikayi Report does not explicitly arrive at a finding in favour of the applicant. In any event, it was for the Committee to fulfil its legislative mandate in considering the totality of evidence presented to arrive at a recommendation to be presented to the Premier. It would have committed an irregularity had it merely delegated that task to a researcher. Its treatment of the Garikayi Report is not, in my view, indicative of bias.

---

<sup>36</sup> P 63 of the index.

[36] The claim that there may have been bias because of the Committee's treatment of the third respondent and the acceptance of his submissions before it is equally difficult to sustain. As the Chairperson made clear, the Committee's recommendations merely reflected the submissions it had received from the third respondent as part of its analysis of the evidence. It emphasised that the claimant's team had no answer to the documentation that had been submitted. Importantly, the main basis for the Committee's recommendation that the claim be dismissed, appearing on the final page of its recommendation, refutes the claim based on the poor quality of the applicant's response to questions, the fluid basis for the claim and the contradictions and doubts that had subsequently resulted in the third respondent's response being preferred. This conclusion was supported by an analysis of the applicant's case, and rejection thereof, based on established customary law principles. Significantly, none of these matters, which go to the heart of the recommendation, have been addressed in the applicant's review application.

[37] The procedural fairness challenge flounders on a proper application of the *Plascon-Evans* rule. The applicant seeks final relief and the first respondent has refuted any suggestion that the missing submission had in fact been submitted to the Committee for consideration. 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 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.<sup>37</sup> Considering the available documentation in its totality, it cannot be said that the first respondent's version on this point is so far-fetched or clearly untenable so that it should be rejected out of hand. The first respondent raises a *bona fide* dispute of fact that must be resolved in its favour. This is also a basis for rejecting any suggestion that the Committee was improperly constituted at the time its recommendation was made.

[38] The applicant's arguments about the legality of the Premier's decision given the underpinning legal framework requires special focus. The cases of *Sigcau*<sup>38</sup> and

---

<sup>37</sup> *Plascon-Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634A to 635C. For an application of the rule in the context of traditional leadership, see *Gwayi v MEC, Responsible for Local Government and Traditional Affairs and Others* [2015] ZAECBHC 37 para 2.

<sup>38</sup> *Sigcau v President of the Republic of South Africa and Others* [2013] ZACC 18.



*Nxumalo*<sup>39</sup> are important, but cannot benefit the applicant's cause in this matter. The Constitutional Court held in *Sigcau* that the President should have acted in terms of the Act, prior to its amendment.<sup>40</sup> Because a decision had been made by the old commission in terms of the Act prior to amendment (that decision was made on 21 January 2010, before the amendment to the Act came into operation), the President had no power to decide the applicant's claim in that matter.<sup>41</sup> It was the old commission that had that power and the President's obligation under the Act, prior to amendment, was simply to implement the decision of the old commission. Having instead sought to make his own decision in terms of the Act (i.e. the Act, as amended), he had acted outside his powers and the notice containing his decision was set aside. The remarks of Zondo J in *Nxumalo* about the President 'acting under a wrong Act' must be read in the context of the old commission having had the authority to decide the applicant's claim in *Sigcau* in terms of the Act, prior to its amendment, because that claim was placed before the old commission. The President erroneously made his own decision, erroneously operating under the Act, as amended, and treating the decision of the old commission as a mere recommendation. His actions in terms of the amendments to the Act were therefore, in a sense, premature and resulted in his notices being set aside. A similar fate befell the decision in *Nxumalo*, for a similar reason. It may also be noted, for the sake of completeness, that the outcome in *Nxumalo* was not that the old commission's decision in the matter was also set aside. The High Court's approach in showing deference to the old commission, as a specialist body established by an Act of Parliament to deal with a special category of disputes affecting a large section of society, was upheld.<sup>42</sup>

[39] By contrast, in the present instance, the Commission was seized with a claim in terms of the Act (i.e. the act, as amended). In terms of the applicable sections of the Act, cited above, the Committee acted properly in making a recommendation for the Premier's consideration and the Premier's decision cannot be set aside on the authority of *Sigcau* or *Nxumalo*. There appears to be a rational connection

---

<sup>39</sup> *Nxumalo v President of the Republic of South Africa and Others* [2014] ZACC 27.

<sup>40</sup> The terminology used by the Constitutional Court was 'the old Act' for the Act, as unamended, and 'the new Act' for the Act subsequent to its 2009/2010 amendment: *Sigcau* para 5.

<sup>41</sup> The amendment to the Act came into operation on 25 January 2010.

<sup>42</sup> See *Nxumalo* supra para 21.

between the material that was before the Premier and the decision that he took, and a rational connection between this decision and the reasons provided in explanation. There is no reason to believe that the Premier committed any misdirection in endorsing the Committee's recommendation, or that that recommendation was improperly supported or advanced. The application accordingly stands to be dismissed.

### **Costs**

[40] The parties were in agreement that the *Biowatch* principle ought to be applied in the event that the applicant was unsuccessful.<sup>43</sup> That appears to me to be the appropriate position given the nature of the parties and the application. I have also noted that similar cases have previously followed this approach. In accordance with the normal rule that applies to constitutional litigation against an organ of state, each party should bear their own costs.

### **Order**

[41] The following order will issue.

1. The application is dismissed.
2. Each party to bear their own costs.

---

**A. GOVINDJEE**  
**JUDGE OF THE HIGH COURT**

**Heard:28 April 2022**  
**Delivered:29 April 2022**

---

<sup>43</sup> *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC) paras 21-23.

Appearances:

Counsel for the Applicant: Adv M.P.G. Notyawa  
Makhanda

Instructed by : Simphiwe Jacobs & associates Inc.  
c/o Mankayi Masoka Attorneys  
25 Dawning Street  
King William's Town  
Email:zmasoka@ymail.com

Respondent's Counsel: Adv M. Mayekiso  
Asante Chambers  
East London

Instructed by : The State Attorney  
17 Fleet Street  
Old Spoornet Building  
East London  
c/o Shared Legal Services  
Office of the Premier  
32 Alexandra Road  
King William's Town