



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

NOT REPORTABLE

Case no: 3277/2018

In the matter between:

ZUKISWA KONA

Applicant

and

THE PREMIER, EASTERN CAPE

First Respondent

**MEC FOR CO-OPERATIVE GOVERNANCE AND
TRADITIONAL AFFAIRS (EASTERN CAPE)**

Second Respondent

**PROVINCIAL HOUSE OF TRADITIONAL
LEADERS (EASTERN CAPE)**

Third Respondent

MBUKUMBUKU KONA

Fourth Respondent

NOMISILE KONA

Fifth Respondent

**KONA ROYAL FAMILY
Respondent**

Sixth

JUDGMENT

Govindjee J

[1] The applicant seeks an extension of the 180-day period prescribed in s 7(1) of the Promotion of Administrative Justice Act, 2000¹ ('PAJA'), in respect of the institution of judicial review against the following decisions:²

(a) 'the decision taken by the second respondent ('the MEC') in or around 2011 to recognise the Fourth Respondent as Headman of the Gqunqu Village in terms of s 18(3) of the 2005 Act';

and

(b) 'the determination by the Eastern Cape Provincial House of Traditional Leaders in terms of s 21(2) of the Traditional Leadership and Governance Act, 41 of 2003, recorded in a report dated 6 September 2013 that the applicant was legitimately excluded from succession to the Headmanship of the Gunqe Village'.

[2] In terms of an order issued on 23 August 2019, the issue concerning the applicant's delay in instituting the application is to be determined first, subject to any contrary ruling. The parties have had full opportunity to ventilate the issue on the papers and during argument. The point is such that its determination might be dispositive of the entire application. I am, for these reasons, inclined to deal with this issue at the outset.

¹ Act 3 of 2000.

² The applicant initially sought to also review the recognition of her mother as Headwoman during 2008, but abandoned this relief prior to the commencement of argument in the matter.

Brief background

[3] The applicant's case is that the headmanship of the Gqunqe Village ('the Village') is, by custom, hereditary, passing to the eldest child of the departing incumbent. She alleges that a body purporting to act as the Kona Royal Family refused to identify her as the rightful successor to her father in terms of the applicable legislation, namely the Traditional Leadership and Governance Framework Act³ ('the Framework Act') and the Eastern Cape Traditional Leadership and Governance Act⁴ ('the Provincial Act').

[4] It is common cause that the MEC, as per a delegation from the first respondent ('the Premier'), issued a certificate of recognition ('the 2011 Recognition Decision') recognising and appointing the fourth respondent as headman. The applicant confirms that she approached the Commission for Gender Equality ('CGE') as early as 3 June 2011 to seek assistance in challenging this decision. The founding papers explain the steps taken thereafter, purportedly as 'internal remedies' prior to launching this application. It was the applicant's dissatisfaction with the 2011 Recognition Decision, and the advice that she received, that precipitated a complaint to the Eastern Cape Provincial House of Traditional Leaders ('the Provincial House'), as an internal dispute resolution process in terms of s 21 of the Framework Act. The consequent report ('the Provincial House Report'), dated 6 September 2013, recorded approval of the decision taken by the royal family in favour of the fourth respondent. This is linked to the request for condonation or extension of the 180-day period prescribed in PAJA. For reasons that will become apparent, it is convenient to first consider the review of the 2011 Recognition Decision.

³ Act 41 of 2003.

⁴ Act 4 of 2005.

Was there an unreasonable or undue delay?

[5] The Constitutional Court has endorsed the following approach to determining a plea of undue delay:⁵

‘(1) Consider whether the delay is unreasonable or undue (a factual enquiry upon which a value judgment is made in the light of all the relevant circumstances); and if so,
(2) Decide whether the court’s discretion should be exercised to overlook the delay and nevertheless entertain the application.’

[6] Section 7 of PAJA provides as follows:

‘(1) Any proceedings for judicial review in terms of s 6(1) must be instituted without unreasonable delay and not later than 180 days after the date –

- (a) subject to subsection 2(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection 2(a) have been concluded; or
- (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

(2)(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 ...’

[7] The prescribed 180-day time-period may be extended for a fixed period, following application to court, where parties are unable to agree to this, in cases where the interests of justice so require.⁶

⁵ See *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal* 2014 (3) BCLR 333 (CC) (*Khumalo*) para 49, as confirmed in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (6) BCLR 661 (CC) (*Asla*).

⁶ S 9 of PAJA.

Was the 2011 Recognition Decision subject to internal remedies?

[8] In determining whether these proceedings have been instituted within the prescribed time period, or without unreasonable delay, it is first necessary to consider the issue of internal remedies. The applicant followed a process, seemingly on the advice of the CGE, centred on the Provincial House. It was attempted engagement in that process that has occupied the time of the applicant and her advisors for parts of the period between the end of 2011 and 2018, when the application was launched. It was the outcome of that process that was penned during 2013 but only communicated to the applicant in 2017. If that approach constituted a process properly instituted as an internal remedy 'provided for in any other law', it would affect the calculation of the 180-day period in terms of PAJA in favour of the applicant. If not, the proverbial clock started running from the date that the applicant became aware or reasonably ought to have become aware of the administrative action.⁷ In that case, the circumstances surrounding the approach to the Provincial House, are factors to be considered as part of the explanation for the delay.

[9] Various decisions of the SCA and Constitutional Court, which have considered similarly worded provincial legislative provisions and interpreted the relevant sections of the Framework Act, have clarified the position. In *Tshivhulana*,⁸ the Constitutional Court considered s 21 of the Framework Act, following a High Court's decision that internal remedies were to be exhausted prior to a review application. As in the present instance, the High Court had been approached on the basis that the Premier's decision to recognise the respondent as a village headman ought to be reviewed and set aside. The point *in limine* considered by the Constitutional Court was whether the appellant had failed to exhaust the internal remedies prescribed by s 21 of the Framework Act, prior to reviewing the Premier's decision in terms of PAJA. The Court interpreted that section as follows:⁹

⁷ S 7(1)(b) of PAJA. See, in general, *Reed and Others v Master of the High Court of SA and Others* [2005] 2 All SA 429 (E) paras 20-25.

⁸ *Tshivhulana Royal Family v Netshivhulana* [2016] ZACC 47 (*Tshivhulana*).

⁹ *Ibid* para 32.

'The dispute may be referred from one level to the next only if it is unresolved. When a definitive decision is taken at any level, the aggrieved party does not have any further internal recourse. This is so because none of the levels is a review or appeal level. A decision at any level gives the aggrieved party the right to exit the internal structure and approach a court for appropriate relief.'

[10] In addition:¹⁰

'The dispute or claim that should be subjected to the internal remedies prescribed in section 21 must be one *between or within* traditional communities or customary institutions as defined in the Framework Act ... [the applicant] presented the dispute in the High Court as the unlawful or irregular recognition of the respondent by the Premier ... The dispute is between [the applicant] and the Premier. The Premier is not a traditional community or customary institution. It is highly unlikely that the Legislature would have contemplated a dispute between the Premier and a traditional community or a customary institution to fall within the purview of section 21(1)(a) of the Framework Act. This is so because the Premier is part of the internal dispute resolution institutions or persons in section 21. It would be absurd to have the Premier simultaneously as a party to and resolver of the dispute. In recognition disputes, the Premier's decision would invariably be impugned because he or she is the recognising authority. Having decided the issue, he or she would be disqualified to resolve the dispute about his or her alleged unlawful conduct ... the section 21 dispute resolution remedies are not applicable when the Premier's action is challenged ...'

[11] The judgment of Mogoeng JP in *Mamogale*,¹¹ cited with approval in *Tshivhulana*, further elucidates the position:

'The Premier of this Province has pronounced herself ... on the recognition of the second respondent as his replacement. This decision has elevated what once was an internal dispute, potentially capable of internal resolution, to a dispute between a faction of the Royal Family ... and the Provincial Government ... which has caused the resolution to no longer be internal. A truly internal dispute is, in the context of this case, capable of being resolved by the Royal Family through customary laws, customs and processes ... once the Premier takes a decision, the dispute loses every semblance of being internal ...'

¹⁰ Ibid paras 35, 37, 38, 40, 43.

¹¹ *Mamogale v Premier, North West* [2006] ZANWHC 63 paras 19-20.

[12] Applying these decisions, the 2011 Recognition Decision was a definitive decision which precluded internal recourse. As the subsequent dispute involved the Premier or their delegate, it was clearly not one that was 'between or within traditional communities', and the s 21 Framework Act dispute resolution remedies were inapposite. Instead, this court ought to have been approached in terms of PAJA, on the timeframes applicable to review of administrative action where no internal remedies existed.

[13] In addition, it may be noted that PAJA's references to 'any internal remedy' in s 7(2)(a), read with s 7(1)(a), is specific to 'any internal remedy provided for *in any other law*' in respect of the impugned decision. The referral to the Provincial House simply did not fit the bill in respect of the 2011 Recognition Decision. As a result, the applicant was engaged, between 3 June 2011 and November 2018, when this application was launched, in 'attempted dispute resolution' in circumstances where no internal remedy was prescribed or could have been utilised in order to challenge the 2011 Recognition Decision. On the applicant's own papers, this date in June 2011 may be taken as the date on which she became aware of the impugned administrative action. Instead of launching the review sometime during the subsequent 180 days, the application was filed some seven years late.¹²

[14] Judicial review proceedings should be initiated without unreasonable delay.¹³ In *Gqwetha v Transkei Development Corporation and Others*,¹⁴ Nugent JA explained the rationale for this as follows:

'[22] It is important for the efficient functioning of public bodies ... that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale for that longstanding rule ... is twofold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view

¹² See *Premier of the Eastern Cape and Others v Ntamo and Others* [2015] ZAECBHC 14; 2015 (6) SA 400 (ECB) para 65. Also see *Members of the Murangoni Royal Family and Another v Tshivhase Traditional Council and Others* [2021] ZALMPTHC 7 paras 9-11. Cf *Kobe and Others v Lebogo and Others* [2021] ZALMPPHC 31. For reasons that will become apparent, the position would, in the circumstances of this matter, be the same even if the appeal to the Provincial House had constituted an internal appeal in terms of PAJA.

¹³ *City of Cape Town v Aurecon South Africa (Pty) Ltd* [2017] ZACC 5; 2017 (4) SA 223 (CC) (*Aurecon*) para 37.

¹⁴ *Gqwetha v Transkei Development Corporation and Others* [2006] 3 All SA 245 (SCA) paras 22 – 24.

more importantly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions. As pointed out by Miller JA in *Wolgroeiens Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 41E-F (my translation):

“It is desirable and important that finality should be arrived at within a reasonable time in relation to judicial and administrative decisions or acts. It can be contrary to the administration of justice and the public interest to allow such decisions or acts to be set aside after an unreasonably long period of time has elapsed – *interest republicae ut sit finis litium* ... Considerations of this kind undoubtedly constitute part of the underlying reasons for the existence of this rule.”

[23] Underlying that latter aspect of the rationale is the inherent potential for prejudice, both to the efficient functioning of the public body and to those who rely upon its decisions, if the validity of its decisions remains uncertain. It is for that reason in particular that proof of actual prejudice to the respondent is not a precondition for refusing to entertain review proceedings by reason of undue delay, although the extent to which prejudice has been shown is a relevant consideration that might even be decisive where the delay has been relatively slight (*Wolgroeiens Afslaers*, above, at 42C).

[24] Whether there has been undue delay entails a factual enquiry upon which a value judgment is called for in the light of all the relevant circumstances including any explanation that is offered for the delay (*Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie, en 'n Ander* 1986 (2) SA 57 (A) at 86D-F and 86I-87A). A material fact to be taken into account in making that value judgment – bearing in mind the rationale for the rule – is the nature of the challenged decision. Not all decisions have the same potential for prejudice to result from their being set aside.’

[15] In the case of PAJA reviews, s 7 of the Act creates a presumption that a delay of longer than 180 days is ‘per se unreasonable’.¹⁵ The delay in reviewing the 2011 Recognition Decision was clearly unreasonable, being well in excess of the prescribed 180-day period. It was not suggested otherwise, counsel for the applicant rightly conceding the point. Nonetheless, the obligatory nature of dealing with both legs of the test has been highlighted, so that even an unreasonable delay cannot be

¹⁵ *Opposition to Urban Tolling v South African National Roads Agency Ltd* [2013] ZASCA 148; [2013] 4 All SA 639 (SCA) (*OUTA*) para 26.

'evaluated in a vacuum'.¹⁶ What remains to be considered, and involves the exercise of a so-called true discretion,¹⁷ is whether the court should overlook the delay and nevertheless entertain the application in the interests of justice.¹⁸

Should the delay be condoned?

[16] A court is only empowered to entertain the review application if the interests of justice dictate an extension in terms of s 9 of PAJA, and absent such extension there is no authority to entertain the review application at all.¹⁹ Condonation for failure to comply with the time period prescribed by PAJA in traditional leadership disputes is not simply there for the asking, and a proper explanation is necessary.²⁰ The court has a discretion whether or not to grant condonation. It is trite that the discretion must be exercised in a judicial manner, with due regard to the nature of the relief sought, the extent and cause of the delay and its effect upon the administration of justice, the reasonableness of the explanation for the delay, whether or not the delay has caused prejudice to the other parties, the importance of the issue for determination to the parties and the applicant's prospects of success. The overarching focus remains consideration of what outcome would be in the interests of justice.²¹

[17] In *Camps Bay*, Maya JA confirmed the position as follows:²²

¹⁶ *Khumalo* above n 5 para 49.

¹⁷ See *Member of the Executive Council for Cooperative Governance and Traditional Affairs, KwaZulu-Natal v Nkandla Local Municipality and Others* [2021] ZACC 46 para 58; *Notyawa v Makana Municipality* [2019] ZACC 43 (*Notyawa*) paras 40-41.

¹⁸ See, for example, *Gongqose and Others; S v Gongqose and Others v Minister of Agriculture, Forestry and Fisheries and Others* [2016] ZAECHMHC 1; [2016] 2 All SA 130 (ECM); 2016 (1) SACR 556 (ECM) (*Gongqose*) para 68.

¹⁹ *OUTA* above n 15 para 26. In such an instance, whether or not the decision was unlawful is immaterial as the decision has been 'validated by the delay'. It may be added that the applicant did not rely on the *Gijima* principle, so that there is no need to enter the debate as to whether the principle may possibly be applicable to PAJA reviews: see C Hoexter and G Penfold *Administrative Law in South Africa* (3rd Ed) (Juta) (2021) at 730, 731. For the sake of completeness, it may be noted that this was not a case of 'clear and indisputable' illegality or unlawfulness akin to the circumstances in *Central Energy Fund SOC Ltd v Venus Rays Trade (Pty) Ltd* [2020] ZAWCHC 164 para 298.

²⁰ *Mbabama v Premier of the Eastern Cape and Others* [2022] ZAECHMHC 36 para 13.

²¹ See, for example, *Matiwane v President of the Republic of South Africa and Others* [2019] ZAECHMHC 23; [2019] 3 All SA 209 (ECM) paras 13, 14.

²² *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] 2 All SA 519 (SCA) para 54. Also see *Aurecon* above n 13 para 47.

'...the question whether the interests of justice require the grant of such extension depends on the facts and circumstances of each case: the party seeking it must furnish a full and reasonable explanation for the delay which covers the entire duration thereof and relevant factors include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issues to be raised in the intended proceedings and the prospects of success.'

The explanation of the delay

[18] It is expected that a party applying for condonation will give a full and honest explanation for the whole period of the delay.²³ The extent and cause of the delay are also pertinent considerations. The reasonableness of the delay must be examined with reference to the explanation offered for the delay.²⁴ Importantly, an explanation for the delay must cover its entirety.²⁵ According to Hoexter and Penfold, the explanation for the delay, and its reasonableness, assumes greater importance in PAJA reviews when considering that these factors would not necessarily have been interrogated in the first leg of the test (when the delay exceeds 180 days).²⁶

[19] Given the misguided understanding of the purported internal remedy, it is unsurprising that the case for extension of the prescribed period is dealt with only briefly in the founding papers. A limited explanation has been provided in explaining the years of delay, also after the purported internal remedy decision was taken in 2013. Reliance is placed squarely on an abortive referral of the matter to the Premier via COGTA's Head of Department, the applicant assuming that each of the processes described in s 21 of the Framework Act was a precursor to a court application. Once advised that the Premier would not entertain the dispute further, the application was launched without undue delay. The applicant also submits that no prejudice would result from an extension granted, and fails to deal with the prospects of success under this heading.

²³ *Asla* above n 5 para 80.

²⁴ *Khumalo* above n 5 para 44.

²⁵ *Department of Transport v Tasima (Pty) Ltd* [2016] ZACC 39; 2017 (2) SA 622 (CC) (*Tasima I*) para 153.

²⁶ Hoexter and Penfold above n 19 at 728.

[20] It is relevant to consider that the applicant attempted to resolve the dispute through the Provincial House prior to resorting to court.²⁷ The applicant concedes that this process was incorrectly invoked, based on the advice of COGTA. But that cannot on its own justify subsequent inaction of the kind that followed. It does not avail the applicant to lay the blame for all delays at the door of the CGE in circumstances where the applicant fails to explain her own conduct in pursuing the matter through the CGE or otherwise, or to obtain the outcome of the process considered to be an internal remedy. As the papers demonstrate, the CGE's assistance was provided sporadically and, even making some allowance for the usual difficulties of dealing with a bureaucracy, the overall pace adopted was sedentary.

[21] For example, for a year subsequent to August 2011, all that was achieved was a single meeting following protracted correspondence. Nothing occurred between October 2011 and June 2012. Representatives of the Eastern Cape Department of Cooperative Governance and Traditional Affairs ('COGTA') advised the CGE that the Provincial House was the correct forum to resolve the dispute. That was at a meeting on 14 August 2012, but nothing transpired for another three months. Correspondence reflects that once the dispute was referred to the Provincial House on 8 November 2012, the CGE, based on an undertaking received from COGTA, expected finalisation within 90 working days from 14 January 2013. There is nothing on the papers to suggest that it did not keep the applicant apprised of such developments. A public hearing was convened in February 2013. Despite the expectation of an outcome on 24 May 2013, little seems to have occurred until the CGE summoned COGTA's Head of Department to a meeting during February 2015, and the Department of Cooperative Governance and Traditional Affairs addressed a letter to the Kona Royal Family in May 2015. In the applicant's own words, 'despite numerous inquiries the report of the Provincial House was not provided, nor were any further steps taken by COGTA in connection with the dispute for almost two years'. A letter was addressed to the Head of Department in June 2013. The subsequent family meeting occurred only in September of that year. Other than generic correspondence from the CGE in September 2016, only in January 2017

²⁷ OUTA above n 15 paras 29-30.

was a follow-up to the outstanding report from the Provincial House sought, some years after it had been expected. As the applicant acknowledges, at least from September 2015 to December 2016 there was no progress at all on this matter, despite some letters having been addressed to COGTA by the CGE and a complaint to the Premier regarding departmental inaction in certain matters.

[22] The Acting Head of Department: Cooperative Governance and Traditional Affairs was eventually summoned to appear before the CGE in April 2017, resulting in the outcome letter, dated 6 September 2013, being provided on 12 April 2017. The applicant received advice, via the CGE, from the Acting Head of Department on 6 June 2017, proposing that the applicant submit an appeal to the Executive Authority, which followed on 13 June 2017. Other than a meeting with the MEC and HoD on 30 November 2017, when it was suggested that an outcome would be furnished by 28 February 2018, nothing occurred until 26 April 2018, when the MEC indicated that an appeal was not possible. Legal advice was sought and an application prepared only during September 2018. The founding affidavit launching these proceedings was commissioned more than a month thereafter.

[23] The applicant has failed to confront the excessive delay meaningfully and with full reference to her own conduct during the years that have lapsed.²⁸ The CGE failed to pursue the matter with any urgency, despite the lengthy period of time that elapsed since the applicant sought its assistance. Neither the applicant nor the CGE appear to have even attempted to seek legal advice until at least May 2018. There is nothing on the papers explaining any serious attempts on the part of the applicant to accelerate proceedings, notwithstanding the nature of the relief sought and its importance to her, and considering that the fourth respondent remained in the position. It must be accepted that she was content to permit the CGE to engage in protracted correspondence spanning an inordinate period of time, blindly expectant of those efforts yielding an outcome that would overturn the recognition of the fourth respondent in 2011. Notwithstanding due consideration of the fact that the CGE and

²⁸ See *Sithelo Royal Family and Another v The Premier of the Eastern Cape and Others* [2021] ZAECMHC 28 para 23. Where an application seeks condonation for delay, a full explanation that covers the 'entire period' must be provided: *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) para 22. Also see *Notyawa* above n 17.

applicant received erroneous advice, the explanation provided for the subsequent delays in obtaining the 2013 Provincial House Report is incomplete and wholly inadequate when considering the substantial period of delay.²⁹ Even if this had constituted an internal remedy in terms of s 7(1)(a) of PAJA, those proceedings were concluded during 2013, and the explanation for the excessive delay in launching the review is inadequate. The applicant's attitude, contrary to what might have been expected, was indifferent and it cannot be said that all reasonable steps were taken.³⁰ The applicant must, as a result, bear significant responsibility for the extensive delay when considering the limited explanation offered.³¹

[24] The difficulties in granting condonation in such circumstances have been articulated in decided cases. In instances where the unlawfulness of the impugned action is not clear-cut, it must be accepted that delay to this extent may accentuate the risk that the review is adjudicated on the basis of unreliable facts. This potentially includes prejudice where, as a result of the delay, the recollections of parties or the person whose decision is being reviewed is likely to have paled; persons who have to depose to affidavits or testify may no longer be available; and where documentary or other forms of evidence are no longer available.³²

The prospects of success and the importance of the issue

[25] Even though the issue at hand has been elevated, as described, to be determined at the outset of these proceedings, and notwithstanding the above

²⁹ See *Beweging vir Christelik-Volkseie Onderwys v Minister of Education* [2012] 2 All SA 462 (SCA) (BCVO) para 64. This is a key distinction between the facts of this matter, which involve unwarranted lethargy in pursuing a supposed internal appeal, and cases such as *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* [2010] ZACC 26; 2011 (4) SA 113 (CC) (*Bengwenyama Minerals*), where apparent confusion about the availability of an internal appeal warranted a short delay in pursuing review proceedings: *Bengwenyama Minerals* para 59. The applicant's reliance on this decision is in any event misplaced on the facts. In that matter the time lines were such that the court found that there was no indication of any deliberate delay on the part of the applicants and a department letter opened the door for a review: *Bengwenyama Minerals* paras 57, 58. Also see *Joint Municipal Pension Fund v Grobler and Others* 2007 (5) SA 629 (SCA) paras 29, 30: the issue relating to time was not pressed during argument in circumstances where there was no provision in law for a complaint to an adjudicator as an internal remedy. The unduly delay was, however, for a much shorter period and the application to court was launched with sufficient promptness, so that the interests of justice warranted condonation.

³⁰ See *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA) para 51.

³¹ See *Khumalo* above n 5.

³² See *Madikizela-Mandela v Executors, Estate Late Mandela* 2018 (4) SA 86 (SCA) para 27.

sentiments, delay is not a purely interlocutory matter to be determined in isolation.³³ Regard must still be had to the merits, or prospects of success, in deciding whether the delay should be condoned.³⁴ This is not to suggest that prospects of success will be determinative on its own. Instead, the merits are important as part of a consideration of all the circumstances in determining whether the interests of justice dictate that the delay should be condoned.³⁵

[26] Assessing the prospects of success is complicated by the applicant's failure to deal with this cohesively on the papers, and particularly because of the lengthy period of time that has elapsed since the impugned decision was taken. In essence, the applicant's case is that she was the rightful successor to the headmanship in the Village after her father's passing in 2006 and that she was wrongfully excluded from succession because of her marital status. The Kona royal family, or a body purporting to speak for the family, identified the applicant's mother to serve as acting headwoman of the Village on behalf of her sister, until such time as her sister was old enough to assume the position. That decision, which was formalised by the MEC in terms of s 18(3) of the Provincial Act in 2008, is no longer the subject of any challenge. The applicant's mother was removed from the position in 2011, when the applicant's uncle, the fourth respondent, was recognised by the MEC.

[27] The Provincial Act makes it clear that it is the task of the royal family to identify a person qualifying in terms of customary law to assume the position in question, and to inform the Premier of the particulars of that person and the reasons for the identification. It is the Premier's responsibility to recognise the person formally, and to issue a certificate of recognition.³⁶

[28] The applicant concedes that the royal family is the competent body to determine the successor when a vacancy arises, rather than the broader community. Although there is some suggestion that only 'a fraction of the members of royal family' attended the meeting that resulted in her mother being recognised, it is clear that the body that made the decision applied its mind in coming to that decision,

³³ Hoexter and Penfold above n 26 at 729.

³⁴ *Asla* above n 5 paras 55-57; *Aurecon* above n 13 paras 46, 49.

³⁵ *Asla* above n 5 para 40; *SANRAL v Cape Town City* 2017 (1) SA 468 (SCA) para 81.

³⁶ S 18 of the Provincial Act.

which paved the way for the formal recognition that followed. The applicant claims that she was erroneously excluded from the line of succession, ultimately in favour of her sister and mother, because of a false claim that she had been married. Significantly, there is no suggestion that, at the time, the applicant took steps to right the perceived wrong by taking any steps whatsoever to press her claim based on the appropriate, customary line of succession.

[29] She failed to act even once her mother was removed, during 2010, resulting in her uncle's recognition. Her first attempt to intervene was only in June 2011. Much of her dissatisfaction stems from the Provincial House's summation of the reasons provided to it for the applicant's exclusion by the royal family. It may be reiterated that the 'findings' of the Provincial House were crafted some two years after the 2011 Recognition Decision and were by no means a proper appeal of that decision. That the Provincial House 'simply deferred to the decision of the royal family' is, in any event, unsurprising given the functions to be performed by the royal family in terms of the Provincial Act.

[30] At best for the applicant, it may be accepted that the process that resulted in the fourth respondent's identification and recognition was questionable, especially considering that the position was not vacant at the time. As the SCA has recently confirmed, the recognition of the fifth respondent as regent would have proceeded on the basis of a recognised administrative decision (to appoint the applicant's sister) preceding the recognition of the regent.³⁷ Absent that administrative conduct being set aside, both the MEC and Premier could not lawfully recognise another identified headman nor purport to appoint such person to the position of headman or acting headman.³⁸ But these are realities that might have demonstrated the prospects of success of the applicant's sister or mother, and are of no benefit to the applicant's own claim to the position.³⁹

³⁷ *Maxwele Royal Family & Another v The Premier of the Eastern Cape Province and Others* [2023] ZASCA 73 para 13.

³⁸ *Ibid.*

³⁹ There are also no constitutional obligations compelling the granting of the remaining relief sought: see *Dabula-Mbanga v The Premier of the Eastern Cape and Others* (unreported case no. 4715A/2019) (Eastern Cape Division, Mthatha) (22 March 2022) para 46.

[31] This is a further issue of relevance. It has previously been established that a court is unlikely to grant an extension where the passage of time means that the issue is of little practical import.⁴⁰ In the present circumstances, the years spent by the fifth respondent in the role are uncontested. The fourth respondent's contested identification and recognition has been followed by uninterrupted years spent in the role prior to his passing. The applicant concedes that he became the *de facto* headman of the Village and was treated as such following meetings in November and December 2010. He attended to duties as headman from 2011 until he became too ill to do so prior to his passing in 2021. The practical impact of reviewing and setting aside the impugned decisions in circumstances where the position is presently vacant is questionable and arguably of little practical import.⁴¹ Although the issue is undeniably of importance to the applicant, this is balanced by the likely negative impact on the community in the event that the application succeeds in these circumstances, and considering the extensive history of the matter.⁴²

[32] As an aside, I do not read the papers in a way that permanently precludes the applicant from being identified and recognised as a traditional leader in the Village. It is open to the royal family to identify the appropriate traditional leader in terms of the customs of the community and in accordance with the presently applicable legislation, for the Premier to publish a notice and invite comments, and to then consider and 'decide on the comments' before recognising the person.⁴³ The purported identification of the seventh respondent, if contrary to legislation, may, in appropriate circumstances, also be referred to the Provincial House for a proper recommendation, which might also result in the matter being referred back to the royal family for reconsideration. This is part of the reason why the declaratory relief sought in the papers was ill-conceived, and rightly jettisoned during argument as over-ambitious.⁴⁴ A declaratory order by this court on the present papers would be

⁴⁰ *BCVO* above n 29 para 65.

⁴¹ *Ibid.* Also see *Notyawa* above n 17 para 45 and following.

⁴² In saying this, the court is mindful of the development to the law brought about by PAJA and the Constitution, particularly the rights to just administrative action and access to courts, and that the issue of prejudice may, in an appropriate case, adequately be addressed by the grant of a just and equitable order: *Notyawa* above n 17 para 51 and following.

⁴³ S 23 of the Eastern Cape Traditional Leadership and Governance Act, 2017 (Act 1 of 2017).

⁴⁴ The notice of motion included a prayer for a declaration 'that the customary rule governing succession to the Gqunqe headmanship is that the position is inherited by the eldest child of the previous incumbent upon his or her death or removal from the office, regardless of that child's marital status'. On the applicant's own papers, however, 'the Gqunqe headmanship was only established in

tantamount to usurping the functions of the royal family and premier, as well as the process prescribed in terms of the applicable legislation.

[33] The exercise of a discretion in determining the issue of condonation has been described as involving a ‘factual, multifactorial and context-sensitive framework’.⁴⁵ The considerations that favour granting condonation are heavily overshadowed by the range of countervailing factors identified, notably the extent and cause of the delays, the partial explanation for the delays, the limited prospects of success and likely prejudice to the community.⁴⁶ Ultimately, I do not consider it to be in the interests of justice to exercise my discretion to overlook the extensive delays and entertain the application in respect of the review of the 2011 Recognition Decision.⁴⁷

[34] This conclusion is fatal to the attempt to review the Provincial House Report as an internal appeal decision. As Plasket J held in *Wings Park Port Elizabeth (Pty) Ltd v MEC, Environmental Affairs, Eastern Cape and Others*,⁴⁸ when an applicant has suffered an unfavourable decision at first instance and it is confirmed on appeal, both decisions must be taken on review and, for the applicant to achieve success, usually both decisions will have to be set aside.⁴⁹ In other words, even accepting for present purposes that the Provincial House Report constituted an internal remedy, setting that aside in circumstances where the 2011 Recognition Decision stands would be pointless for purposes of this application.⁵⁰ The consequence is that the application must be dismissed.

Costs

1992 and this is the first time that the question of succession has arisen in connection therewith. How could a settled rule or practice sufficient to constitute a custom arise in these circumstances?’

⁴⁵ *Tasima I* above n 25 para 144.

⁴⁶ See *Gongqose* above n 18 para 73.

⁴⁷ See *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* [2017] ZACC 40 para 49. As indicated, the position would be the same, on these facts, even if the Provincial House outcome was considered to be an internal appeal decision.

⁴⁸ *Wings Park Port Elizabeth (Pty) Ltd v MEC, Environmental Affairs, Eastern Cape and Others* 2019 (2) SA 606 (ECG) (*Wings Park*) paras 34 and 46.

⁴⁹ Also see *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute* 2014 (3) SA 219 (SCA) paras 20-21.

⁵⁰ See *Wings Park* above n 48 para 47; *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) para 28.

[35] Counsel furnished useful supplementary heads of argument in respect of costs and, in particular, in answer to the question as to the applicability of *Biowatch*.⁵¹ That decision explains the appropriate approach to adopt in unsuccessful constitutional litigation against the state. Constitutional litigation is that which has been undertaken to assert constitutional rights.⁵² As a general rule, an unsuccessful litigant in proceedings against the state ought not to be ordered to pay costs.⁵³

[36] A court must exercise its discretion by doing that which is just considering the facts and circumstances of the case. The general approach of not awarding costs against an unsuccessful litigant in genuine constitutional proceedings against the state should not easily be forsaken. To fit the bill, the issues must be genuine and substantive and truly raise constitutional considerations relevant to the adjudication.⁵⁴

[37] The relief sought in the present matter involves, at its core, state functionaries acting, or purporting to act, in terms of statutorily delineated responsibilities. The sixth and seventh respondents have been dragged into the litigation and argue that the applicant, having been unsuccessful, should pay their costs. Sachs J described the position as follows:⁵⁵

'In matter such as these a number of private parties might have opposite interests in the outcome of a dispute where a private party challenges the constitutionality of government action. The fact that more than one private party is involved in the proceedings does not mean however, that the litigation should be characterised as being between the private parties. In essence the dispute turns on whether the governmental agencies have failed adequately to fulfil their constitutional and statutory responsibilities. Essentially, therefore, these matters involve litigation between a private party and the state, with radiating impact on other private parties. In general terms costs awards in these matters should be governed by the over-arching principle of not discouraging the pursuit of constitutional claims,

⁵¹ *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC) (*Biowatch*).

⁵² *Ibid* para 20.

⁵³ See *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3; 2006 (3) SA 247 (CC) para 139. On the three-fold rationale for the general rule, see *Biowatch* above n 51 para 23.

⁵⁴ *Biowatch* above n 51 para 25.

⁵⁵ *Biowatch* above n 51 para 28.

irrespective of the number of parties seeking to support or oppose the state's posture in the litigation.'

[38] These comments are apposite considering the facts of this dispute. The purpose of the application was to assert the applicant's entitlement to recognition as headwoman of the Gqunqe Village in terms of the Provincial Act following the death of her father. The crux of the challenge was the complaint of her unconstitutional exclusion from succession based on marital status. The applicant asserted a constitutionally protected right. To succeed, decisions taken by state respondents were sought to be reviewed and set aside. I am satisfied that this constituted a bona fide attempt to raise an issue of genuine constitutional significance, namely whether a customary rule excluding a woman from succession to traditional leadership positions based on marital status would constitute unfair discrimination. The application was non-frivolous, non-vexatious and, considering the circumstances, not in any other way manifestly inappropriate. This despite the applicant's failure to obtain the required extension of time, for reasons already canvassed.⁵⁶ A costs order in such circumstances would, in my view, hinder the advancement of justice. That being the case, it is appropriate for each party to bear its own costs.⁵⁷

Order

[39] The following order will issue:

1. The application is dismissed.
2. Each party is to pay its own costs.

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⁵⁶ See *Lawyers for Human Rights v Minister in the Presidency and Others* [2016] ZACC 45 para 19.

⁵⁷ See *Rikhotso v Premier, Limpopo Province and Others* [2021] ZACC 1 para 25; *Notyawa* above n 17 para 55; *Baleni v Baleni and Others* [2012] ZAECMHC 19 para 60. Compare, *BCVO* above n 29 para 69.

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