IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case no:15970/2022P

In the matter between

BONGANI WISEMAN ZONDO	**APPLICANT**
And	
THE PREMIER OF THE PROVINCE OF KWAZULU-NATAL	**FIRST RESPONDENT**
MEMBERS OF THE KWAZULU-NATAL EXECUTIVE COUNCIL FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	**SECOND RESPONDENT**
DOUGLAS VUSI ZONDO	**THIRD RESPONDENT**
UMNDENI WENKOSI KWAZONDO	**FOURTH RESPONDENT**

JUDGMENT

PITMAN AJ

[1] The applicant is Bongani Wiseman Zondo who describes himself as being a self-employed livestock farmer residing at Kwa-Ndukuziyabuya Household, Swart Mfolozi, Vryheid, KwaZulu-Natal. He was born on 15 April 1970.

[2] He has brought this review application citing four respondents, the first being the Premier of the KwaZulu Natal Provincial Government, (“the Premier”), the second

being The Member of the KwaZulu-Natal Executive Council for co-operative Governance and Traditional Affairs ("COGTA"), the third being Douglas Vusi Zondo, an adult male who he describes as being erroneously recognised as the iNkosi of the eMpangisweni community, and the fourth being the Umndeni Wenkosi KwaZondo ("the Umndeni") whom he describes as the Zondo "Royal family". The first and second respondents delivered an answering affidavit out of time. Condonation was sought on formal application. It was not opposed, and the arguments proceed on the basis of its inclusion. Insofar as may be necessary I condone the late delivery of that affidavit.

This Application

[3] The relief sought by the applicant, as set out in the Notice of Motion is, in my view, inelegantly framed. The first prayer is on the face of it a review claim. It is for the setting aside of the decision by the first and second respondent *"to abide the recommendations of the Injula Lwazi Research Institute"* (the recommendations referred to not identified with any further particularity in the notice of motion, but the report appears as an annexure to the founding affidavit at pages 137 – 189 of these papers). The second prayer is for a "declaratory" order that there was a *"wrongful appointment and recognition of the third respondent…As the iNkosi of the eMpangisweni community"*. That is also effectively a review claim. Pursuant to the initial two prayers, it seems, the rest of the prayers follow, being the removal of the third respondent *"from his position as iNkosi"*, a declaration that the applicant has complied with section 19(1)(a)(i) and (ii) of the KwaZulu-Natal Traditional Leadership and Governance Act, 2005… *"To be properly identified and recognised as iNkosi"* an Order that the first respondent be directed to *"recognise the applicant as such in terms of section 19(1)(a)(iii) and section 19(2)(a) and (b) of that Act, read with section 6(2)(g)"*, an order that the second respondent be directed to *"facilitate the formal appointment of the applicant as"* iNkosi, and finally an order that all respondents be directed to pay the costs of the application including *"the cost of hiring Counsel"* jointly and severally. The first and second respondents oppose the application. The third respondent has not opposed the application nor taken any part in it. The fourth respondent, by notice dated 21 December 2023, elected to abide the decision of the court.

[4] The parties have set out so called "legislative frameworks" by indicating at the outset various pieces of legislation they consider relevant to this matter. A consideration of all of the legislation set out unnecessarily broadens the debate herein in my view, however. In order to identify the actually relevant legislative framework it is necessary to set out the versions before me in some detail. That also assists in determining the relevant administrative action/s sought to be impugned.

[5] I start by summarising the facts set out in the applicant's founding affidavit as follows. I use italics where I quote directly. The applicant states:

a) His father was the late David Thanduyise Zondo who, during his life, *"held the position of iNkosi of the Madide/Zondo Tribe"*.
b) When his father passed away in 1988, he was 18 years old and could not succeed him as iNkosi despite being *"the only remaining son",* as the age of majority at the time was 21 years.
c) His *"paternal uncle, Samson Ntshiyane Zondo"* (now deceased) was identified by the fourth respondent as *"ibambabukhosi (regent)"* on his behalf in terms of Zulu customs and prevailing laws at the time, the custom being the appointment of a regent when the next in the succession line is too young to be appointed iNkosi immediately.
d) In about 1993 (the applicant would have been about 23 years old then) the third respondent, who he describes as *"my eldest stepbrother",* secured documentation and then conducted himself as the duly appointed iNkosi succeeding the applicant's father.
e) This documentation did not establish that appointment and the third respondent had *"usurped"* the position of iNkosi from Samson.
f) Samson relinquished his position under duress.
g) Had the third respondent been the person who ought to have succeeded his father as iNkosi when his father passed away, the third respondent (an adult at the time) would immediately have been appointed and there would have been no basis for Samson to have been appointed regent.
h) The third respondent was never identified as an iNkosi in terms of either Zulu customary law or in terms of any prevailing legislation.

i) Certain community members went to the streets demanding that he step down, but he refused. They then approached *"the Royal family"* and demanded that he be removed and that *"the rightful person be identified and appointed"*. During the period 2018 until 2019 they were not able to get any assistance. Eventually officials of COGTA, facilitated *"a mediation process based on misconduct"*.

j) In about August 2020 he *"was instructed by members of our Royal family to seek the assistance of an attorney who would take the matter further"*. On about *"13 September 2020"* that attorney wrote to the first and second respondents calling on them to take appropriate action against the third respondent pursuant to, what they called, his *"wrongful appointment"*. (The letter attached to the affidavit is actually dated 22 September.) It included an eight-page *memorandum"* dated 20 September signed by the applicant as *"Duly authorised representative of uMndeni weNkosi".* The letter sets out the applicant's version of the relevant background and *inter alia* requested the suspension of the third respondent from his position, and thereafter related relief. A telephonic response was received from an employee of COGTA who advised him not to use attorneys and *"demanded that they drop legal representation before they could deal with the matter"*. At first, he refused but after consultation with *"the Royal family"* and on the basis that litigation would take years, he agreed.

k) He applied, in terms of the **Promotion of Access to Information Act No. 2 of 2000 ("PAIA")**, for access to *"the requisite information"* regarding the third respondent's appointment. He received, on 22 October 2020, documents from COGTA in response but claims that none identified that the fourth respondent, the first respondent, or anyone else *"in authority"* had recognised the third respondent as the iNkosi in terms of law.

l) They then again wrote to the first respondent advising that there was no evidence on record identifying and recognising the third respondent as the iNkosi and requested the first respondent to remove the third respondent *"on the grounds of wrongful recognition"*.

m) On 1 April 2021, he was advised telephonically by a representative of COGTA that the matter was being dealt with and that a meeting with COGTA officials had been scheduled for 16 April 2021 in Pietermaritzburg to establish, so he says, his *locus standi* in terms of *"Zulu custom regarding succession positions"*. He says the

meeting took place. They were advised that the next step would be for COGTA to engage with the third respondent and give him an opportunity to make representations and that thereafter the applicant could expect a full report within two weeks. The report did not arrive as promised and after a couple of further letters to the first and second respondents, in early July 2021, they received a call from an official of COGTA who advised them that COGTA had decided to appoint an expert to do an enquiry into the matter, and a later telephone call advising that the expert report would be provided by 19 July 2021.

n) The **Injula Lwazi Research Institute** ("the ILRI") was the entity appointed by COGTA to investigate the matter. ILRI conducted interviews and met with interested parties. The meeting scheduled for 19 July 2021 did not materialise due to Covid problems. A meeting was held on 13 August 2021 and in attendance were members of *"the Royal family"*, officials of ILRI, the third respondent and officials of the first and second respondents. He stated that at that meeting there was *"no outright confirmation"* that he should be appointed due to other *"family members"* who were interested in contesting the *"Chieftaincy"* position. He says that they were advised by ILRI and COGTA to convene a family meeting to *"clear the contestation"* and thereafter report back to COGTA.

o) The meeting of *"the Royal family or uMdeni weNkosi"* was held on 11 September 2021 to clear up this contestation and it was agreed that the Royal houses eligible to participate in the identification of the successor to his father were the households: **Thanduyise**, **Magungwane** and **Mgoboyi** and that he was the one identified as the new iNkosi for the Zondo Tribe and eMangisweni community. The minutes of this meeting were sent to the first and second respondents and ILRI on 15 September 2021.

p) The meeting held on 11 September 2021 *"marked the uMndeni WeNkosi's official compliance with section 19 of the KZN Act"*. The Act he refers to is **The KwaZulu-Natal Traditional Leadership and Governance Act, No. 5 of 2005.** ("The KZN Act")

q) Thereafter the second respondent and ILRI requested that he convene a meeting of members of the fourth respondent on 8 October 2021. That meeting was chaired by Prof Sihawu Ngubane of the ILRI, assisted by officials of the second respondent. He claims that at this meeting ILRI and COGTA officials accepted the minutes as

a true reflection of the fourth respondents wishes and undertook to submit a final report to the first and second respondents at the end of October/November 2021.

r) By the end of 2021 he had still not received the ILRI report. On 14 January 2022 a letter requesting the report was sent to the first and second respondents. There was no response. In February 2022 another PAIA application was made for access to the report. It was rejected on 24 February 2022 on the basis that *"at the time of our request, the MEC for COGTA had not had an opportunity to read it".*

s) This refusal was challenged in correspondence but on 9 May 2022 he received a telephone call from a COGTA official who instructed him to convene a meeting of the members of the fourth respondent on 25 May 2022, *"purportedly to deliver a copy of the ILRI report and advised the family on the way forward"*. A letter confirming the meeting and the venue (KwaNkosikayithandwa Royal Household) was sent to the first and second respondents.

t) The meeting of 25 May 2022 did not take place. The report was not delivered.

u) The applicant and the fourth respondent were obliged to launch an application to this Court on 9 September 2022 which, inter alia, requested an Order that the report of ILRI be provided. There were a number of other Orders sought relating to the alleged irregular, unlawful and void appointment of the third respondent as iNkosi and attendant relief removing him and appointing the applicant herein. The only relief obtained at the first hearing on 16 September 2022 was the adjournment of the application *sine die* and an interdict restraining the third respondent from violent conduct toward members of the eMpangeni community and the Zondo tribe. The ILRA report was attached to the answering affidavit of COGTA which is how the applicant came into possession of it.

v) The final conclusion and recommendation, as it appears in the ILRI report, reads as follows:

"In light of the above background on the Zondo succession dispute, it is clear that the family is divided. We therefore recommend that COGTA put the matter to rest and Vusumuzi Douglas Zondo retained his position as iNkosi yamaZondo. He was rightfully appointed in terms of section 19(1)of the KwaZulu-Natal Traditional Leadership and Governance Act No. 55 of 2005, as amended. Inkosi Vusumuzi Douglas Zondo is the firstborn child of Maria KaMaphisa Zondo the sole spouse of the late iNkosi Thanduyise David Zondo whose lobola was paid by iSizwe

samaZondo. Strict measures should be observed by COGTA to investigate the conduct of the Inkosi and follow appropriate disciplinary action".

w) The ILRI report he alleges, was poorly written, mostly irrelevant, often distorted and biased and is not supported by any evidence. He denies that there was in fact evidence that the third respondent was *"rightfully appointed"* and that *"the family was divided"*. He also denies that there was acceptable evidence that the third respondent was his father's son. He claims that the third respondent was not born of his father. He complains that the report *"depicts me as parasite that wants chieftaincy for financial gain"* which he denies and objects to.

x) He seeks orders compelling the first and second respondents to comply with their statutory obligations in terms of the KZN Act and recognise him as *"iNkosi of the Zondo Tribe"* in terms of section (19)(2)(a)(b) and (3) of the KZN Act read with section 211 of the Constitution.

y) The fourth respondent has complied with the provisions of the KZN Act in that they have informed the first respondent of the particulars of the traditional leader to be removed and provided grounds for such removal. He sets out the provisions of section 21of the KZN Act which deals with the Removal of Traditional Leaders and claims that the fourth respondent has complied. In addition, he states that the third respondent has been provided the opportunity to submit representations in response to the allegations as required in section 21(3) of the KZN Act, and that the third respondent had failed *"to produce any documents supporting the right fullness and/or lawfulness of his appointment and recognition as iNkosi of the eMpangisweni community"*.

z) That in consequence of the above, the first respondent has *"performed an administrative action"* which is subject to *"judicial review"* in terms of the **Promotion of Administrative Justice Act, No. 3 of 2000. ("PAJA")** The applicant does not identify precisely which *"administrative action"* he refers to, but when dealing with the provisions of section 6 of PAJA, which set out the various possible grounds of Review and particularly those he relies upon, he states the following:

i. The ILRI report was biased and unreasonable. It did not interrogate the evidence or lack thereof. It had been, so he says, *"tasked with a fact-finding mission"* but came out as *"one-sided"* and *"The first respondent has not acted impartially and*

is not endeavoured in good faith to bring an equitable resolution to the succession dispute".

ii. There is no evidence that the third respondent was ever recognised as required by law. The fourth respondent's members at the meeting of 11 September 2021 unanimously identified him as iNkosi. In the circumstances the first respondent has failed to comply with section (19)(2) of the KZN Act to recognise him and as such has not complied with *"A mandatory and material procedure or condition prescribed by an empowering provision."*

iii. The *"Action is procedurally unfair"* because the third respondent was not recognised as a consequence of the following of the correct procedure in law.

iv. The first and second respondents relied on an *"irregular certificate of jurisdiction"*, such reliance being a *"grave error of law"* to the extent that *"the action was material influence by an error of law".*

v. In further individual paragraphs he complains that the action was taken for reasons not authorised by the empowering provision, the action was taken because irrelevant considerations were considered, all relevant considerations were not considered, the action was taken because of the unauthorised or unwarranted dictates of another person or body, and the action was taken arbitrarily or capriciously. These complaints are based on the same allegations as set out in the subparagraphs immediately above and it is not necessary that I repeat them.

vi. Finally, that in the event that the first respondent *"has not made a decision"* the first respondent has a duty to do so in compliance with section (19) of the KZN Act.

[6] In defence of this case, the first and second respondents delivered an answering affidavit deposed to by Mr. Tubane, the Head of COGTA who alleged he was deposing to it also on behalf of the first respondent, duly authorised. The answering affidavit, and pursuant argument by the first and second respondents, in summary, is as follows:

a) The application papers are defective as they neither comply with form 2 nor form 2(a) of the Uniform Rules of Court. This was not pursued in argument before me. I consider it no further.
b) The issues herein are *lis alibi pendens* as the earlier application sought essentially the same relief and had not yet been completed. (I was informed at the outset of this hearing, however, that the applicant had withdrawn that application and that this defence was therefore not being pursued.)
c) The application, being in terms of PAJA, was out of time by almost 3 decades because the third respondent had been recognised as iNkosi since 1993.
d) The correct uMndeni Wenkosi had not been joined.
e) As a result of the third respondent being the first son of David Thanduyise Zondo, the *"line of succession has been established"* and he is, and always has therefore been, the correct iNkosi.
f) Documents in the first and second respondents' possession evidence that the third respondent was recognised and appointed by the authorities as iNkosi in 1993 and remains iNkosi.
g) Insofar as reliance is placed on section 21 of the KZN Act regarding an argument that there has been an application or his removal, there has not been compliance as there has not been the obligatory *"enquiry".*
h) This Court has no power to direct the Premier to recognise the applicant as iNkosi nor to facilitate his appointment as such.
i) The evidence in the possession of the first and second respondents reveals that the third respondent had been recognised in about 1993 under the then Black Administration Act, No.38 of 1927. ("the BAA")
j) The **KwaZulu Amakhosi and Izaphakanyiswa Act, No. 9 of 1990** (the "KAIA"), which commenced on 1 October 1991, repealed the relevant sections of the BAA, but s37(a) preserved, for KwaZulu-Natal, the status of every recognised iNkosi for purposes of the KAIA by deeming them to have been appointed under the KAIA.
k) The KAIA was then repealed by the **KwaZulu-Natal Traditional Leadership and Governance Act, No 5 of 2005.** ("the KZN Act") which also has a deeming provision recognising, for purposes of it, iNkosi recognised immediately before its commencement. (Section 57(7).)

l) Against that backdrop, only the "Commission" as established in terms of s22 of the Traditional Leadership and Governance Framework Act., 41 of 2003 ("the TLGFA") is able to determine these disputes. It is argued that such "Commission" has now completed its business.

m) There are no grounds to set aside the third respondent's appointment.

n) The ILRI report was not administrative action but was merely advisory.

o) The uMndeni Wenkosi was not correctly joined.

[7] Before considering the real issue/s herein, being the appointment issues, at this stage I record that I reject the arguments set out in 6(n) and 6(o) immediately above. It is not the ILRI report which is sought to be reviewed but the first respondent's administrative decision based on it. That decision constituted administrative action.[1] The argument in 6(o), it is not supported by any evidence. Significantly, the fourth respondent (the uMndeni weNkosi itself) has delivered a Notice to Abide. It has not indicated that it is the wrong uMndeni nor raised a challenge on that issue.

[8] As set out above, the applicant seeks a declarator that the third respondent has never lawfully or validly been recognised as iNkosi, alternatively, and if he has, that he was wrongfully recognised as such and must be removed pursuant to the application to the first respondent in terms of section 21 of the KZN Act. (That is the application referred to in paragraph [5](j) above). He seeks Orders effectively reviewing and declaring, in terms of PAJA, the initial appointment and recognition of the third respondent as iNkosi to have been wrongful if it is found to have occurred, and also reviewing the first respondent's decision to abide the ILRI recommendation. Pursuant thereto, he seeks Orders compelling the first and second respondents to comply with what he calls their statutory obligations in terms of the KZN Act and recognise him as *"iNkosi of the Zondo Tribe"* in terms of section (19(1)(a)(iii) and (19)(2)(a) and (b) of the KZN Act, read with section 6(2)(g) of PAJA. I therefore set out sections 19 (Recognition of an iNkosi) and 21(Removal of an iNkosi) of the KZN Act in full:

*"**Recognition of an Inkosi***

[1] See the definitions of "administrative action" and "decision" in section 1 of PAJA.

19.(1) Whenever the position of an Inkosi is to be filled, the following process must be followed -

(a) Umndeni wenkosi must, within a reasonable time after the need arises for the position of an Inkosi to be filled, and with due regard to applicable customary law and section 3 -

(i) *identify a person who qualifies in terms of customary law to assume the position of an Inkosi after taking into account whether any of the grounds referred to in section 2l(l)(a), (b) or (d) apply to that person;*

(ii) *provide the Premier with the reasons for the identification of that person as an Inkosi; and*

(iii) *the Premier must, subject to subsection (3) and section 3, recognise a person so identified in terms of subsection (l)(a)(i) as an Inkosi.*

(2) *The recognition of a person as an Inkosi in terms of subsection (l)(a)(iii) must be done by way of -*

(a) a notice in the Gazette recognising the person identified as an Inkosi; and

(b) the issuing of a certificate of recognition to the identified person.

(3) *The Premier must inform the Provincial House of Traditional Leaders of the recognition or appointment of an Inkosi.*

(4) *Where there is evidence or an allegation that the identification of a person to be appointed as an Inkosi was not done in accordance with customary law, customs or processes, or was done in contravention of section 3 of this Act, the Premier -*

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

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

(c) must refer the matter back to umndeni wenkosi for reconsideration and resolution where the certificate of recognition has been refused.

(5) *Where the matter which has been referred back to umndeni wenkosi for reconsideration and resolution in terms of subsection (4) has been reconsidered and resolved, the Premier must recognise the person*

identified by umndeni wenkosi if the Premier is satisfied that the reconsideration and resolution by umndeni wenkosi has been done in accordance with customary law.

(6) *The recognition of an Inkosi as the senior traditional leader of a recognised traditional community takes effect on a date specified in a notice published in the Gazette by the Premier.*

(7) *Within three weeks after the date of recognition or the date of publication of the notice referred to in subsection (6), whichever is the later date, an Inkosi so recognised must furnish, in writing, to the Premier the names of induna or Izinduna of that Inkosi, together with the date of and names of all members present at the traditional council at which the appointment of such Induna, or Izinduna was unanimously approved by the traditional council.*

(8) *(a) An Inkosi is deemed to retire from office upon his or her written request for retirement to the responsible Member of the Executive Council.*

(b) On retirement, an Inkosi ceases to be recognised and appointed in terms of this Act"

*"**Removal of traditional leader***

21.(1) A traditional leader [An iNkosi is defined as such] *may be removed from office on the grounds of-*

(a) conviction of an offence with a sentence of imprisonment for more than 12 months without an option of a fine;

(b) physical incapacity or mental infirmity which, based on acceptable medical evidence, makes it impossible for that Inkosi to function as such;

(c) wrongful appointment or recognition;

(d) a transgression of a customary rule or principle that warrants removal;

(e) a breach of the Code of Conduct; or

(f) misconduct as contemplated in section 23.

(2) Whenever any of the grounds referred to in subsection (l)(a), (b), (c), (d) and (e) come to the attention of umndeni wenkosi, and umndeni wenkosi concerned decides to remove a traditional leader, umndeni wenkosi may, within a reasonable time and through the relevant customary structure -

(a) inform the Premier of the particulars of the traditional leader to be removed from office; and

(b) furnish reasons for such removal.

(3) A traditional leader may only be removed from office on the grounds set out in subsections (l)(a), (b) or (c) above after he or she has been given an opportunity to submit representations in response to the grounds upon which his or her removal from office have been considered, and those representations have been considered by the appropriate authority.

(4) A traditional leader may only be removed from office on the grounds set out in subsections- (l)(d), (e) or (f) above after an inquiry in terms of section 23.

(5) Where it has been decided to remove a traditional leader in terms of section 23 the Premier must-

(a) withdraw the certificate of recognition with effect from the date of removal;

(b) publish a notice in the Gazette with particulars of the removed traditional leader; and

(c) inform umndeni wenkosi and the removed traditional leader concerned, and the Provincial House of Traditional Leaders of such removal.

(6) Where a traditional leader is removed from office, a successor may be appointed in terms of this Act and in accordance with prevailing customary law and custom."

Analysis.

[9] Distilling the chaff from the wheat of the founding affidavit, as I see it, the applicant is alleging that the commencement of the procedure set out above in the KZN Act for the removal of the third respondent as iNkosi was by way of the letter and memorandum to the first and second respondents dated 22 September 2020 referred to above. The letter does not mention the KZN Act, but the memorandum does. It is not necessary to set out the contents of the memorandum save to state that it is signed off by the applicant as *"Duly authorised representative of uMndeni weNkosi."* Paragraph 29, the penultimate paragraph, reads *"In conclusion, indeed we are very clear that this matter also involves a case of misconduct perpetrated by DV, against family members and iSizwe saseMpangisweni (as contemplated in Section 23). However, iSilo (via his Council) has advised that, it is best to tackle the wrongfulness in the appointment/recognition of iNkosi yakwaZondo eMpangisweni,* (my underlining) *which stance is – in our understanding – supported by iSilo, the paramount custodian of the Zulu customary law and procedures."* The final paragraph (30) reads *"Based on the aforegoing, the office of the Premier is implored to please accede to our request as set out in paragraph 27, as a matter of urgency…."* Paragraph 27 reads as follows *"In the premises, and in the light of the fact that DV's appointment is void ab initio, we call upon COGTA and the Premier to take a swift action, (on the bases that the Premier's office cannot documentary* (sic) *support its recognition of iNkosi yawaZondo and uMndeni weNkosi rejects the current iNkosi);*

a. *To immediately suspend DV from his position,*
b. *To call upon DV to produce proof within 14 days, confirming that he was so appointed/identified by uMndeni weNkosi to the position he occupies. Upon failing to produce documentary proof in his support, the suspension may be confirmed.*
c. *Thereafter/simultaneously engage with uMndeni weNkosi to establish the name of the appropriate person who qualifies in terms of customary law to assume the position of an iNkosi, to be properly recognised."*(sic).

[10] The first and second respondents did not answer the applicant's founding affidavit paragraphs *ad seriatim* but rather by way of a narrative. As a result, their answer to the timeline of events, and specifically whether the first or second respondents viewed this letter and memorandum as anything other than an application

in terms of section 21 of the KZN Act, is not entirely clear. They record that a written report by the Department of COGTA dated 9 September 2022 attached to the answering affidavit "…*sets out the entire history of the appointment of the third respondent, the complaints received from the Applicant's group, the appointment of Injula Lwazi Research Institute to investigate the dispute, and the receipt of its Report."* They then alleged that *"the recommendations of the Institute Report were adopted by the Premier in Executive Council ("the Cabinet") on 8 June 2022* and accept that that constituted a decision by the first respondent.

[11] At the hearing Mr. Mdladla for the applicants focused upon submissions that the third respondent had never validly been recognised or appointed iNkosi. Particularly, he took issue with the documentation relied upon by the first and second respondents allegedly evidencing this fact. He claimed that there is no evidence that the third respondent was ever appointed *"as a native chief of Zondo/Madide tribe and/ or eMpangisweni community in terms of section 2 (7) of the Black Administration Act."* He argued that the "Certificate of Jurisdiction" relied upon by the first and second respondents does not resolve that issue because, so he submitted, the document was either *"forged or fraudulent".*

[12] Mr Dickson SC argued that the Certificate of Jurisdiction together with a document put up by the first and second respondents, being a "Proclamation by the Chief Minister of KwaZulu, M.G. Buthelezi dated 5 May 1992, recording the establishment under section 5 (1)(a) of the KAIA of *"…a Tribal Authority in respect of the aforesaid tribe* (the Zondo Tribe) *under Ibambabukhosi Samson Zondo, to be known as the Zondo Tribal Authority"* sufficiently established that the third respondent had been lawfully recognised and appointed in about 1993. He also pointed out that the third respondent had been accepted as such ever since then. He argued that a review of that appointment now, 30 years later, was well out of time in respect of PAJA and there being no application for an extension of the time as required by PAJA, such purported review must fail.[2]

[2] Section 7(1) of PAJA sets the time limit at 180 days.

[13] As I have set out above, however, whilst the applicant has relied upon the history to assert that the third respondent was not, and could not have been, recognised and appointed iNkosi of his *"Tribe"*, the review is also against the decision by the first respondent *"to abide the recommendations of the Injula Lwazi Research Institute",* pursuant to the procedure invoked (clumsily perhaps) by the applicant, purportedly on behalf of the relevant uMndeni weNkosi, in terms of section 21 of the KZN Act. I intend to refer to this procedure as "the section 21 complaint".

[14] The latter decision being sought to be reviewed then, is the decision taken by the first respondent effectively dismissing/rejecting the section 21 complaint when the first respondent, so it is set out in the first and second respondent's affidavit, considered the ILRI report and had it adopted *"in Executive Council ("the Cabinet") on 8 June 2022."* This application was launched on 21 November 2022 according to the Registrar's stamp. That was within the 180 days of that latter *"decision"* as provided for by PAJA.

[15] The first and second respondents submit at paragraph 24 of the answering affidavit as follows:

> *"Furthermore, if a case for removal under section 21 of the KZN Act is sought to be made, this involves a complaint and action by the Premier, who cannot remove an Inkosi without an enquiry. None of those jurisdictional facts exist and no hearing has been held."*

[16] However, in paragraph 39.9 of the first and second respondents answer it is alleged that *"The Premier did make a decision. It was taken in Executive Council. The Premier accepted the recommendations of the Institute."* That can only mean on these facts, that the first respondent decided the section 21 complaint and based that decision on the investigation initiated by COGTA and the report, ultimately, of the ILRI.

[17] I do not agree with the argument by the first and second respondents that the *"jurisdictional facts"* relating to the section 21 complaint do not exist. The first and second respondents complain about the absence of a *"hearing"* and/or *"enquiry"*. But that is not what section 21 requires. The letter and accompanying memorandum to the

first and second respondents dated 22 September records the submission of the dispute in terms of section 21 of the KZN Act particularly in terms of section 21(1)(c). It also records that whilst it contains allegations of misconduct, the "wrongful appointment" issue is the section 21 *"removal"* issue relied upon. What is then required of the first respondent, as a consequence of a complaint is set out in section 21(3) as follows:

> *"(3) A traditional leader may only be removed from office on the grounds set out in subsections (l)(a), (b) or (c) above after he or she has been given an opportunity to submit representations in response to the grounds upon which his or her removal from office have been considered, and those representations have been considered by the appropriate authority."*

[18] The answer of the first and second respondents is that "the Department", being the Department of the second respondent, investigated the history and facts surrounding the relevant iNkosi appointment/s and in so doing sought the expertise of the ILRI to *"assist with the investigation and mediation of the dispute".* (Paragraph 4.9 of the Department report dated 9 September 2022.)

[19] It is, to my mind, clear that the first and second respondent pursued the complaint by the applicant/uMndeni weNkosi in terms of section 19 and 21 of KZN Act. This is, after all, a KZN matter and I can conceive of no reason why they could not proceed on that basis. That being so, the first respondent enlisted the assistance of the second respondent with the representations set out in the complaint, which then investigated the matter and in turn enlisted the assistance of experts of the ILRI who also investigated and produced a report. This the first respondent was obliged to do in terms of section 21(3) of the KZN Act. I repeat; a complaint was made with reference to the relevant sections of the KZN Act and an enquiry was held. The first respondent then made her decision. Paragraph 39.9 of the answering affidavit clearly says as much when it records *"The Premier did make a decision. It was taken in Executive Council. The Premier accepted the recommendations of the Institute."*

[20] The applicant accepted that eventually (alleging initial dilatory conduct by the first and/or second respondents as set out above) an investigation was conducted by

the first and/or second respondents culminating in the investigation by the ILRI. The applicant also accepted that that investigation included *"interviews and members of the Royal Family participated in the process. Apparently ILRI met with all interested parties within the family and other individuals within the community".*

[21] The applicant places significant reliance on the meeting of what he calls *"the Royal family or uMndeni weNkosi"* on 11 September 2021. He claims that at that meeting it was *"unanimously decided that I was the one identified as the new iNkosi for the Zondo tribe and eMpangisweni community".* That meeting, so he says, *"marked the uMndeni weNkosi's official compliance with section 19 of the KZN Act."* He claims that those minutes are a true reflection of the fourth respondent's wishes, and that the second respondent's officials accepted that fact.

[22] After receiving the ILRI report for the first time he was of the view that the report was poorly written and the content unsupported by evidence. He claims that the report was confused as to whether the instruction had been to mediate or establish whether the third respondent had in fact been wrongfully appointed. He denied that there was any evidence that the third respondent had in fact been rightfully appointed. He denied the allegation in the report that *"the family was divided"* and denied the adverse findings made against himself. He claims that the report found that the third respondent was the firstborn child of Maria KaMaphisa Zondo, his mother, but that the report had avoided pointing out that there was no evidence that the third respondent was in fact a son of the applicant's father.

[23] He alleges that in order to be considered as a successor to his father the third respondent ought to have been his father's firstborn child. He pointed out that the report referred to the third respondent as *"ilongwe"*, which means illegitimate child, and claimed that an illegitimate child *"can never assume the bloodline of ubukhosi".* He alleged further that when the report recommended an investigation into the conduct of the third was on and "full purposes of disciplinary action" the inference was that the report was confused as to whether it was being conducted in terms of a misconduct allegation or a wrongful recognition allegation.

[24] In the result he alleges the following reviewable irregularities in the Premier's decision, reliant as it is on the findings of the ILRI report:(I summarise)

a) Bias or reasonable suspicion of bias on the basis that the ILRI report was one-sided, biased, and unreasonable.

b) A mandatory and material procedure or condition prescribed by an empowering provision was not complied with on the basis that there was no evidence that the third respondent had been validly appointed and that because of the meeting of 11 September 2021 it was mandatory that he, the applicant, be appointed.

c) The action was procedurally unfair on the basis that it was not necessary for the ILRI to have enquired into alleged misconduct on the third respondent's part.

d) The action was materially influenced by an error of law on the basis that the reports acceptance of the appointment of the third respondent was a *"grave error of law"*.

e) The action was taken for reasons not authorised by the empowering provision on the basis that there is no empowering provision authorising the appointment of the third respondent.

f) The action was taken because irrelevant considerations were taken into account, all relevant considerations were not considered on the basis that there was no evidence that Samson and never been removed, and that the third respondent had not been lawfully recognised but had *"usurped"* the position over 30 years.

g) The action was taken because of the unauthorised or unwarranted dictates of another person or body on the basis that the ILRI report was used as the sole reference.

h) The action was taken arbitrarily or capriciously on the basis that the first and second respondents' acceptance of the report recommendations was unfounded, random, and not based on facts or evidence.

i) The action concerned consists of a failure to take a decision only on the basis that in the event that the first respondent alleged that no decision had been taken then she had a duty to do so.

[25] The first and second respondents denied any bias and alleged that the Department had been *"very careful to conclude this dispute without a bias. The Premier accepted the recommendations of the Institute without bias. The complaint about the meeting is not evidence of any bias or favouritism".* They also denied non-compliance with procedures, any procedural unfairness, any errors of law and any unauthorised actions. They denied that any irrelevant considerations were either accepted or omitted. They pointed out that the administrative action appointing the third respondent had existed for 30 years and could not just be ignored. Nothing had been done by the applicant between 1993 and 2020. They denied that receiving the Institute Report constituted the acceptance of unauthorised or unwarranted dictates of another body. It was pointed out that the content of the report did not contain *"dictates"*. They denied that the decision was arbitrary or capricious. They emphasised that a decision had been taken. They allege that this dispute is not about appointing a successor in terms of section 19 of the KZN Act because there is already an incumbent.

[26] In my view, a material issue in this application is a determination of the status of the third respondent at the time the first respondent made her decision. In my view, current attitudes of the community towards him are not relevant to that determination.

[27] The first and second respondents attached to their answer, an initial written report of an investigation by the Department on the issue by dated November 2020, the report of ILRI dated 24 November 2021 and a further written report by the Department dated 9 September 2022.

[28] In its executive summary the ILRI report makes it clear that their investigation was into essentially two claims, the first being whether the third respondent had been *"wrongfully recognised"* and the second being the issue of the paternity of the third respondent and its relevance to the position he holds.

[29] The relevant customary law provides for the principle of male primogeniture which dictates that only a male who is related to the deceased through a male line qualifies as interstate heir and it looks to the eldest male descendant of the deceased

first.[3] The ILRI was well aware of this principle being applicable at the time. It conducted an extensive investigation into this *"succession dispute"*. The report consists of no less than 30 pages of close-cropped print. Whilst it may make for difficult reading, what is clear is that the investigation was thorough and both appreciative of applicable legislation and applicable custom/s. It is evident that the ILRI interviewed and investigated the relevant parties and families extensively and in detail. They did this against the knowledge that these types of succession disputes invariably result in tensions within families and traditional communities and that a resolution based on a proper and full investigation is essential. As the report says, *"face-to-face interviews are preferred"*. That was done extensively. There were also meetings, so the report records, with the applicant, the third respondent and numerous other relevant immediate family individuals. The ILRI was aware of the 11 September 2021 meeting (as it was in respect of the other relevant meetings) and notes in its report that the third respondent had not been present at that meeting.

[30] In my view the ILRI considered all relevant information in a careful manner before coming to its conclusion and recommendation. In its opinion it was satisfied that the evidence indicated that the third respondent was the oldest son of the previous iNkosi but that to put that matter to permanent rest a DNA test could be conducted. The report sets out, however, that the illegitimacy issue is immaterial as it *"was withdrawn for reasons highlighted in the letter of the claim by Mr B.S.W. Zondo as recorded in the minutes of the meeting of 11 September 2021*". That is the meeting that the applicant places significant reliance on, as set out above. In my view there is no satisfactory evidence that the third respondent was not the first-born son of the erstwhile iNkosi. Those allegations are subjective, speculative, and contradictory. The applicant did not seek that the matter be referred for oral evidence. It requires the application to be decided on the papers. The speculative nature of these allegations, anyway, do not result in a genuine dispute of fact. Even if true, however, for 30 or so years the third respondent has occupied the position and continues to do so. A review of the third respondent's appointment and recognition as iNkosi in 1993, is manifestly late and there is no acceptable reason, in my view, for the almost 30-year delay. The

[3] **Madondo MI.** Customary Law in Constitutional Democratic South Africa, First Edition, LexisNexis, 2023 pp 84 and 311

result is that it has become "insulated" from review, whatever its initial justification may or may not have been. Mr Dickson SC relied upon **Mec for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute - 2014 (3) SA 481 (CC)** at **paragraph 97** particularly, for that submission. In paragraph [97] the Constitutional Court held as follows: *"The point is this. Far from unjust administrative conduct not being administrative action at all, PAJA makes clear that it falls within the definition of administrative action but is subject to review. This approach to the nature of administrative action and decisions meshes with the premise inherent in both the common-law rule against unreasonable delay and PAJA's requirement that proceedings for judicial review must be instituted without unreasonable delay and, subject to condonation, within 180 days. Both proceed on the basis that irregular administrative actions may become insulated from review because of delay. This means they will never be declared invalid. They therefore retain lawful consequence. No other approach is practicable."* I align myself with that analysis of the legal position therein.

[31] The ILRI report is also clear that there were numerous contradictory contentions by the persons and entities investigated and interviewed in respect of how it had come about that the third respondent had been recognised. Blame was apportioned left, right, and centre. Yet the report managed to distil conclusions and recommendations in respect of the relevant claims and disputes. On this issue, the report sets out that *"the claim of illegitimacy was withdrawn by the family and the inappropriate appointment was disproved by documents received by the Department which endorses that iNkosi Vusumuzi Douglas Zondo was installed properly by the then MEC iNkosi N J Ngubane."* The final ILRI conclusion and recommendation is what I have already set out in paragraph [5](v) above.

[32] The first and second respondents attached to the answering affidavit copies of documentary evidence considered by the ILRI, which the first and second respondents allege confirms the recognition and appointment of the third respondent as iNkosi in 1993. That documentation constitutes a *"Certificate of Jurisdiction signed by the Minister of Justice on 7 June 1993"* certifying the area of jurisdiction of Third Respondent as Chief of the Madide clan (Zondo Clan), a Proclamation by the Chief

Minister of KwaZulu, M.G. Buthelezi dated 1992 fixing the area of the Zondo tribe jurisdiction and as being at the time under the Regent Samson Zondo, and a certificate dated 26 June 1993 signed by the Director-General of the Department of Regional and Land Affairs in terms of section 12 of the Black Administration Act 36 of 1927 which records the third respondent is being recognised as *"Kaptein"*, another word at the time for iNkosi, of the Zondo tribe. These were accepted, correctly in my view, by the ILRI.

[33] The circumstances surrounding the Regent's alleged recognition at the death of David Thanduyise Zondo is anything but clear on the evidence. On an acceptance of the third respondent's lineage, however, as oldest son he was next in line. Thus, in my view, his recognition and appointment in 1993 or so, was justifiable. Mr. Mdladla pointed out that the third respondent did not take any part in this application. I am not satisfied that that fact is of any assistance to the applicant because this application is to review administrative action/s by the first and/or second respondents.

[34] There is no dispute that for years the third respondent's occupation of that position was never challenged. Instructive on this issue is the ILRI report that *"The succession dispute between B.S.W. Zondo and V.D. Zondo emerged in 2019"* only.

[35] The applicant saw fit to deliver an affidavit of one Mkhobeni Meshak Mashazi dated March 2023 together with his replying affidavit, purportedly to introduce new evidence as to the circumstances of the recognition of the third respondent as iNkosi in 1993. No condonation was applied for to introduce new evidence at that stage and such attempt was objected to be the first and second respondents who argued that it had to be iognored. Whatever the case may be, I do not consider that it takes the appointment of the third respondent initially much further. Ultimately, he says *"I am advised that there is no record that such installation/recognition event was even official, I was not part of that process either."* He does not set any first-hand facts disputing the recognition of the third respondent.

[36] The first and second respondents have argued that the *"real uMndeni weNkosi"* have not been joined, such non-joinder being fatal. I am not convinced, however, that

there is merit in that submission. It is instructive that the fourth respondent has, independently of the applicant, given Notice on 21 December 2023, of its intention to abide. No party objected thereto or challenged that Notice was fraudulent or not binding on the relevant uMndeni. The ILRI report talks of numerous meetings with Umndeni representatives but precisely who constitutes the relevant uMndeni in respect of this application is also far from clear. The complaint was launched initially by the applicant alleging to be acting on behalf of the uMndeni. The founding affidavit describes the fourth respondent and sets out its address. The Notice to abide is signed by an individual *"duly authorised"* by the fourth respondent from that address. I accept, in the circumstances, the proper joinder of the fourth respondent.

[37] I now turn to the specific grounds of review relied upon by the applicant as set out above:

a) **The report was biased and unreasonable:** In my view, a consideration of the report as a whole does not support that argument. The applicant pointed out no specific instances demonstrating bias or an unreasonable approach by the ILRI and the ground has no merit.
b) **The lack of evidence of the third respondent's appointment and the ignoring of the meeting of 11 September:** The ILRI had the documentary evidence referred to above. The events happened about 30 years ago and nothing more is available. The available documents result in an unavoidable inference, in my view, that the third respondent was so appointed. Even if I am wrong, the unjustifiable delay has now insulated that appointment.
c) **The action was procedurally unfair:** For reasons fully set out above, I do not agree. The procedure required by section 21 of the KZN Act was followed and the investigation involved all parties, including the applicant.
d) **Irrelevant considerations were applied:** The applicant does not specify what these were. A careful reading of the relevant reports as considered by the first respondent do not evidence that in my view. I do not agree that the decision was taken capriciously or arbitrarily as submitted by the applicant. The reasons for the decision are founded in a comprehensive and fair investigation by the relevant authorities and ultimately the first respondent.

Conclusion

[38] Against that background, I am not persuaded that the first and second respondents were wrong in their assessment of the decision to be taken, and ultimately taken, by the first respondent regarding the applicant's section 21 complaint.

[39] I have carefully considered all attacks on the first respondent's decision to *"abide the recommendations of the Injula Lwazi Research Institute"* report but find that on the evidence before me, they are all unjustified.

[40] I am satisfied that the first respondent acted lawfully in consequence of the complaint lodged by the applicant under section 21 of the KZN Act and that the requirements of section 21(3) were complied with.

[41] In my view that there is no evidence justifying the applicants PAJA complaints. The complaints are perfunctorily set out. Mainly they are regurgitations of grounds set out in section 6 of PAJA. I am not satisfied that the applicant has established merit in any of them.

[42] The first and second respondents have asked that the application be dismissed with costs. Given the nature and character of this litigation, and the principles set out in **Biowatch Trust v Registrar, Genetic Resources, and Others - 2009 (6) SA 232 (CC),** I am not prepared to make such a costs order.

[43] In the result:

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

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PITMAN AJ

Date reserved: 31 January 2024
Date delivered: 13 March 2024

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