Case No 566/94

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

THE GOVERNMENT OF THE PROVINCE OF 1ST APPELLANT
KWAZULU/NATAL

ZWELAKHE ALBERT NGWANE 2ND

APPELLANT

and

BHEKUYISE EPHRAIM NGWANE

RESPONDENT

CORAM: VAN HEERDEN, EM GROSSKOPF, NIENABER,

OLIVIER JJA et ZULMAN AJA

HEARD: 19 AUGUST 1996 DELIVERED: 9

SEPTEMBER 1996

JUDMENT

/NIENABER JA

NIENABER JA:

The late chief Msongelwa became chief ("nkosi") of the Mnqobokazi tribe in the Ubombo area of KwaZulu/Natal in 1941. Two of his sons aspire to succeed him. The one, Zwelakhe Albert Ngwane (second respondent in the court below), was the eldest son of the late chiefs third wife. The other, Bhekuyise Ephraim Ngwane (applicant in the court below), was the eldest son of the late chiefs fifth wife. I intend no disrespect to either if for the sake of convenience I refer to them as Zwelakhe and Bhekuyise respectively. The late chief, then over 80 years old, frail and with failing eyesight, decided in 1989 to relinquish his chieftainship. Both of his sons, at various times, received his support. On 19 February 1991 the KwaZulu cabinet resolved to appoint Zwelakhe as his successor. Shortly thereafter, on 14 May 1991, chief Msongelwa died. On 2 November 1991 Zwelakhe was installed as the new nkosi. But his appointment was challenged by Bhekuyise,

who applied to the Natal Provincial Division for an order against the KwaZulu government (subsequently transformed into the government of the Province of KwaZulu/Natal) as first respondent and Zwelakhe as second respondent, setting aside the latter's appointment as chief and declaring Bhekuyise to be the chief, alternatively, directing the government to appoint him as such. The application before Hurt J succeeded. Zwelakhe's appointment was set aside with costs. It is against that order which the government, as first appellant, and Zwelakhe, as second appellant, with leave of the court a quo now appeal.

Two main grounds of complaint were advanced by Bhekuyise in his founding affidavit. The court a quo did not discuss the first (that it was ultra vires the powers of the cabinet to appoint Zwelakhe), dismissed the second (that the government by its own past conduct fettered its otherwise unfettered discretion) and found for Bhekuyise on a third ground, not mentioned or even

foreshadowed in either the founding or replying affidavits (that Bhekuyise had the legitimate expectation to be heard before an appointment was finally made).

Before dealing with each of these issues in greater detail a brief chronological account of the events culminating in Zwelakhe's installation as chief of the Mnqobokazi tribe will, I think, be helpful.

Nkosi Msongelwawas sworn in as chief in 1941. In 1945 he married Zwelakhe's mother and, according to documentation found in the tribal files at Ulundi and not disputed by Bhekuyise, he thereupon made a declaration to the native commissioner, so described, at Ubombo designating her to be his chief wife - an indication, according to customary law, that her eldest son would be regarded as his natural successor. On 21 February 1990, when he was 80 years old, he caused a letter to be written to the magistrate of Ubombo requesting him to attend a tribal meeting at which he

proposed to nominate Bhekuyise as his successor. At that meeting, held on 27 February 1990 and at a subsequent meeting held on 7 August 1990, both attended by both rivals and by magistrate Schnetler, the chief nominated Bhekuyise. Magistrate Schnetler kept minutes which he forwarded to the government at Ulundi. According to the minutes the chief, when asked about his volte face, said: "The reason why I have changed my mind is only known to me. It is just because I like him." The magistrate, according to the minutes, then stated, 'I'll leave this matter in the hands of the Umndeni to come out with the solution." (The "umndeni" has variously been described in the papers as "a tribal meeting", a meeting of "relatives" and as "a body of blood relatives of the Ngwane Royal clan".) On 11 September 1990 a rather plaintive letter was addressed to the magistrate at Ubombo, dictated by the chief to the tribal secretary. Although the letter is described as "suspect" by Bhekuyise it must be accepted for a fact in accordance

with the approach outlined in Plascon-Evans Paint Ltd v Van Riebeek Paint (Pty) Ltd 1984 (3) SA 623 (A). It reads, inter alia:

> "I would like to request the Magistrate together with Pretoria to help me in any way they wish. They must choose the Inkosi from my two sons I have pointed or they must do what they see or think is right for them. I have tried for myself to choose the Inkosi but I have failed because of an argument noise from my sons. I do not know what to do now because they all want to become Inkosi. Now I am tired of this noise of choosing the Inkosi here at Mnqobokazi. I do not wish to speak of choosing Inkosi next time because if I choose the one to be the ruler, the one which has not been chosen will say my father hates me and that will cause an argument too. Please help me with this noise. I could be very much happy if my request could be a success."

And this was followed by a further letter dated 9 January 1991, the authenticity of which was later confirmed by the chief to magistrate Nieuwoudt, who succeeded magistrate Schnetler, in which he stated:

> "I earnestly request our Honourable Magistrate to entrust my son Zwelakhe Albert Ngwane in my position as a chief urgently. I earnestly request the Kwa-Zulu Government to entrust him in my presence to avoid clash among my family."

The cabinet thereupon made the appointment of Zwelakhe as chief on 19 February 1991 but the decision was only conveyed to the tribe at magistrate Nieuwoudt's meeting with them in June 1991. In the meantime the magistrate had had a meeting with the chief in March 1991, shortly before he died in May, at which he again expressed preference for Zwelakhe as his sucessor. Notwithstanding a complaint by Bhekuyise to the government in October 1991, Zwelakhe was installed as the new nkosi in November of that year.

Against that background I retum to the three issues mentioned earlier.

The first ground raised on behalf of Bhekuyise was that Zwelakhe's appointment was ultra vires since any such appointment had to be made not by the cabinet but by the chief minister acting on advice of his cabinet.

The power to make an appointment derives from s 2(7) of the Black Administration Act, 1927, which provides that:

> "The Governor-General may recognize or appoint any person as a chief of a Black tribe ..."

Such power of appointment, incidentally, has been held to be

unfettered (cf Minister of Native Affairs and Another v Buthelezi 19(51 (1) SA 766 (D); Buthelezi v Minister of Bantu Administration and Develoment and Another 1961 (4) SA 835 (A)). In terms of s 3(b) of the Republic of South Africa Constitution Act, 1961, any reference to the governor-general shall be construed as a reference to the state president and in terms of s 16(1) the executive government of the republic is vested in the state president acting on the advice of the executive council, consisting of the duly appointed ministers. Section 22 of the National States Constitution Act, 21 of 1971 (then named the Bantu Homelands Constitution Act) provides, inter alia, that:

> " ... the administrative control, power, authorities and functions... which ... were vested in or exercised by the State President in relation to matters in respect of which a legislative assembly may make laws in terms of this Act, shall be vested in the executive council of the area concerned."

One such matter was "the appointment... of paramount chiefs, chiefs and headmen." (Item 27 of the first schedule).

Section 29 of the same Act (as amended by s 18 of Act 32

of 1987) provides as follows:

> "(1) The executive government of a self-governing territory with regard to all matters referred to in Schedule 1 shall vest in a cabinet, which shall consist of a chief minister and other ministers ..."
> (2) The provisions of this Act ... with regard to an executive council, a Chief Councillor and a Councillor shall mutatis mutandis apply with regard to a Cabinet, a Chief Minister and a Minister respectively."

This KwaZulu legislative assembly was established by Proclamation No. R 70 of 1972 and by Proclamation No. R 11 of 1977 KwaZulu was declared as a self-governing territory.

It follows from the above, more particularly s 29 of the National States Constitution Act, that the power to appoint a chief vested in the cabinet of what was then known as the KwaZulu government.

The second ground advanced on Bhekuyise's behalf in the court below was that the KwaZulu government had fettered its discretion by its custom of taking into account the wishes of the incumbent chief and the umndeni in appointing a new chief; and since the wishes of the chief and the umndeni were not respected in

this instance, that the cabinet did not properly exercise its discretion. The court a quo dismissed the complaint on the simple ground that there was no evidence "which established any fixed procedure or course of conduct" adopted by the government "in relation to the appointment of chiefs in general". Counsel for Bhekuyise did not contend in this court that the court a quo erred in rejecting this complaint. In my view this concession, as indeed a similar concession in respect of the first ground, was entirely correctly made.

That brings me to the third ground, which is of the court a quo's own making. It is that Bhekuyise had the legitimate expectation that he would be, but was not, given a full hearing before any appointmement was made. There are, with respect, two preliminary but nevertheless fatal flaws in this approach.

The first is that Bhekuyise does not say so himself. Nowhere in the correspondence or in the founding or replying affidavits is it stated that he expected or believed himself to be entitled to be briefed or consulted before any appointment was made. Had the point been spelt out in the application papers the respondents, duly

alerted, could have responded on fact and on law. It was argued on Bhekuyise's behalf that the picture was complete because everything that could be said had been said. That may or may not be so. Although it is difficult to envisage what other material could have been adduced, counsel for the appellants rightly submitted that the issue was not explored because the minds of the appellants and their advisers were simply not attuned to the doctrine of legitimate expectation when the answering affidavits were drawn (cf Administrator, Transvaal and Others v Thaletsane and Other 1991 (2) SA 192 (A) at 195F-196D).

The second flaw is this. Even assuming in Bhekuyise's favour that the full conspectus of relevant material had been placed before the court, it falls short of establishing the case sought to be made out by the court a quo. That case was, in the words of the court a quo:

> "Once it had been decided to embark on an enquiry into the question of who should be the new chief, the first respondent was bound to ensure that a fair and full enquiry was held."

But there was no decision to embark on an enquiry, not by the cabinet, not by the government, not even by the magistrates.

Magistrate Schnetler visited the chief at the latter's invitation. He reported the matter to his department, as he was duty bound to do, but there was no pretense either on his part or on that of his successor to conduct a full-scale enquiry. Section 10 of the KwaZulu Act on the Code of Zulu Law, Act 1(5 of 1985, since repealed (cf KwaZulu Act 9 of 1990), did make provision for a structured enquiry in a situation such as the present if the cabinet "by reason of any dispute or other circumstance deem it desirable". Even then the cabinet's discretion to appoint whomsoever it regards as the appropriate appointee remains unfettered, albeit that the cabinet will be "guided by the public interest and the interest of the tribe concerned" (Minister of Native Affairs and Another v Buthelezi supra, at 770A-H, and cf Buthelezi v Minister of Bantu Administration and Development and Another, supra 841G-H). Counsel for Bhekuyise conceded that he could pitch his argument in support of the Court a quo's finding no higher than that the old chief (and not the government) may have created in Bhekuyise the expectation that he would be chosen as his father's successor; and that the government, through the two magistrates who visited the

chief and consulted the tribe, may have created the expectation in him that he would be heard before an adverse appointment is made (cf Administrator, Transvaal and Others v Traub and Other 1989 (4) SA 731 (A) at 758D-G). The mere allegation does not justify the invocation of the doctrine of legitimate expectation. The court a quo should have dealt with the third ground, its own inspiration, as it dealt with the second, namely, that it lacked the factual foundation to support it.

The appeal is upheld with costs. The following order is substituted for the order made by the court a quo "The application is dismissed with costs."

P M Nienaber Judge of Appeal Concur
Van Heerden JA E M
Grosskopf JA Olivier JA
Zulman AJA