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

REPORTABLE
Case No: 2710/2021
Date heard: 11/05/2023
Date delivered: 04/07/2023

In the matter between:

JONGIKHAYA FOKAZI **APPLICANT**

and

THE MEMBER OF THE EXECUTIVE COUNCIL
FOR CO-OPERATIVE GOVERNANCE AND
TRADITIONAL AFFAIRS- EASTERN CAPE **FIRST**
RESPONDENT
THE EASTERN CAPE HOUSE OF TRADITIONAL
LEADERS **SECOND RESPONDENT**
BULELANI MTSHAZI **THIRD RESPONDENT**

JUDGMENT

Notyesi AJ

Introduction

[1] Cloete JA once warned–

> "It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest – the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts."[1]

[2] Jongikaya Fokazi is the headman of Mndundu Administrative Area, Willowvale. He was elected for that position by the community, and thereafter, he was officially appointed by the MEC for Housing, Local Government and Traditional Affairs on 12 December 2005. His position of headmanship was challenged by Bulelani Mtshazi, who filed a dispute and a claim with the Eastern Cape House of Traditional Leaders in terms of section 21(2)*(a)* of the Traditional Governance and Framework Act 41 of 2003 (the Act), as amended, read with section 36(2)*(c)* of the Eastern Cape Traditional Leadership and Governance Framework Act 1 of 2017 (ECTLGF). The Eastern Cape House of Traditional Leaders (the House) upheld the claim of Bulelani Mtshazi on 17 November 2020. This decision was taken by the executive committee of the House.

[3] In this application, Mr Fokazi is seeking relief for the review and setting aside of the decision by the executive committee of the Eastern Cape House of Traditional Leaders. In the notice of motion, Mr Fokazi is further seeking a declarator that the appointment of Mr Bulelani Mtshazi as the rightful headman for Mndundu Administrative Area, Willowvale, is unlawful and that it should be declared of no legal force and effect. There are other ancillary reliefs sought by Mr Fokazi. The essence of the contention by Mr Fokazi is that the investigations conducted by an *ad hoc* committee appointed by the Eastern Cape House of Traditional Leaders were shoddy, irregular, and procedurally unfair and that he was not afforded adequate hearing during such investigations.

[4] The Eastern Cape House of Traditional Leaders is refuting the allegations of Mr Fokazi on the basis that the decision to uphold the claim of Mr Mtshazi was pursuant to a fair process of investigations, which was procedurally fair, public, and

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[1] *Minister of Land Affairs and Agriculture v D & F Wevell Trust* [2007] ZASCA 153; 2008 (2) SA 184 (SCA) para 43.

transparent and that Mr Fokazi was afforded an adequate hearing during the investigations. The House further submitted that the executive committee and the House applied their minds when taking the decision to uphold the claim and that Mr Fokazi has not attacked the decision of the House and that of its executive committee.

Issue

[5] The crisp issue concerns the validity of the decision to uphold the claim of Mr Bulelani Mtshazi by the executive committee of the House and questions whether Mr Fokazi was afforded an adequate hearing during the investigation process of the claim.

The parties

[6] For the sake of convenience, the parties shall be referred to as–

(a) Applicant – Mr Fokazi;

(b) First Respondent – the MEC;

(c) Second Respondent – the House; and

(d) Third Respondent – Mr Mtshazi.

Background

[7] On 21 June 2021, Mr Fokazi launched these review proceedings in accordance with the provisions of Uniform Rule 53, essentially seeking a review of the decision by the executive committee of the House taken on 17 November 2020. The grounds of review are set out in the founding affidavit. The answering affidavit was filed on behalf of the MEC, the House and Mr Mtshazi on 28 September 2021. The answering affidavit is deposed by Senior Traditional Leader Jongisizwe Ngcongolo. Senior Traditional Leader Jongisizwe Ngcongolo was a member of the *ad hoc* committee that investigated the claim.

[8] The records pertaining to the impugned decision were filed on 11 April 2022. Mr Fokazi did not supplement his grounds of review upon receipt of the records.

[9] In the founding affidavit, Mr Fokazi had alleged that the history of the Fingoes and the headmanship was settled by colonialists after the last frontier wars. According to him, at the conclusion of the last wars of resistance of 1877 to 1879, a large number of Fingoes were removed from the Nqamakwe district by the government and placed on the west side of the Bashee river as a buffer against the Gcalekas.

[10] Mr Fokazi had alleged that one Manqoba, who was a police officer at Nqamakwe, was appointed as the headman of the Fingoes by the government. He further alleged that Manqoba's son, Enoch, was also appointed to succeed his father by the government. At each time of these appointments, according to Mr Fokazi, there were no elections nor any form of testing the views of the community. Mr Fokazi alleged that the headmen were simply imposed upon the people. Mr Fokazi alleged that the government-imposed headmen had faced resistance from the local community because they were viewed as government informers.

[11] Mr Fokazi alleged that upon the death of Enoch Manqoba, an acting headman was appointed because the son of Enoch was a minor. In this regard, Botani Nyewe was appointed as a regent for the son of Enoch Manqoba. According to Mr Fokazi, when Botani Nyewe passed on, his son, Martin Nyewe, was appointed as a successor. Upon the death of Martin Nyewe, the position of headmanship became vacant. Mr Fokazi alleged that the community demanded that there should be elections for the position of the headman. According to him, the demand of the community was yielded. Mr Fokazi alleged that from the time of the death of Martin Nyewe, the position of headmanship for Mndundu Administrative Area was filled by way of general elections, and it was no longer hereditary.

[12] Mr Fokazi alleged that after the death of Martin Nyewe, the position of headmanship became contested through public elections and in this regard, there were two contesting candidates, Ntefelele Gwebixhala Mtshazi and Mandlenkosi Nyewe. According to Mr Fokazi, candidate Ntefelele Mtshazi succeeded as a headman due to political influence. Mr Fokazi confirmed that when Ntefelele Mtshazi died, Bongosizwe Mtshazi was appointed as a headman.

[13] He further alleged that when the position of the headman was again vacant, he availed himself and was contested by Anele Mtshazi and Mandlenkosi Nyewe. He was successful in those elections and was appointed as the headman. After he was appointed, Mr Fokazi became the headman and chairperson of the Nqabeni Traditional Council, according to his version.

[14] Mr Fokazi confirmed that during October 2020, he received a communication dated 8 October 2020 from the House. The communication invited him to attend an enquiry at Nqabeni Traditional Council regarding a dispute and claim filed by Mr Bulelani Mtshazi regarding the headmanship of Mndundu Administrative Area. Mr Fokazi confirmed that the meeting was scheduled for a hearing on 19 October 2020 at 11h00. He confirmed that, on the appointed date, he attended the hearing with his councillors and participated in the hearing.

[15] Mr Fokazi set out the procedure that was followed, and I directly quote the procedure as set out by him–

> "a. The chairperson of the ad hoc committee asked the Mr Bulelani Mtshazi to justify his claim;
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> b. Oral presentation was made by Mr Bulelani Mtshazi;
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> c. Mr Bulelani Mtshazi produced no documentary evidence, either for the chairperson of the committee or Mr Fokazi;
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> d. The chairperson never handed any documents to Mr Bulelani Mtshazi or Mr Fokazi;
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> e. Mr Bulelani Mtshazi was never engaged on any information that was contained in a document;
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> f. According to Mr Fokazi, after the oral presentation by Mr Mtshazi, it was then a turn for Mr Fokazi;
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> g. Mr Fokazi and his witnesses gave oral presentation;
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> h. In the oral presentation, Mr Fokazi and his witnesses gave history of how headmanship evolved at Mndundu Administrative Area;
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> i. During Mr Bulelani Mtshazi and his witnesses' presentation, they made it clear, according to Mr Mtshazi, that all previous and subsequent headmen from Manqoba family were imposed by the government;
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> j. According to Mr Fokazi, they stated plainly that the customary practice in Mndundu Administrative Area, is for headmen to be elected by the community;
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> k. According to Mr Fokazi, he submitted his letter of appointment to substantiate that the practice in the area is elections;

l. Mr Fokazi alleged that the ad hoc committee never handed him any documentary evidence and that Mr Bulelani Mtshazi merely stated that headmanship of Mndundu Administrative Area has always been held in his family, although he did not mention the years during which his family held the headmanship."

[16] Essentially, Mr Fokazi's grounds for review could be briefly summarized as follows–

(a) That he was not furnished with documents, and that was procedurally unfair;

(b) The failure to give him documentary information constituted non-compliance with the *audi alteram partem* rule, and therefore, the investigative mechanism or process was flawed;

(c) The customary practice of Mndundu Administrative Area is for the community to elect their headman;

(d) The historical custom of electing a headman is evident from the list of the majority of past headmen;

(e) The institution of traditional leadership envisaged in the Act does not provide for an undemocratic process in the election and appointment of traditional leaders;

(f) The committee had a statutory duty to investigate the claim and, in doing so, to consider the customary law and custom of the area;

(g) There is no basis to sustain Mr Bulelani Mtshazi's claim;

(h) The previous and subsequent appointment of the Manqoba family without the involvement of the community was and is not promoting the spirit, purport and objects of the Bill of Rights and was thus irrational and not rationally connected to the purpose of empowering provision and/or information before the committee.

[17] The respondents have filed one answering affidavit. That affidavit is deposed by Jongisizwe Ngcongolo. Jongisizwe Ngcongolo was a member of the *ad hoc* committee that conducted the investigations. He averred, in the answering affidavit, that he is the senior traditional leader. That he is employed by the Department of Traditional Affairs and a member of the House. He confirmed that he was a member of the *ad hoc* committee. They investigated the claim of Mr Bulelani Mtshazi against

Mr Fokazi. They found, after such investigations, that the headmanship of the Mndundu Administrative Area was hereditary. He alleged that the evidence for their conclusion is that Enoch Manqoba was the headman of the Mndundu Administrative Area, and he died in 1920. A regent headman, Joseph Nyewe, was thereafter appointed as a headman for the reason that the son of Enoch Manqoba, Mphathi, was a minor. According to him, the last Mtshazi headman who ruled the area was Nkefelele Mtshazi, who ruled during the 80s. He disputed that Martin Nyewe was ever appointed as a headman. According to him, there was a dispute concerning headmanship after the death of Botani Nyewe. The dispute arose for the reason that Martin Nyewe had mistakenly believed that he was in line to inherit the position. This was despite the fact that Joseph Nyewe was only a regent. According to Ngcongolo, the dispute was resolved by the tribal chief of the time as he restored the headmanship to the house of Mtshazi and thereafter, Bongisizwe Mtshazi was appointed as a headman.

[18] He confirmed that the hearing was conducted in a procedurally fair manner. According to him, Mr Bulelani Mtshazi submitted an application form for his claim. The House decided to investigate the claim. Mr Fokazi was informed about the claim and invited to a hearing. The *ad hoc* committee did not have any documents save for the documents filed at the time of submitting the claim. That document was in possession of the chairperson of the enquiry. This was part of the claim. There were no documents relied upon by the *ad hoc* committee.

[19] According to Ngcongolo, their process was to find facts from both Mr Bulelani Mtshazi and Mr Fokazi and, thereafter, to do their own analysis of those facts. Ngcongolo admitted that both parties, Mr Bulelani Mtshazi and Mr Fokazi, presented their respective evidence and submissions. Ngcongolo disputed that the rules of natural justice were violated. Ngcongolo submitted that the process was procedurally fair, public hearing, open, and transparent and that Mr Fokazi participated. Ngcongolo also disputed that there was information that was withheld from Mr Fokazi. The only information that was received from Mr Bulelani Mtshazi was attached to his claim form, and that information was made available in the archives to which Mr Fokazi had access.

[20] Senior Traditional Leader Ngcongolo disputed all the grounds of review as set out by Mr Fokazi, insisting that the hearing was procedurally fair and that Mr Fokazi was given an adequate opportunity to present his own case. According to Ngcongolo, Mr Fokazi and his witnesses presented their evidence regarding their alleged history of headmanship for the Mndundu Administrative Area. He emphasized that during the hearings, there were no requests for documents from any other parties. Mr Fokazi did not request documents during the hearing. Instead, he was assisted by his witnesses in the presentation of his evidence and submissions.

[21] Senior Traditional Leader Ngcongolo submitted that the resolution of 17 November 2020 was taken by the House after consideration of the investigation by the *ad hoc* committee. The resolution was thereafter communicated to Mr Fokazi on 14 December 2020. It was submitted that the House followed the correct procedures in adopting the resolution of the ad hoc committee. According to Ngcongolo, the House had deliberated on the investigations by the *ad hoc* committee and had applied its mind before the resolution was taken.

Contentions of the parties

[22] Mr *Gagela*, counsel for the applicant, submitted that the *ad hoc* committee was tasked to investigate Bulelani Mtshazi's traditional leadership claim and, therefore, the *ad hoc* committee had a statutory duty to investigate the dispute between Mr Bulelani Mtshazi and Mr Fokazi. In this regard, Mr *Gagela* submitted that the *ad hoc* committee merely investigated a historical background of Mndundu headmanship between Mr Fokazi and the Manqoba family. The contention by Mr *Gagela* was that the *ad hoc* committee had failed to appreciate the scope of its mandate, and that constituted a gross irregularity, which warrants the decision of the House to be reviewed and set aside. Mr *Gagela* did not point out the statutory basis for the submission that the *ad hoc* committee had a statutory obligation. However, he insisted on the submission, suggesting that, as an investigating *ad hoc* committee, the statutory obligation should be inferred and that the *ad hoc* committee failed to appreciate its statutory obligations.

[23] Insofar as Mr Fokazi complains about non-compliance with the *audi* rule, Mr *Gagela* submitted that the chairperson of the *ad hoc* committee was in possession of a document he received from Mr Bulelani Mtshazi and that he ought to have given such document to Mr Fokazi. He submitted that the information had a bearing on the decision of the *ad hoc* committee. He relied, in this regard, on the authority of *Matiwane v President of the Republic of South Africa and Others*,[2] where Griffiths J held–

> "In my view, this was wholly insufficient to satisfy the requirement that the applicant be given a reasonable opportunity to make representations. On a reading of the transcript it is clear that a few specific questions were levelled with regard to the question of the AmaMpondomise kingship and that such questions clearly did not convey the import of the "collection" of adverse information which the Commission alleges it had gathered. The applicant ought to have been provided with all the information which the Commission had independently gathered, particularly that which was adverse to his quest for a declaration that a kingship existed, in order that he might have been placed in a position to meaningfully deal therewith. This is particularly so in that the contextualization of such information given the nature of the matter could well have provided a completely different meaning or slant thereto. This had the potential to affect Commission's deliberations had it been availed of such submissions, but it was not."

[24] Mr *Gagela* further contended that there is no evidence that the headmanship of Mndundu Administrative Area was hereditary and, in this regard, submitted that the overwhelming evidence is that the customary practice of the area is that headmanship is elected and a candidate must obtain a popular vote. Mr *Gagela* further submitted that Mr Fokazi's case is simple and that it is founded on the basis that there were shoddy investigations and non-compliance with the *audi* rule. Insofar as it was suggested that there is a failure to exhaust internal remedies, Mr *Gagela* submitted that the recommendations of the House were final in nature and, therefore, there was no need to exhaust internal remedies. Mr *Gagela* relied, in this regard, on the authority of *Tshivulana Royal Family v Netshivhulana,*[3] where the Constitutional Court interpreted the provisions of section 21 of the Act as follows–

> "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

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[2] *Matiwane v President of the Republic of South Africa and Others* [2014] JOL 31498 (ECM) para 40.
[3] *Tshivhulana Royal Family v Netshivhulana* [2016] ZACC 47; 2017 (6) BCLR 800 (CC) para 32.

level gives the aggrieved party the right to exit the internal structure and approach a court for appropriate relief."

[25] On the contrary, Mr *Luzipo*, counsel for the respondents, submitted that the *ad hoc* committee had acted lawfully and that it followed its own methodology before reaching its conclusion. The *ad hoc* committee had given a hearing to both Mr Bulelani Mtshazi and Mr Fokazi. They both made oral presentations and produced documentary evidence. The *ad hoc* committee made its own factual analysis of evidence and thereafter reached its findings. Mr *Luzipo,* in his oral submissions, emphasized that the *ad hoc* committee merely recommend to the House, and the recommendations are not binding to the House. He contended that it is only the House that has binding recommendations to the MEC. He contended that Mr Fokazi had not challenged the procedure adopted by the House when upholding the claim of Mr Bulelani Mtshazi. Mr *Luzipo* further submitted that Mr Fokazi had not extracted the portions of the record upon which he relies for the relief he seeks and that the onus was on him to bring the evidence from records in advancing his review. In this regard, Mr *Luzipo* submitted that Mr Fokazi, for inexplicable reasons, abandoned the provisions of rule 53 and did not identify the portion from records upon which he relies. Mr *Luzipo* relies on the authority of *SACCAWU and Others v President of the Industrial Tribunal and Another*[4] in which Melunsky AJA held–

> "An applicant who does not furnish the record to the Court runs the risk of not discharging the onus, especially where the allegations upon which it relies are put in issue.
>
> ……….
>
> Without the recourse to the records of proceedings the disputes cannot be resolved on the affidavits. The result is that the appellants' generalised allegations of bias have not been established."

[26] Mr *Luzipo* further submitted that Mr Fokazi has not made out a case on any of the grounds of review for the simple reason that he was afforded a hearing and he did participate in the enquiry. Mr *Luzipo* insisted that, as Mr Fokazi is relying on the provisions of PAJA, he ought to have exhausted the internal remedies and that he failed to do so, and for that reason, the review should be refused.

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[4] *SACCAWU and Others v President of the Industrial Tribunal and Another* [2000] ZASCA 74; 2001 (2) SA 277 (SCA); [2001] 2 All SA 117 (A) at 282D.

[27] I turn to consider the parties' contentions.

Legal Framework

[28] Section 21, in part, of the Act provides as follows–

"(1)

(*a*) Whenever a dispute or claim concerning customary law or customs arises between or within traditional communities or other customary institutions on a matter arising from the implementation of this Act, members of such a community and traditional leaders within the traditional community or customary institution concerned must seek to resolve the dispute or claim internally and in accordance with customs before such dispute or claim may be referred to the Commission.

(*b*) If a dispute or claim cannot be resolved in terms of paragraph (*a*), subsection (2) applies.

(2)

(*a*) A dispute or claim referred to in subsection (1) that cannot be resolved as provided for in that subsection must be referred to the relevant provincial house of traditional leaders, which house must seek to resolve the dispute or claim in accordance with its internal rules and procedures."

[29] Section 36(2)*(c)* of ECTLGF contains similar provisions to section 21 of the Act. The section provides–

"If a king or queen's council or principal traditional council is for whatever reason unable to resolve the dispute as provided for in paragraph (*a*), the dispute must be referred to the Provincial House of Traditional Leaders, which must seek to resolve the dispute in accordance with its internal rules and procedures."

[30] Clause 2.5 of the standing rules and orders of the House, as amended in 2011, provides for the establishment of a Dispute Management Committee. Clause 2.5.1 provides–

"The Disputes Management Committee shall be responsible for the following functions:

(a) Investigating all claims and disputes referred to the House and make appropriate recommendations to the Exco for consideration by the House.

(b) Establishing protocol to manage relations with the National and Provincial Commission on Claims and Disputes of Traditional Leadership and

(c) Promoting claims and dispute prevention mechanisms within the institution of Traditional Leadership."

[31] Clause 4 of the Standing Rules and Orders of the House deals with the election of the executive committee and its functions.

[32] Section 75 of the ECTLGF deals with the powers and duties of the Provincial House. Section 75(3)*(c)* provides–

> "The Provincial House may investigate and make available information on traditional leadership, traditional communities, customary law and customs."

[33] In terms of section 80 of the ECTLGF, all decisions of the Provincial House must be taken by the majority of members constituting the meeting of the Provincial House.

[34] In *Matiwane v President of the Republic of South Africa and Others*[5] *,* Griffiths J held–

> "On the other hand, courts are not to lose sight of the purpose of judicial review which, as expressed in section 33 of the Constitution, is that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Where, in any given case, a court comes to the conclusion that the administrative action in question does not pass muster in this regard it should not refrain from exercising its duty to correct administrative action which is unjust. As stated by Harms JA:
>
> "The right to just administrative action is derived from the Constitution and the different review grounds have been codified in PAJA, much of which is derived from the common law. Pre-constitutional case law must now be read in the light of the Constitution and PAJA. The distinction between appeals and reviews must be maintained since in a review a court is not entitled to reconsider the matter and impose its view on the administrative functionary. In exercising its review jurisdiction a court must treat administrative decisions with "deference" by taking into account and respecting the division of powers inherent in the Constitution. This does not "imply judicial timidity or an unreadiness to perform the judicial function."[6]

[35] In motion proceedings, the affidavits constitute both the pleadings and the evidence, and the issues and averments in support of the parties' cases should appear clearly therefrom.[7]

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[5] Above n 2 para 23.
[6] *Foodcorp (Pty) Ltd v Deputy Director-General: Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management and Others* 2006 (2) SA 191 (SCA) at 196E-G.
[7] *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and Another* [2014] ZASCA 151; 2015 (1) SA 106 (SCA); [2015] 1 All SA 121 (SCA) para 19.

[36] In *Minister of Land Affairs and Agriculture v D & F Wevell Trust*,[8] Cloete JA stated–

> "It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest – the other party may well be prejudiced because evident may have been available to it to refuse the new case on the facts. The position is worse where the arguments are advanced for the first time on appeal. In motion proceedings, the affidavits constitute both the pleadings and the evidence: *Transnet Ltd v Rubernstein*, and the issues and averments in support of the parties' cases should appear clearly therefrom. A party cannot be expected to trawl through lengthy annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained. Trial by ambush cannot be permitted."

[37] In *Director of Hospital Services v Mistry*,[9] Diemont JA said–

> "Counsel cited authority, ancient and modern, for the principle that a judicial officer in civil proceedings must resolve the dispute on the issues raised by the parties and confine the enquiry to the facts placed before the Court; he must not have regard to extraneous issues and unproved facts. Thus *Voet* says in discussing the duties of a Judge:
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> "But things can no how be done by him without being called upon which spring in their own origin from the litigants. Thus account should not be taken in giving judgments of exceptions not raised, nor of witnesses not produced . . .
>
> It follows from this that a Judge cannot make good matters of fact if they are not stated by the parties, unless they are quite notorious from the documents which have been put in by way of proof in the proceeding. That is to prevent his appearing by making good doubtful matters of fact to fill the role not so much of Judge as of advocate, and to defend as counsel rather than to judge."
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> When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by Krause J in *Pountas' Trustee v Lahanas* 1924 WLD 67 and 68 and as has been said in many other cases:
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> ". . . an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny."

[8] Above n 1 para 43.

[9] *Director of Hospital Services v Mistry* 1979 (1) SA 626 (AD) at 635E-636.

> Since it is clear that the applicant stands or falls by his petition and the facts therein alleged, it is not permissible to make out new grounds for the application in the replying affidavit."

[38] On the basis of the above principles, I evaluate the submissions of the parties and the pleadings.

Evaluation and findings

[39] The founding affidavit of Mr Fokazi was not a model of clarity. It contains several passages in which reliance was placed on an alleged infringement of his rights to just and fair administrative action, but on a reading of the founding affidavit, it must be accepted that he relies on PAJA. Mr *Gagela* submitted that in terms of section 21 of the Act, Mr Fokazi had no duty to exhaust internal remedies for the reason that there is no appellate body against the decision of the House. I agree. This question was settled in *Tshivhulana Royal Family v Netshivhulana:*[10]

> "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."

[40] *.* Brooks J, in *Ranuga and Another v The Chairperson of the House of Traditional Leaders, Eastern Cape Province and Others*[11] held–

> "The proper interpretation of Section 21 of the Act set out in the preceding paragraph also demonstrates the lack of merit in the legal point relied upon by the first to the fourth respondents in their opposition to the application for review. No basis exists upon which the recommendation, resolutions and decision purportedly taken by the second respondent requires the further attention of the fourth respondent "making a decision" based thereon before the applicants can institute review proceedings. Even the content of the impugned decision demonstrates that the second respondent believed that what it purported to recommend, or resolve or decide, constituted a decision that could be reviewed in this court."

[10] Above n 3 para 32.

[11] *Mnoneleli Ranuga and Another v The Chairperson of the House of Traditional Leaders, Eastern Cape Province and Others* [2021] ZAECMHC 45 para 57.

[41] On the above basis and for the reasons set out by the authorities, I reject the submissions relating to the exhaustion of internal remedies. Mr Fokazi was entitled to approach the Court for review.

[42] Mr *Gagela* submitted that Mr Fokazi was not afforded a hearing because he was not given certain documents that were in possession of the chairperson of the *ad hoc* committee. In this regard, he relied on the judgment of *Matiwane v The President of the Republic of South Africa and Others*.[12] This submission cannot stand since this case is distinguishable from the *Matiwane* judgment. In the *Matiwane* judgment, the commission conducted three public hearings. The applicant, in that case, had submitted documents which supported his claim for kingship. There was also a submission by Professor Pieres. The commission drafted questions based on some sources of history and furnished them to the applicant for answers. The commission did not furnish the applicant with the source documents for those questions. The commission made an adverse finding against the applicant based on the sources that were not furnished to the applicant. In the final analysis, Griffiths J found that the commission was specifically invited by the applicant to provide the sources of the questions or information, which invitation the commission refused with the statement that its failure to disclose the source of such information is irrelevant for review purposes and Griffiths J concluded–

> "In my view this was wholly insufficient to satisfy the requirement that the applicant be given a reasonable opportunity to make representations. On a reading of the transcript it is clear that a few specific questions were levelled with regard to the question of the AmaMpondomise kingship and that such questions clearly did not convey the import of the "collection" of adverse information which the Commission alleges it had gathered. The applicant ought to have been provided with all the information which the Commission had independently gathered, particularly that which was adverse to his quest for a declaration that a kingship existed, in order that he might have been placed in a position to meaningfully deal therewith. This is particularly so in that the contextualization of such information given the nature of the matter could well have provided a completely different meaning or slant thereto. This had the potential to affect Commission's deliberations had it been availed of such submissions, but it was not."[13]

[12] Above n 2.
[13] Above n 2 para 40.

[43] In this case, the only complaint by Mr Fokazi is that he was not given documents of Mr Bulelani Mtshazi, although the chairperson was in possession of those documents. Mr Fokazi does not state how the documents adversely affected him and in what respect he was entitled to the documents. Senior Traditional Leader Ngcongolo, a member of the *ad hoc* committee, had stated in the answering affidavit that they had no documents and that their process was to find facts from both Mr Fokazi and Mr Bulelani Mtshazi and thereafter to do their own analysis. It has further been revealed that the only document that Mr Bulelani Mtshazi submitted was part of lodging his claim. Mr Bulelani Mtshazi gave oral evidence in the presence of Mr Fokazi.

[44] In the founding affidavit, Mr Fokazi has not alleged that he asked for documents from the *ad hoc* committee, which request was declined by the committee. In this regard, I do find that the submission by Mr *Gagela* relating to availing of documents which were never asked for lacks merit and stands to be rejected.

[45] It is well to remember what was said in *Heatherdale Farms (Pty) Ltd v Deputy Minister of Agriculture and Another*[14] where Colman J said–

> "It is clear on the authorities that a person who is entitled to the benefit of the *audi alteram partem* rule need not be afforded all the facilities which are allowed to a litigant in a judicial trial. He need not be given an oral hearing, or allowed representation by an attorney or counsel; he need not be given an opportunity to cross-examine; and he is not entitled to discovery of documents. But on the other hand (and for this no authority is needed) a mere pretence of giving the person concerned a hearing would clearly not be a compliance with the Rule. For (Nor) in my view will it suffice if he is given such a right to make representations as in the circumstances does not constitute a fair and adequate opportunity of meeting the case against him. What would follow from the lastmentioned proposition is, firstly, that the person concerned must be given a reasonable time in which to assemble the relevant information and to prepare and put forward his representations; secondly he must be put in possession of such information as will render his right to make representations a real, and not an illusory one.
>
> As to the provision of information to the person who is to be heard there is authority. In *Minister of the Interior v Bechler and Others*; *Beier v Minister of the Interior and Others* 1948

[14] *Heatherdale Farms (Pty) Ltd v Deputy Minister of Agriculture and Another* 1980 (3) SA 476 (T) 486D-487C. See also *Matiwane* above n 2 para 34.

(3) SA 409 (A) it was indicated at 451 that what should be disclosed to the person concerned is "the substance of the prejudicial allegations against him". But what is meant by that "substance" appears from other decisions. In *Sachs v Minister of Justice* 1934 AD 11 STRATFORD JA at 38 approved the approach adopted by TINDALL J (as he then was) in the Court below. And what TINDALL J had said was that the person concerned should have "a fair opportunity of submitting any statements in his favour and of controverting any prejudicial allegations made against him". And in the later Appellate Division case of *R v Ngwevela* (supra) CENTLIVRES CJ again approved that formulation.

A special application of the general principle, invoked in *Lukral Investments (Pty) Ltd v Rent Control Board, Pretoria, and Others* 1969 (1) SA 496 (T), arises in relation to a fact which is equivocal, in the sense that it tends to support a certain inference, but may not do so if it is put in its proper setting. It was held that there cannot be a fair hearing unless the person against whom such a fact is to be used has been given an opportunity to place the equivocal fact in its setting and thus show that no inference should be made from it which is adverse to his interests.

I do not know of any authority which discusses the application of the *audi alteram partem* rule to a situation where the case against a person whose interests are in jeopardy rests wholly or partly upon the opinion of an expert. It seems to me, however, to flow necessarily from the relevant principles that the person concerned:

(a) should be made aware, not merely of the expert's conclusion, but also of his reasoning and of the relevant facts accepted or assumed by him; and

(b) should have an opportunity of refuting or correcting the relevant facts, of putting forward other relevant facts, and of adducing contrary expert opinion."

[46] In this case, the *ad hoc* committee has not alleged anywhere in the answering affidavit that it has independently established information that is adverse to Mr Fokazi. The *ad hoc* committee simply analysed the facts presented by the parties and made its own recommendations. I do find that Mr Fokazi was afforded a hearing and that there was compliance with the *audi* rule. I therefore reject the submissions relating to violation of the *audi* rule. I may well add that the *ad hoc* committee has not suggested that it had relied on any documentary evidence in arriving at its decision.

[47] Another contention on behalf of Mr Fokazi was that the *ad hoc* committee had failed to appreciate the scope of its mandate, and that constituted a gross irregularity. This ground of review was not raised in the founding affidavit. Mr Fokazi had merely contended himself with the allegation that he was not given documents, and that was non-compliance with the principles of the *audi* rule. This contention,

too, stands to be rejected for the simple reason that no case was made in this regard. I must also add that Mr Fokazi has failed to identify the statutory provision upon which the legal conclusion is drawn. The *ad hoc* committee was instructed by the House to do investigations and report to the House with non-binding resolutions. Only the House would, in terms of the ECTLGF, make binding recommendations to the MEC. The submission has no merit. As held in *Director of Hospital Services v Mistry*:

> '[A]n applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny.
>
> Since it is clear that the applicant stands or falls by his petition and the facts therein alleged, "it is not permissible to make out new grounds for the application in the replying affidavit".'[15]

[48] Mr Fokazi's review is further defective and stands to fail for many reasons. In the notice of motion, he attacks the decision of the executive committee of the House. Mr Fokazi failed to present facts on why the decision of the executive committee of the House was unlawful. He merely contended himself by attacking the conduct of an *ad hoc* committee that does not even pass binding recommendations to the House. An *ad hoc* committee is merely tasked to gather information and present it to the House, of which the House must deliberate, apply its mind and rationally take a decision. There are no allegations that the executive committee or the House did not apply its mind to the report of the *ad hoc* committee. The decision of the executive committee is simply not assailed on any recognisable ground under PAJA. In my view, Mr Fokazi has simply made no case for the review of the executive committee decision of 17 November 2020. The application should fail on that ground too.

[49] Another disturbing feature of Mr Fokazi's case is that he seeks relief that the appointment of Mr Bulelani Mtshazi as a rightful headman of the Mndundu Administrative Area be declared unlawful and set aside. There are no facts set out regarding this relief, and it is simply not pursued in the founding affidavit and was not pursued during oral submissions. There is no allegation that Mr Mtshazi was

[15] Above n 9 at 636A.

appointed as a headman, by whom, when was such appointment made. There is simply a paucity of information in this regard. The relief is sought with no foundation of facts. Again, the review is defective.

[50] Mr Fokazi has also asked that he be declared as the only person entitled to be appointed as a headman in accordance with the customary practices of the area and to be reinstated as a headman. He has placed no evidence why he should be declared as the only person entitled to be appointed as a headman. There is no evidence that he was removed from his position as a headman and, therefore, that he should be reinstated. Again, this relief is sought with no factual basis. The question to be asked would be when Mr Fokazi's election was. For how long was he elected, and what are the material conditions that must be met in order for the elections to be carried out? Absent all that information, the relief sought by Mr Fokazi cannot be granted.

[51] I must further remark that a bundle of records filed in terms of Uniform Rule 53 was placed in the court file. There was no reference to any portion of those records upon which Mr Fokazi relies. The bundle of records was merely placed in the court file. This Court had difficulty in understanding the import of the record in circumstances where there is no reference to the portions upon which Mr Fokazi relies. Cloete JA had once warned–

> 'It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest – the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts.'[16]

Findings

[52] For all the reasons stated above, Mr Fokazi was afforded a hearing by the *ad hoc* committee, and he participated in the enquiry. On the facts presented, I cannot fault the findings of the executive committee and the House. The application stands to be declined. There is a further reason why the application should be refused. The impugned report of the *ad hoc* committee was not placed before Court. The Court

[16] *Minister of Land Affairs and Agriculture v D & F Wevell Trust* above n 1.

was unable to assess the report itself for the reason that it was not placed before Court.

[53] Mr *Luzipo* correctly relied on the authority of *SACCAWU and Others v President of the Industrial Tribunal and Another*[17] in which Melunsky AJ held–

> "An applicant who does not furnish the record to the Court runs the risk of not discharging the onus, especially where the allegations upon which it relies are put in issue.
>
> . . .
>
> Without the recourse to the records of proceedings the disputes cannot be resolved on the affidavits. The result is that the appellants' generalised allegations of bias have not been established."

Conclusion

[54] Mr Fokazi has failed to make out a case, and his application stands to fail. The costs should follow the results. There is no reason to depart from the general rule, and I will award the costs of the MEC, the House and Mr Bulelani Mtshazi.

Order

[54] In the result, the following order is made–

(1) The application is dismissed;

(2) The applicant shall pay the costs of the application.

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M NOTYESI

ACTING JUDGE OF THE HIGH COURT, EASTERN CAPE DIVISION MTHATHA

Appearances

Counsel for the Applicant : *Adv F Gagela*

[17] *SACCAWU and Others v President of the Industrial Tribunal and Another* above n 4.

Attorneys for the Applicant	:	*B Makade Incorporated* Mthatha
Counsel for the Respondents	:	*Adv S M Luzipo*
Attorneys for the Respondents	:	*Office of the State Attorney* Mthatha