

SOUTH AFRICA / JUDGMENT

Premier of the Eastern Cape and Others v Hebe and Others (14/2014) [2017] ZAECBHC 14; [2018] 1 All SA 194 (ECB) (28 September 2017) [2017] ZAECBHC 14

COURT

Eastern Cape High Court, Bhisho

BEFORE

D Van Zyl, I.T. Stretch, P. T. Mageza

CASE / FILE NUMBER

14/2014

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IN THE HIGH COURT OF
SOUTH AFRICA
(EASTERN CAPE LOCAL
DIVISION, BHISHO)
CASE NO. 14/2014
REPOTABLE: YES/NO
In

the matter between:

THE
PREMIER OF THE EASTERN CAPE
First
Appellant
THE
MEMBER OF THE EXECUTIVE COUNCIL
FOR
LOCAL GOVERNMENT & TRADITIONAL
AFFAIRS,
EASTERN CAPE
Second
Appellant
THE
SUPERINTENDANT GENERAL FOR
LOCAL
GOVERNMENT & TRADITIONAL
AFFAIRS,
EASTERN CAPE
Third
Appellant
THE

COMMISSION ON TRADITIONAL
LEADERSHIP
DISPUTES AND CLAIMS,
EASTERN
CAPE
Fourth
Appellant
and
CHIEF
VIWE SIMON HEBE
First
Respondent
SABELO
PRINCE KATSI
Second
Respondent
THE
CHAIRMAN OF THE EASTERN CAPE
HOUSE
OF TRADITIONAL LEADERS
Third
Respondent
FULL COURT APPEAL

JUDGMENT

D VAN ZYL DJP:

Introduction

[1] The dispute raised in this appeal concerns the senior traditional leadership (“the chieftaincy”) of a traditional community to which the parties interchangeably referred to as the abaThembu Traditional Community or the Zweledinga

Traditional Community. The community, its boundaries, and what is presently referred to as a Traditional Council, were established

by means of a proclamation, and the late Simon Mthobeni Hebe (“Hebe Senior”) was appointed as the Chief (“iNkosi”) of the Community. He was succeeded by his son who is the first respondent, Chief Viwe Simon Hebe (“Chief Hebe”). Chief Hebe was recognised and appointed to the position with effect from 1 July 2007 when the second appellant, as the Member of the Executive Council of the Department for Local Government and Traditional Affairs (“the MEC”), issued a certificate to that effect in terms of section 18 of the Eastern Cape Traditional Leadership and Governance Act[1] (“the Provincial Act”).

- [2] A provincial committee (“the Committee”) of the fourth respondent, being the Commission on Traditional Leadership Disputes and Claims (“the Commission”) subsequently investigated a claim by the second respondent, Sabelo Prince Katsi (“Mr Katsi”), that he, and not Chief Hebe, should rightfully have been appointed as the chief of the area concerned. The Committee’s

recommendation to the first appellant as the Premier of the Eastern Cape Province (“the Premier”), was that the claim of Mr Katsi should be upheld (referred to as “the recommendation”). The Premier decided to accept the recommendation by issuing a written pronouncement to that effect (referred to as “the decision”).

- [3] The third appellant as Superintendent-General of the Provincial Department of Local Government and Traditional Affairs (“the Superintendent-General”) thereafter advised Chief Hebe that the Premier had decided to declare Mr Katsi as the rightful incumbent of the chieftaincy, and this consequently rendered as wrongful his recognition and appointment to the position. The Superintendent-General further informed Chief Hebe that as the functionary delegated to implement the Premier’s decision in compliance with the Provincial Act, he was inviting him to make written representations as to why the ‘annulment’ of his appointment should not be given effect to, and his salary terminated.
- [4] Chief Hebe made representations before the cut-off date as he was requested to do. However, shortly after having done so, he decided to institute legal proceedings in the Eastern Cape Local Division, Bhisho. The relief he sought in his application to the Court was two-fold. In part A of the notice of motion he asked the Court to interdict the Premier, the MEC, and the Superintendent-General from implementing the decision of the Premier pending a determination of the relief claimed in the second part of his application. In part B the Court was asked to review and set aside the recommendation of the Commission and the decision of the Premier to uphold the claim of Mr Katsi to the disputed chieftaincy.
- [5] The interim interdict was granted and the review proceedings subsequently served before Bacela AJ (“the Court below”). She made the interim order final and proceeded to set both the recommendation of the Commission and the decision of the Premier to accept and implement it aside. She remitted the matter to the Commission and ordered the Premier and the Commission to pay the costs of application.
- [6] The order is appealed against, with the leave of the Court below, by the Premier, the MEC, the Superintendent-General and the Commission.

The findings of the Court below

- [7] Chief Hebe sought the following relief in the review proceedings in Part B of his notice of motion:

‘1. Reviewing and setting aside the decision of the First Respondent, conveyed through the Fourth Respondent by letter dated 12 November 2013 (annexure “SSH 4”), to remove the Applicant as the Senior Traditional Leader of abaThembu of Zweledinga Traditional Council in Whittlesea and terminate his appointment and remuneration in terms of Section 20(1) and 20(3) of the Eastern Cape Provincial Framework Act, 2005;

2. Reviewing and setting aside the decision of the First Respondent, of 10th October 2013 to uphold the claim of Fifth Respondent (Sabela Prince Katsi) for the senior traditional leadership of abaThembu of Zweledinga Traditional Council in Whittlesea;
3. Reviewing and setting aside the recommendation of the Fourth Respondent to the First Respondent made in its report of 11th April 2013, that the claim of Fifth Respondent (Sabelo Katsi) for his recognition as the senior traditional leader of abaThembu of Zweledinga Traditional Council, Whittlesea should be upheld.’

[8] The Court below made three findings. The first finding dealt with the lawfulness of the implementation of the decision of the Premier to accept the recommendation of the Committee. It found that the correspondence addressed to Chief Hebe by both the Premier and the MEC showed that the Premier had appointed Mr Katsi to the disputed position without first removing Chief Hebe from that position. As the recognition and appointment of Chief Hebe as iNkosi remained valid until it was set aside, it effectively meant that two persons were appointed to the same position. This was held to be in conflict with the finding in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*[2], that until administrative action is set aside by a Court in proceedings for judicial review, it exists in fact and has legal consequences:

‘The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or

ignored depending upon the view the subject takes on the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.’ [3]

The failure to first remove Chief Hebe from his position was accordingly found to have rendered the appointment of Mr Katsi unlawful, and it was set aside.

[9] In the hearing before the Court below the legality of the Committee’s recommendation and the Premier’s decision to accept it was disputed on various grounds. The second finding dealt with one of the grounds and was concerned with the manner in which the Committee arrived at its recommendation. Being proceedings for judicial review, the Court was not concerned with the correctness of the recommendation and the decision, but rather with the legality of the process in terms of which it was arrived at. It found that the recommendation, and with that the decision of the Premier to accept the recommendation, must be reviewed and set aside by reason of the Committee’s failure to consider evidence

which was relevant to the exercise of its mandate as envisaged in section 6(2)(e)(iii) of PAJA[4], and that it had consequently failed to properly discharge its functions.

[10] The third finding was that the decision of the Premier to accept the recommendation of the Committee was rendered invalid by reason of her failure to comply with the provisions of section 140 of the Constitution. Relevant to the case put forward in this regard are sub-sections (1) and (2) which read as follows:

‘(1) A decision by the Premier of a province must be in writing if it –

- (a) is taken in terms of legislation; or
- (b) has legal consequences.

(2) A written decision by the Premier must be countersigned by another Executive Council member if that decision concerns a function assigned to that other member.’

[11] The Court found that the decision of the Premier was concerned with a function assigned to the MEC as envisaged in sub-section (2), and that the provisions of sub-section (2) are mandatory. Accordingly, the failure of the MEC to countersign the decision of the Premier constituted a reviewable irregularity as envisaged in section 6(2)(b) of PAJA.[5]

[12] Based on these findings the Court granted the relief claimed in Part B of the notice of motion. At the hearing of the appeal argument was presented in respect of each finding. I intend to deal with the first and second findings of the Court only.

The recommendation of the Committee and the decision of the Premier

13] In the introduction to its written recommendation to the Premier, the Committee acknowledged the statutory nature of its existence, powers and functions. Its mandate was to investigate a claim by Mr Katsi to ‘the Senior Traditional Leadership of the AbaThembu Traditional council in Whittlesea, against incumbent Simon Siviwe Hebe son of late Simon Mthobeni Hebe.’

The Committee identified this as a claim to ‘a traditional leadership position where the title or right of the incumbent is contested’ as envisaged in section 25(2)(a)(iii)

of the Traditional Leadership and Governance Framework Act (the Framework Act)[6].

[14] The recommendation of the Committee was that ‘the claim of Sabelo Prince Katsi for the senior traditional leadership as abaThembu Traditional Council in Whittlesea be upheld.’

The recommendation was essentially made on the basis of the following factual findings:

- (a) The area of Zweledinga was historically occupied by a certain Bawana Tshatshu.
- (b) His descendants, recognised as one of the tribes of the abaThembu people, were presented with the opportunity to return to their ancestral land when the area known as Transkei was given independence in 1976.

- (c) At that time the amaTshathu tribe had already for some time been campaigning for its recognition 'as a traditional community in the now disputed area, and strategizing on the chieftainship thereof.'
- (c) Its aspirations for the creation of a chieftaincy for the amaTshatshu in the area concerned had the approval of the Paramount Chief of Emigrant Tembuland and other traditional leaders.
- (d) Following upon their return to the area after the independence of the Transkei, the father of Mr Katsi, Rueben Nyabonyathi Katsi, was recognised by the Ciskei authorities as a chief. He however died in 1980 before he could be instated as such. Katsi senior was a member of the Right Hand House of Sobantu, the head of the amaTshatshu Great House.
- (e) In 1981 the father of Chief Hebe was appointed and instated as the Chief of the area. At that time Mr Katsi was still young and attending school.
- (f) The chieftaincy of Hebe senior was strongly contested by the amaTshatshu and a number of challenges to his position were launched over the years without any real success.
- (g) This left the amaTshatshu without a chieftaincy. They however continued to campaign for the return of the chieftainship to them.
- (h) In accordance with customary law and practices of succession, the guiding principle is always primogeniture in the male line. Mr Katsi is the eldest son of Katsi senior. He is accordingly the successor in line to the chieftaincy of the amaTshatshu.
- (i) The tribe to which Chief Hebe belongs has historically no connection to the area of Whittlesea and only arrived in the area at the time of the independence of the Transkei.
- (j) The appointment of Chief Hebe's father was as a result of political influence and manoeuvring.

[15] Based on these findings, the Committee reached the following conclusions:

'9.1 There is historical evidence that the land now known as Zweledinga previously belonged to Bawana, a Tshatshu and a forebear of Katsi. In addition the historical events as explained above show that Reuben Katsi was appropriately identified and appointed as the chief of Zweledinga.

9.2 On the other hand Hebe's chieftainship surfaces in 1981 after the death of Katsi.

9.3 Hebe before the chieftainship was a businessman and a Member of Parliament in the then Ciskeian government.'

[16] The Premier made her decision in writing. The decision is said to have been made pursuant to the investigation and recommendation of the Committee, and to have been based on the following grounds:

- '1. There is uncontested historic evidence that the land, now known as Zweledinga, where abaThembu Traditional Council is based, previously belonged to Bawana, a Tshatshu and forebear of Katsi.
2. In addition, historic events show that Reuben Katsi, father to the claimant, was appropriately identified and appointed as the chief of Zweledinga when abaThembu moved back there from Glen Grey.
3. On the other hand, Hebe's chieftainship only surfaces in 1981 after the death of Katsi and, conveniently and curiously, after L L Sebe marries from the Hebe family.
4. Before the chieftainship, Hebe was a businessman and a member of Parliament in the then Ciskei Government with no known traditional leadership lineage.
5. As a matter of fact, as of the Mngxongo clan, Hebe could not be a traditional leader of abaThembu or any of the Thembu tribes such as AmaTshatshu.'

Interpretative approach

[17] As the issues raised in the appeal require an application of statutory provisions, it is necessary to establish the correct approach to their interpretation. In *Cool Ideas v Hubbard*[7] the Constitutional Court summarised the principles of statutory interpretation as follows:

'[28] A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

- (a) That statutory provisions should always be interpreted purposively;
- (b) The relevant statutory provision must be properly contextualised; and
- (c) All statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)'[8]

[18] An aspect that requires attention in the context of the issues raised in this matter, is what appears to be a conflict between section 26 of the Framework Act and section 33 of the Provincial Act. Section 146 of the Constitution deals with conflicts between national legislation and provincial legislation in the functional areas listed in schedule 4 of the Constitution. The Constitution allocates legislative powers between central and provincial governments on the basis of the subject matter of the legislation.[9] The subjects are listed in schedule 4. Subject to section 211 and 212 of the Constitution, traditional leadership, indigenous law and customary law all fall under section 4. This means that national and provincial governments have concurrent legislative authority over traditional

leaders.

[19] Section 146 of the Constitution finds application if a conflict is found to exist between national legislation and provincial legislation. The relevant portion is sub-section 2(b). It provides that national framework regulation prevails over provincial legislation when:

‘The national legislation deals with a matter that, to be dealt with effectively requires uniformity across the nation, and the national

legislation provides that uniformity by establishing –

- (i) norms and standards;
- (ii) frameworks; or
- (iii) national policies.’

[20] The fact that the national legislation is framework legislation does however not mean that it must automatically take precedence over provincial legislation. In the second certification judgment[10] the Constitutional Court indicated that the requirement in section 146(2)(b) that a framework ‘deals with a matter that, to be dealt with effectively, requires uniformity across the nation’ places a significant limitation on the range of frameworks which may override provincial legislation.[11]

[21] Two other sections of the Constitution that are relevant in this context are sections 148 and 150. Section 148 provides that if a dispute concerning a conflict cannot be resolved by a court, the national legislation shall take precedence over the provincial legislation. Section 150 deals with the question of interpretation where there is a conflict. It provides that, when considering an apparent conflict between national and provincial legislation, a court must prefer any reasonable interpretation of the legislation that will avoid the conflict. The section is clearly aimed at the avoidance of conflict where it is possible, by preferring an interpretation that will have that result.

The legislative framework

[22] The institution, status and role of traditional leadership according to customary law are recognised, subject to the Constitution. Sections 211 and 212 of the Constitution deal with the recognition of traditional leaders and the enactment of national and provincial legislation to deal with the role of traditional leadership and matters related thereto. The two sections read as follows:

‘211 Recognition

- (1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.

- (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.
- (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

212 Role of traditional leaders

- (1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.
- (2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law –
 - (a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and
 - (b) national legislation may establish a council of traditional leaders.’

[23] The legislative framework envisaged in section 212(1) of the Constitution is provided by the Framework Act. It was extensively amended with effect from 25 January 2010 by the Traditional Leadership and Governance Framework Amendment Act.[12] The position prior to the amendment was extensively dealt with in the decision in *Sigcau v President of the Republic of South Africa*. [13] It is the Framework Act in its amended form that finds application to the recommendation of the Committee and the decision of the Premier.

[24] The Framework Act recognises four leadership positions, namely kingship or queenship, principal traditional leader, senior traditional leader, and headmanship.[14] It further provides for the recognition of traditional and principal traditional communities,[15] the establishment and recognition of traditional, principal traditional and kingship or queenship councils and sub-councils,[16] the functions of the respective councils,[17] and the withdrawal of the recognition of traditional and principal traditional communities.[18] In terms of section 2(1) the prerequisites for the establishment of a traditional community are twofold: it is subject to a system of traditional leadership in terms of the community’s customs, and it observes a system of customary law.

[25] The recognition of a traditional community is effected by the Premier of the Province concerned by means of the publication of a notice in the Provincial Gazette, and must be in line with provincial legislation after consultation with the relevant role players, such as the community concerned, and the king or queen whose authority the community would be subject to. For this purpose provincial legislation must be enacted.[19]

[26] The appointment of a senior traditional leader is regulated by section 11 of the Framework Act. It places the duty on the royal family to identify a person who qualifies in terms of customary law to assume the position concerned, and to inform the Premier of the particulars of the person so identified.[20] In terms of section 11(1)(b) the Premier is obliged

(‘must’) to recognise the person so identified and to effect the appointment by notice in a provincial gazette, by issuing a certificate of recognition, and by informing the relevant house of traditional leaders of the recognition. The only qualification placed on the duty of the Premier to recognise the person identified, is when there is evidence that the identification was not done in accordance with customary law, in which event the Premier may either refer the matter to the house of traditional leaders, or refuse to issue the certificate and refer the matter back to the royal family for consideration.[21]

[27] The removal of a senior traditional leader is governed by section 12 of the Framework Act. The removal takes place on specified grounds, and on the decision of, and at the request of the royal family. It reads:

‘(1) A senior traditional leader, headman or headwoman 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 senior traditional leader, headman or headwoman to function as such;
 - (c) wrongful appointment or recognition; or
 - (d) a transgression of a customary rule or principle that warrants removal.
- (2) Whenever any of the grounds referred to in subsection (1)(a), (b) and
- (d) come to the attention of the royal family and the royal family decides to remove a senior traditional leader, headman or headwoman, the royal family concerned must, within a reasonable time and through the relevant customary structure –
- (a) inform the Premier of the province concerned of the particulars of the senior traditional leader, headman or headwoman to be removed from office; and
 - (b) furnish reasons for such removal.
- (3) Where it has been decided to remove a senior traditional leader, headman or headwoman in terms of subsection (2), the Premier of the province concerned must, in terms of applicable provincial legislation –
- (a) withdraw the certificate of recognition with effect from the date of removal;
 - (b) publish a notice with particulars of the removed senior traditional leader, headman or headwoman in the Provincial Gazette; and
 - (c) inform the royal family concerned, the removed senior traditional leader, headman or headwoman, and the provincial house of traditional leaders concerned, of such removal.

- (4) Where a senior traditional leader, headman or headwoman is removed from office, a successor in line with customs may assume the position, role and responsibilities, subject to section 11’.
- [28] The establishment and recognition of traditional councils are dealt with in section 3. Section 3(1) provides that once the Premier has recognised a traditional community, that traditional community must establish a traditional council in line with principles set out in provincial legislation. The members of a traditional council are comprised of the leaders and members of a particular traditional community as selected by the senior traditional leader, who is ex officio a member and chairperson of the traditional council, and other members who are to be democratically elected, and must constitute 40 per cent of the members of the traditional council.[22]
- [29] Of particular importance to the present proceedings are the transitional arrangements which are found in section 28(1), (3) and
- (4) of the Framework Act,[23] and in the provisions of the legislation which preceded this Act. Sub-section (1) provides that any traditional leader who was appointed as such in terms of applicable provincial legislation, and who was still recognised as a traditional leader immediately before the commencement of the Act, is deemed to be recognised as such in terms of sections 8 and 11. Sub-section (3) in turn provides for the continued existence of what is referred to as a ‘tribe’ that had been established before the commencement of the Framework Act. It is deemed to be a tribal community in terms of section (2). In terms of sub-section
- (4) any tribal authority that had been established and was still recognised as such before the commencement of the Framework Act shall continue to exist, and is deemed to be a traditional council as contemplated in section 3.
- [30] The effect of section 28 is to ensure the continued existence of traditional leadership institutions that existed in terms of legislation that preceded the Constitution and the Framework Act. Of importance for present purposes is that the continued recognition of a traditional leader and a traditional community is made subject to a decision of the commission as contemplated in terms of section 26.[24]
- [31] The commission referred to in sub-sections (1) and (3) of section 28 is the Commission on Traditional Leadership Disputes and Claims. The Commission is established by section 22. Its functions are contained in section 25. These sections form part of chapter 6 of the Framework Act aimed at “Dispute and Claim Resolution and Commission on Traditional Leadership Disputes and Claims.” The Commission operates nationally in plenary and provincially in committees. It has authority to investigate and make recommendations on any traditional leadership dispute as contemplated in section 25(2)(a). The sub-section gives it the authority to investigate and make recommendations on the following matters:

‘(i) a case where there is doubt as to whether a kingship or, principal traditional leadership, senior traditional leadership or headmanship was established in accordance with customary law and customs;

(ii) a case where there is doubt as to whether a principal traditional leadership, senior traditional leadership or headmanship was established in accordance with customary law and customs;

(iii) a traditional leadership position where the title or right of the incumbent is contested;

(iv) claims by communities to be recognised as kingships, queenships, principal traditional communities, traditional communities, or headmanships;

(v) the legitimacy of the establishment or disestablishment of ‘tribes’

or headmanships;

(vi) disputes resulting from the determination of traditional authority boundaries as a result of merging or division of ‘tribes’;

(vii) . . .

[Sub-para. (vii) omitted by s.20 of Act 23 of 2009.]

(viii) all traditional leadership claims and disputes dating from 1 September 1927 to the coming into operation of provincial legislation dealing with traditional leadership and governance matters; and

(ix) gender-related disputes relating to traditional leadership positions arising after 27 April 1994.’

[32] Chapter 6 of the Framework Act serves to recognise the existence of disputes in relation to traditional institutions emanating from the manipulation of traditional systems by colonial and apartheid governments and the political entities created by it.[25] Before the amendment of the Framework Act in 2009, the Commission was authorised to also investigate of its own accord disputes and claims concerning traditional leadership.[26] That is as longer the position. It now derives its authority to investigate and recommend from the lodgement of a dispute or a claim. In terms of sub-section (2)(b):

‘a dispute or claim may be lodged by any person and must be accompanied by information setting out the nature of the dispute or claims and any other relevant information.’

[33] The Act compels the Commission to carry out its functions in a fair, objective and impartial manner.[27] The Commission is tasked, when considering a dispute or claim, to ‘consider and apply customary law and customs of the relevant traditional community as they applied when the events occurred that gave rise to the dispute or claim.’(underlining added)[28] The Commission is further instructed (‘must’), in the case of a claim or dispute ‘in respect of a principal traditional leadership, senior traditional leadership or headmanship, be guided by the customary law and customs and criteria relevant to the establishment of a principal traditional leadership, senior traditional leadership or headmanship, as the case may be.’[29]

[34] In terms of section 26 a dispute or a claim lodged with the Commission is determined by it by making a recommendation to the President, or where the recommendation does not relate to the recognition or removal of a king or queen, to the relevant provincial government and the functionary to which the recommendation applies in accordance with applicable provincial legislation.[30] Subsections (2) to (4) of section 26 are relevant for present purposes:

“(2) A recommendation of the Commission must, within two weeks of the recommendation having been made, be conveyed to –

- (a) the President and the Minister where the position of a king or queen is affected by such a recommendation; and
 - (b) the relevant provincial government and any other relevant functionary to which the recommendation of the Commission applies in accordance with applicable provincial legislation in so far as the consideration of the recommendation does not relate to the recognition or removal of a king or queen in terms of section 9, 9A or 10.
- (4) The President or the other relevant functionary to whom the recommendations have been conveyed in terms of subsection (2) must, within a period of 60 days make a decision on the recommendation.
- (5) If the President or the relevant functionary takes a decision that differs with [sic] the recommendation conveyed in terms of subsection (2), the President or the relevant functionary as the case may be must provide written reasons for such decision.”

Subsection (3) clearly places an obligation (“must”) on the President or the relevant functionary to make a decision on the recommendation. The decision is discretionary in the sense that it may differ from the recommendation of the Commission, in which event the President or the relevant functionary is obligated to give reasons for departing from the recommendation.

[35] Provincial committees are established in terms of section 26A of the Framework Act. Their function is to deal with disputes and claims relating to traditional leadership. The provisions of section 25(2) to (5) and (7) apply with the necessary changes, to provincial committees.

[31] A committee may consequently only act upon the lodgement of a dispute or a claim, and its authority to investigate and recommend is limited to those matters specified in section 25(2)(a) of the Framework Act. It makes its recommendation to the provincial government and the relevant functionary as determined by the applicable provincial legislation.[32]

[36] The functionary who has in terms of the Provincial Act been assigned the function of making a decision on the recommendation of the Commission or a committee, is the Premier. In terms of section 33 of that Act the Premier is obliged to ‘within 30 days of the receipt of the decision of the Commission, inform the Provincial House of Traditional Leaders and the relevant Local Houses of Traditional Leaders of the decision,’[33] and to ‘implement’ the decision within a reasonable period.[34]

- [37] Section 33 of the Provincial Act appears to be in conflict with section 26 of the Framework Act.[35] Firstly, in terms of the latter section the Commission or a committee does not make a decision. Its function is limited to the making of a recommendation.[36] Secondly, the relevant functionary is not obliged to implement the recommendation, and is authorised to make a decision that differs from the recommendation.[37] The conflict was created by the amendment to the Framework Act by the Leadership and Governance Amendment Act in terms of which the decision making authority of the Commission was transferred from the Commission to the President or the relevant provincial functionary.
- [38] The apparent conflict between the two sections is capable of resolution as envisaged in section 150 of the Constitution, and does not in any way impact on the issues raised in this matter. In her decision on the recommendation of the Committee the Premier explicitly stated that she had acted pursuant to the provisions of sections 25 and 26 of the Framework Act. That she correctly did so is clear from an interpretation of the provisions of the Framework Act. The Commission and its provincial committees are established, and it exercises its powers and functions in terms of chapter 6 of the Framework Act.[38] In sections 25 and 26A the Commission and its provincial committees have authority to investigate and make recommendations in respect of the matters listed in section 25(2). This authority lies exclusively with the Commission and its committees. The reason for this is found in section 25(9) of the Framework Act. It reads:
- ‘Provincial legislation must provide for a mechanism to deal with disputes and claims related to traditional leadership: Provided that such a mechanism must not deal with matters to be dealt with by the Commission.’
- [39] The Provincial Act does not provide for a mechanism to deal with disputes and claims relating to traditional leadership as envisaged in section 25(2) of the Framework Act, and the Committee did not purport to act otherwise than in terms of chapter 6 of the Framework Act. As stated,[39] in its written recommendation to the Premier it proclaimed itself as a committee established in terms of section 26A of the Framework Act, and to have exercised its mandate in terms of section 25(2)(a)(iii) of that Act. The Committee could accordingly only have derived its authority and exercised its mandate in terms of the Framework Act. As a committee of the Commission, it makes a recommendation to the Premier in terms of section 26(2)(b) of the Framework Act.[40] It is this section that places an obligation on the Premier to make a decision on the recommendation of the Committee. The Premier accordingly could only have made her decision in terms of section 26 of the Framework Act. Section 33 of the Provincial Act does not find application. The only purpose section 33 fulfils in the context of a recommendation in terms of Chapter 6 of the Framework Act, is to identify the ‘relevant functionary to which the recommendation of the Commission applies’ as mandated by section 26(2) of the Framework Act.
- [40] The Provincial Act provides for the recognition of traditional communities and the establishment and recognition of traditional councils by the Premier as envisaged in section 2 and 3 of the Framework Act.[41] The boundaries of traditional councils are to remain the

same as they existed before the coming into operation of the Act.[42] The Premier is given the authority to change the boundaries of any traditional council in accordance with prescribed procedures.[43] The procedure for the appointment and recognition of a senior traditional leader (a chief is referred to as iNkosi and a headman as iNkosana) is dealt with in section 18 of the Act.[44] It mirrors section 11 of the Framework Act.[45]

[41] The removal of a person from the position of senior traditional leader is dealt with in section 20 of the Provincial Act. Save for sub-sections (2) and (3), it corresponds with section 12 of the Framework Act. Sub-sections

(2) and (3) read as follows:

‘(2) Whenever any of the grounds referred to in subsection (1)(a), (b) and

(d) come to the attention of –

(a) The royal family and the royal family decides to remove an iNkosi or iNkosana the royal family concerned must, within a reasonable time and through the relevant customary structure –

(i) inform the Premier of the particulars of the iNkosi or iNkosana to be removed from office; and

(ii) furnish reasons for such removal;

(b) any person, such a person must inform the Premier and the Premier must –

(i) refer the matter to the royal family under whose jurisdiction the iNkosi or iNkosana falls, for an investigation and a decision, and a report thereon; and

(ii) consider the report and act in terms of sub-section (3).

(4) Where it has been decided by a royal family to remove an iNkosi or iNkosana in terms of subsection (2), the Premier must –

(a) advise the iNkosi or iNkosana of such decision and, in writing, call upon such iNkosi or iNkosana to make representations to him or her as to why the decision to remove him or her should not be given effect to;

(b) consider the representations submitted to him or her and withdraw the certificate of recognition with effect from the date of removal if the decision to remove him or her is in accordance with custom;

(c) inform the royal family concerned, the removed iNkosi or iNkosana, and the Provincial House of Traditional Leaders concerned, of such removal;

(d) publish a notice with particulars of the removed iNkosi or iNkosana in the Gazette.’

- [42] Like the Framework Act, the Provincial Act contains a transitional arrangement. It repeals in section 37(1) legislation that found application in the Province to the recognition of traditional communities and leadership institutions. In sub-section (2) it however provides that despite the repeal of laws referred to in sub-section (1), 'anything or (sic) act done in terms of such laws must be deemed to have been done in terms of the corresponding provisions of this Act.'
- [43] The Provincial Act, like the Framework Act, accordingly makes provision for the continued recognition and existence of traditional leadership institutions that were in existence before the commencement of the Act. This fact makes it the necessary to examine the repealed legislation that found application at the time of the creation of, or the recognition of the abaThembu community and its chieftaincy. The Thembu Traditional Council and its chieftaincy is situated in an area known as Zweledinga which forms part of the district of Hewu. In the previous political dispensation Hewu was a district which formed part of a political and geographical area known as the Ciskei. Both these institutions were brought into being by legislation that was enacted during the existence of what was at that time known as the self-governing territory of the Ciskei, and later as the Republic of Ciskei. It was one of the several Bantustan homelands that were created by the apartheid government and granted 'independent' status[46] in 1981 in terms of legislation aimed at achieving racial segregation. This legislation, and the history relevant to the creation of the Thembu Traditional Council will be dealt with in more detail below.
- [44] The Thembu traditional community and Council was established in 1983 by proclamation[47] issued in terms of the Ciskeian Authorities, Chiefs and Headman Act (the Ciskeian Authorities Act).[48] This Act repealed certain sections of the Black Authorities Act[49]. The Black Authorities Act provided for the establishment of a tribal authority in respect of a tribe, or a community authority in respect of a community, or two or more tribes. A tribal authority was established in respect of the area assigned to the chief or headman of the tribe concerned, or in the case of a community, or more than one tribe, the area assigned to such community or tribes.[50]
- [45] The Ciskeian Authorities Act contained a similar provision in section 2(1). It reads as follows:
- '(1) The Minister may by notice in the Official Gazette –
- (a) establish a tribal authority in respect of any tribe;
 - (b) establish a community authority in respect of a community or two or more tribes or communities jointly or one or more such tribes and one or more such communities jointly;
 - (c) modify the constitution of any community authority by including therein or excluding therefrom one or more tribe or community; and
 - (d) disestablish any such tribal or community authority.'

[46] What is evident from this provision is that it envisages the establishment of two distinct institutions. A tribal authority in respect of a particular tribe, or, what is referred to as a community authority, for a community that may consist of more than one community, or of more than one tribe, or of a combination of both. Sub-section (2) in turn confined the area of the tribal authority to the area where the particular tribe was, or, in the case of a community authority, for the area of the community or communities or the tribes concerned. The effect of this is that it restricted the authority of the Traditional Council to persons residing in and forming part of a tribe or a community in a defined geographical area. The boundaries of the Thembu Traditional Council are described in the proclamation[51] in terms of which it was established.

[47] The creation of a chieftaincy, and the recognition or appointment of a person as a chief was regulated in section 43 of the Ciskeian Authorities Act. The authority to recognise and appoint someone as a chief vested in cabinet who did so after consultation with the relevant tribal authority. Section 43 was subsequently amended by the Ciskeian Authorities Amendment Act[52] by its substitution for a provision that empowered the cabinet to, ‘with due regard to any applicable tribal law and custom,’

appoint a chief in respect of a newly created or a vacant chieftainship, ‘any person who in the opinion of the Cabinet is

qualified to hold that office.’ Its effect was to do away with Cabinet’s obligation to consult with the relevant tribal authority, and in its stead to introduce an obligation to have regard to tribal law and custom when making an appointment.

[48] A transitional arrangement is found in section 65(2). In terms thereof every tribal and community authority established under the repealed Black Authorities Act shall be deemed to be a tribal or community authority established under section 2(1).

[49] After the Ciskei was granted independent status, the Ciskeian Authorities Act was repealed and substituted by the Administrative Authorities Act.[53] In section 22 of that Act the relevant cabinet minister was given the authority to appoint someone to a chieftaincy, ‘with due regard to the law and custom governing the succession . . . and with the approval of the Council of State.’ Pertinent to the issues raised in this appeal is the fact that the Administrative Authorities Act retained the statutory design in the Ciskeian

Authorities Act of making provision for the recognition of an identified tribe or community, and the establishment of a tribal

authority, or alternatively, what was termed, a community authority, and for the appointment of a chief as the head thereof. Section 3(1) provided that:

‘There shall for every tribe or community mentioned in Schedule 1 be a tribal authority or a community authority, as the case may be, which shall bear the name and exercise control over the tribal or other area defined or described in relation thereto in the said Schedule.’

- [50] As in the case of the Framework and Provincial Acts, the Administrative Authorities Act also contained a transitional provision that dealt with the status of the tribal, community or regional authorities that were established as from the date of the commencement of the Act. [54] It provided in section 59(2) that the authorities established in terms of section 3 or 8[55] thereof shall for all purposes be deemed to be the successor in law of the authority bearing the same name and in existence immediately

prior to the commencement of the Act, and that the persons who were functionaries of the authority shall continue in office until their positions became vacant.[56]

- [51] That concludes an overview of the relevant legislation. A few observations before dealing with the findings of the Court below. The jurisdiction of traditional leadership institutions is territorial and community specific. A chief stands at the head of a specific traditional community and the traditional council established in respect of that community in a defined area. A traditional community may consist of a single tribe or of more than one tribe. The transitional provisions in the successive legislation meant that traditional institutions and communities that were established before the commencement of the Framework Act continued to exist, and retained its character and composition. The continued existence is however subject to a decision of the President or a provincial functionary as envisaged in section 26 of the Framework Act. That decision is preceded by an investigation and recommendation of the Commission or one of its committees. Its authority to investigate is derived from the lodgement of a claim or dispute in respect of a matter as defined in section 25(2). The claim or dispute raised further serves to define the ambit of the authority of the Commission or a committee.

The findings of the Court below.

The lawfulness of the implementation of the decision of the Premier to accept the recommendation of the Committee

- [52] As stated earlier, the first finding of the Court below related to the lawfulness of the implementation of the decision of the Premier to accept the Committee's recommendation. In his letter to Chief Hebe the Superintendent- General to whom the duty to implement the decision of the Premier was assigned, advised him that the decision of the Premier to accept the recommendation of the Committee rendered his appointment wrongful in terms of section 20(1)(c) of the Provincial Act, and that in compliance with section 20(3) of that Act, he was invited to make representations as to why the decision to remove him should not be given effect to. It is evident from the letter that what was intended was to remove Chief Hebe from his position in the manner as envisaged in section 20 of the Provincial Act.
- [53] At the hearing of this appeal the parties were in agreement that section 20(3) could not find application. The reason for this is that what is envisaged in sub-section (3), read with sub-section (2), is that it is only in an instance where the royal family has made a decision to remove an iNkosi on any of the grounds stipulated in paragraphs (a), (b), and (d) of sub-section (1), that the Premier is obliged to first ask the iNkosi concerned to make

representations before the decision of the royal family is given effect to. A wrongful appointment or recognition as a ground for the removal of an iNkosi as envisaged in sub-section (1)(c), has been excluded from sub-sections (2) and (3).

[54] The question is then how a Premier gives effect to his or her decision made in terms of section 26 of the Framework Act to accept the recommendation of the Commission or one of its committees that the appointment or recognition of an iNkosi is wrongful. The finding of the Court below was in essence that the decision of the Premier could not achieve the removal of an iNkosi without also first setting aside his or her preceding decision to recognise and appoint the person concerned as an iNkosi. The appellants submitted that this finding was incorrect, and that the principle in *Oudekraal* did not find application. The reason, so it was argued, is that the Premier's acceptance of the Committee's recommendation resulted in a decision that Chief Hebe's appointment was wrongful, which in turn empowered the Premier to remove him from his position without more.

[55] Counsel for Chief Hebe in turn supported the finding of the Court below. The submission was essentially that section 20(1)(c) on which the appellants placed reliance, does not create a mechanism for the implementation of a decision of the Premier taken in terms of section 26 of the Framework Act. It simply creates a ground on which the removal of a senior traditional leader may be sought. That being so, the removal of a senior traditional leader cannot be achieved without first setting aside the decision to appoint the person concerned to that position. In the absence of statutory authority to the contrary, that can only be achieved in proceedings for judicial review.

[56] Support for this argument can be found in the decision of the Constitutional Court in *Tshivhulana Royal Family v Netshivhulano* [57] where it was held that section 12 of the Framework Act does not give the Premier the power to remove a headman on the ground of wrongful appointment or recognition. The Constitutional Court reasoned as follows:

'The royal family may, however, not request the removal of a headman on the ground of wrongful appointment or recognition. The Framework Act does not prescribe a procedure for the removal of a headman on the ground of wrongful appointment or recognition.

The Framework Act gives the Premier the exclusive power to recognise a headman. He or she does not have the power to remove a headman on the ground of wrongful appointment or recognition. The reason why the Premier is not reposed with this power must be because that would give rise to a conflict. It would be the appointment action that is impugned. All recognition disputes would therefore involve the Premier. The Legislature recognises, by implication, that the Premier may not revoke or review an earlier decision because he or she would be *functus officio* (having discharged his or her office).' [58]

[57] The answer to the question posed must in my view be found in the provisions of the Framework Act itself as contended on behalf of the appellants. Section 26 must be read in the context of chapter 6 of the Act. Chapter 6 contemplates the creation of a mechanism for the resolution of disputes and claims in relation to customary matters as circumscribed in

sections 21(1) and 25 thereof.[59] The decision of the President or the Premier forms an integral part of this dispute resolution mechanism. The process culminates in, and reaches finality with the making of a decision as envisaged in section 26 of the Framework Act. What the outcome and the legal effect of the process is, is accordingly determined by the decision of the President or the Premier. Support for this interpretation is found in section 28 that makes the continued existence of traditional institutions which were created by repealed legislation subject to a decision as envisaged in section 26.[60] Section 26 of the Framework Act is not prescriptive with regard to the nature of the decision which the relevant functionary must make. It simply requires the President or the Premier concerned to ‘make a decision on the recommendation.’ While the relevant functionary is obliged to make a decision on the recommendation, the decision itself may be different from the recommendation.[61] On this approach, the removal of a traditional leader is achieved through the mechanism created by chapter 6, and not in terms of section 12 of the Framework Act, or section 20 of the Provincial Act.

- [58] The issue raised by the first finding of the Court below in essence concerns the implementation and the legal effect of the decision made by the Premier. A finding on this issue is premised on the validity of the Committee’s recommendation and the Premier’s decision. The conclusions I reach with regard to that question is dispositive of the matter leaving no reason to also decide what the legal consequences were for the Premier’s acceptance of the recommendation of the Committee.
- [59] There is a further reason for not deciding this issue. The Court below appeared to have premised its finding on an incorrect factual basis, that is, that the Premier removed Chief Hebe from his position, and appointed Mr Katsi in his stead. However, as counsel for Chief Hebe quite correctly pointed out, the letter on which Chief Hebe placed reliance for seeking an order setting aside the decision to remove him from his position and to appoint Mr Katsi, did not embody such a decision at all. On a careful reading of the letter in question it goes no further than inviting Chief Hebe in terms of section 20(3) of the Provincial Act to make representations as to why the decision of the Premier to accept the recommendation of the Committee ‘should not be implemented’, and why the removal of Chief Hebe as Chief ‘should not be effected.’
- [60] The Superintendent – General expressed nothing more than an intent to remove Chief Hebe from his position. As stated earlier, Chief Hebe made representations, but before there was a response to the representations, an interim order was granted at his behest interdicting the Premier from implementing her decision to recognise and appoint Mr Katsi to the disputed position. That order was made final by the Court below in the review proceedings. The factual position is therefore that there was no intention to remove Chief Hebe without more from his position on the basis as contended by the appellants, and Mr Katsi was not appointed in his place. It will serve no purpose to decide the validity of an action that was nothing more than an expression of intent.

The legality of the process in terms of which the Commission and the Premier performed their functions

[61] The relief claimed in the application was in the form of proceedings for review in terms of PAJA. It was correctly not disputed that the recommendation and the decision constituted administrative action which is subject to judicial review. Administrative action is defined in section 1 of PAJA.[62] It has three constituent elements. Relevant in the present context is that the action must be a decision of an administrative

nature made by an organ of State in the exercise of a public power in terms of legislation, which decision adversely affects the rights of any person, and has a direct, external effect. Whether or not a decision is of an administrative nature as contemplated in section 1 of PAJA depends on the context. As stated in *Viking Pony Africa Pumps (Pty) Ltd t/a Tricons African v Hydro-Tech Systems (Pty) Ltd and Another*,[63] it is a question that must not be determined in the abstract, but in the context of the facts of each case by a careful analysis of the nature of the power or function and its source or purpose.[64]

[62] The Committee is a statutorily constituted body. It exercises a public power under an empowering provision in the Framework Act. That the Committee makes a recommendation and not a binding decision must be considered in the context of the nature of the function that it performs. The dispute resolution mechanism in chapter 6 of the Framework Act envisages a two stage process that is continuous and interlinked. It commences with an investigation and recommendation of the Committee, and is concluded with the decision of the Premier.

[63] The Premier similarly derives the power to make a decision on the recommendation from the Framework Act. He or she cannot take a binding decision without the recommendation of the Committee. The Premier can only act upon receiving the Committees' recommendation. The recommendation is accordingly a jurisdictional fact and a prerequisite for the exercise by the Premier of his authority as contemplated in section 26 of the Framework Act. The function of the Committee is accordingly an inherent feature of the process contemplated in chapter 6.

[64] The purpose of the actions of the Committee is the determination of a claim or the resolution of a dispute, the outcome of which is likely to affect rights and to have a direct external effect. Although the Premier is empowered to make a decision that differs from the recommendation of the Committee, he or she is obliged to act on the recommendation. Section 26(3) of the Framework Act dictates that a decision regarding the recommendation must be taken within 60 days.[65] That decision is informed and limited by the nature of the claim made or the dispute raised, and the investigation and recommendation of the Committee. While the actions of the Committee may be said to only have the "capacity to affect legal rights"[66] during the course of the investigation, they impact directly on the rights of a person where the Premier, as in the present matter,

decides to accept the recommendation of the Committee. If the Committee's role in the decision making process was flawed, the entire process will be tainted. The recommendation and the decision accordingly constitute administrative action within the meaning of PAJA.

[65] The gist of Chief Hebe's complaint regarding the recommendation and the decision made thereon, was the Committee's reliance on evidence that Mr Katsi, who is a member of the amaTshatshu tribe, and who enjoys recognition according to custom as a traditional leader of that tribe, has a better right to the disputed chieftaincy by reason of the historical connection which the amaTshatshu tribe has with the area concerned, and the continued efforts of the tribe to be recognised as a traditional community with its own chieftaincy. It was contended that the emphasis on the aspirations of the amaTshatshu resulted in the Committee losing sight of the composition and the historical context of the creation of the abaThembu community, its Tribal Council and the abaThembu chieftaincy. This failure, it was contended, meant that the Committee did not comply with its obligations (as set forth in 25(3) of the Framework Act) to consider and apply the customs of the community as they applied when the events occurred that gave rise to the dispute, thereby rendering the Committee's actions unlawful.

[66] A further point taken was that the Committee's failure rendered its investigation flawed as it meant that it took irrelevant considerations into account and ignored that which was relevant to the proper exercise of its mandate. It is evident from its recommendation that the Committee relied for its recommendation inter alia on an affidavit that was deposed to by the then Paramount Chief of Western Thembuland, the late Kaizer Matanzima. The affidavit in question was filed in opposition to what was said by the father of Chief Hebe in court proceedings in what was then known as

the Supreme Court of Ciskei (case number 357/1982). In the affidavit Chief Matanzima stated that Hebe senior could not be a chief as he was not of royal blood, and further that the father of Mr Katsi had a claim to the chieftainship 'because the land belonged to Bavuma Tshatshu'. The affidavit of Chief Matanzima was evidently meant to serve as a response to an earlier affidavit deposed to by Hebe senior in the court proceedings.

[67] The failure of the Committee to also have had regard to the other affidavits filed in the court proceedings was found by the Court below to have resulted in the Committee having failed to have regard to considerations that were relevant to its investigation. The Court in my view correctly rejected the Committee's suggestion in its answering affidavit that Chief Hebe had the duty to place the documentation filed in the Ciskei case before the Committee. Save to state that the affidavit of Chief Matanzima was drawn from the relevant case file, the Committee did not say how it came to be in possession thereof. What is however clear from the recommendation itself, is that the Committee was aware that it was filed in court proceedings, which proceedings were concerned with the chieftaincy of the abaThembu Council and an earlier challenge to the chieftaincy of Hebe senior. That this is so is confirmed by the judgment delivered in the matter.[67] What is also clear from the judgment is that the proceedings were contested, and that opposing affidavits were filed. On a mere

reading of the judgment, or for that matter, the affidavit of Chief Matanzima, the Committee should have been alerted to the existence of evidence other than that which it chose to rely upon in making its recommendation.

- [68] The grounds of review require a consideration of the historical context and the evidence in the Ciskei case on which Chief Hebe relied, and its relevance to the discharge by the Committee of its mandate. Zweledinga is inhabited by people who belong to a number of abaThembu tribes. They are the amaTshathu, the amaHala, the amaGcina and the amaNdungwana. Zweledinga is situated in the area of the former Ciskei. The people of Zweledinga were however not always resident in that area. Before 1976 they were resident in the district of Glen Grey. The reason for their relocation to Zweledinga lies in the political developments at that time which were driven by the implementation of apartheid era policies of separate development and the creation of the bantustan homelands along tribal lines. How and why this happened is best understood if one has regard to the legislation which directed the various stages of the excision of the homeland areas from the rest of South Africa.
- [69] A useful exposition of the relevant legislation is found in the decision in *Tshwete v Minister of Home Affairs (RSA)*. [68] The legislative framework provided for the division of Black peoples into certain separate national units on the basis of language and culture. [69] In the Eastern Cape this led to the creation of the Transkei and the Ciskei. The road to the creation of separate independent states commenced with the establishment of territorial authorities by the Black Authorities Act. The structures created thereby were grafted onto the existing structures of traditional leadership. A territorial authority was made up of regional authorities, which in turn consisted of a tribal authority in respect of a tribe, or a community authority in respect of a community or two or more tribes. The territorial authorities were responsible for the administration of the areas under their jurisdiction and were given limited legislative and executive functions. The Ciskeian Territorial Authority was established in 1961 in respect of a number of regional authorities which included the regional authority for the district of Glen Grey. [70] This was followed by the status of responsible government [71] and in 1972, self-government. [72] The self-governing area similarly included the district of Glen Grey. Legislative functions were assigned to a legislative assembly consisting of the paramount chief and the chiefs of all the tribal authorities.
- [70] Tribal ties between the abaThembu in Glen Grey and the remainder of the abaThembu people in Thembuland in the Transkei led to the transfer of Glen Grey to the Transkei when it was granted independent status in 1976. [73] However, not all the tribesmen were in favour of their excision from the Ciskei. Some chose instead to be relocated to lands situated in the district of Hewu in the Ciskei. The result of this was that they no longer fell under the jurisdiction of the chiefs of the three abaThembu tribal authorities that existed in the Glen Grey district. [74]

[71] In 1983, after the Ciskei was given independence, the abaThembu Tribal Council was established in terms of the Ciskeian Authorities Act. This Act, like the Black Authorities Act and the Administrative Authorities Act that later repealed it, provided for the creation of two institutions, namely a tribal authority in respect of a single identifiable tribe; alternatively, a community authority, that may consist inter alia of a community, or of more than one tribe. Although it was called a tribal authority, the Thembu Traditional Council was not established in respect of a single tribe. That this is so becomes clear upon a reading of schedule 1 to the Administrative

Authorities Act.[75] Read with section 3 of that Act, the schedule provided for the establishment of six tribal authorities in the district of Hewu, five of which, with the exclusion of the Thembu Tribal Council, were created in respect of a single identifiable tribe. So for example was the Zulukama Tribal Authority established for the area of the Hlubi tribe, and the Amaqwati Tribal Authority for the area of the Amaqwathi tribe. There are other examples of this in the schedule. The absence of any mention of a specific tribe lends strong support to Chief Hebe's case that the Thembu Traditional Council, as its name suggests, was created for all the abaThembu tribesmen who in 1976 chose to be relocated from Glen Grey to Zweledinga in the Hewu district, and that its character was preserved by the transitional arrangements in the legislation dealt with earlier.

[72] It is against this background that the relevance of the evidence in the Ciskei case to the recommendation of the Committee and the decision of the Premier must be assessed. I do not intend to deal with this evidence in any detail. It essentially dealt with the reasons for the creation of the Thembu Traditional Council and its chieftaincy, the process of consultation and election that preceded the appointment of Hebe senior as the first Chief of the community, and the rejection by the relevant functionary of a request by the AmaTshatshu tribe for the creation of its own chieftaincy in the area of Zweledinga, and for the appointment of Mr Katsi to that position.

[73] The evidence is undoubtedly relevant to the events that gave rise to the dispute which the Committee was tasked to investigate, and to its obligation in section 25(3)(a) to consider and apply customary law and customs as it existed "when the events occurred that gave rise to the dispute or claim". The function of the Committee was to make a recommendation after it had investigated Mr Katsi's claim to the disputed chieftainship.[76] The investigation as envisaged in section 25 of the Framework Act must not be equated with legal proceedings where the rules of evidence may compel a litigant to place evidence before the court at the risk of attracting an adverse finding. The statutory duty to investigate the claim was on the Committee. Its failure to have regard to all the evidence in the Ciskei case meant that it not only failed to carry out its mandate, but also failed to have regard to evidence that was relevant to it making an informed recommendation to the Premier. The Court below was accordingly correct in finding that this rendered the recommendation of the Committee flawed and that it must be reviewed, and set aside.

- [74] But there is a more fundamental problem. The principle of legality requires the holders of public power to act lawfully, that is, within their powers.[77] The question must be asked whether the Committee did not exceed its authority. Lawfulness is relevant to the exercise of all public power. It matters not that the exercise of the power does not constitute administrative action in terms of PAJA. Lawfulness depends on the terms of the empowering statute. The exercise of public power that is not sanctioned by the relevant empowering statute, will be unlawful and invalid.[78] As stated, the authority of the Committee to investigate and make a recommendation is derived from the lodgement of a claim or a dispute.[79] The claim or dispute raised consequently determines the ambit of its powers of investigation and its recommendation. In the present matter the Committee was tasked to investigate a dispute in relation to the right or title of Chief Hebe to the Chieftaincy of the Thembu Traditional Council as envisaged in paragraph (iii) of section 25(2) of the Framework Act. The investigation was accordingly directed at the right or entitlement to be appointed to the chieftaincy of an existing senior traditional community.
- [75] The underlying basis of the Committee's recommendation was that the amaTshatshu should be recognised as a traditional community in the land of their ancestors, and that the appointment of Mr Katsi to the disputed chieftaincy would achieve just that. This constitutes a serious misdirection. It fails to recognise that the dispute was concerned with the chieftaincy of an existing traditional community composed of more than one abaThembu tribe sharing a common culture, and that its recommendation effectively meant that the character and composition of the community established as a result of the events in 1976 would be changed in order to give recognition to the aspirations of one of the tribes. Put differently, the Committee's recommendation effectively dealt with the traditional leadership of the amaTshatshu community, as opposed to the leadership of the abaThembu community of Zweledinga, as it was mandated. The Committee as a result dealt with the dispute as if it was a claim by a community to be recognised as a principal traditional community with its own chieftaincy as envisaged in paragraph (iv) of section 25(2) of the Framework Act. The effect of this is that the Committee strayed beyond the terms of its mandate. In the result, it exceeded its authority which rendered its recommendation unlawful and invalid.

Conclusion

- [76] In the light of the finding that the recommendation of the Committee, and with that the decision of the Premier, were flawed and fall to be set aside, it is neither necessary nor would it be appropriate to also deal with the finding of the Court below that the decision of the Premier did not comply with the provisions of section 140(2) of the Constitution. That finding raises a constitutional issue, and it is appropriate to apply the principle in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*[80]:

“While the concept of ripeness is not precisely defined, it embraces a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”[81]

[77] In the result, and for the foregoing reasons, I am of the view that the appeal should be dismissed with costs. It is so ordered.

D VAN ZYL

DEPUTY JUDGE PRESIDENT

BHISHO

I agree:

I.T. STRETCH

JUDGE OF THE HIGH COURT

P. T. MAGEZA

ACTING JUDGE OF THE HIGH COURT

Counsel for the appellants: Mr N. Arendse (SC) Mr N. Mayosi Instructed by: The State Attorney
Counsel for the respondents: Mr T. J. M. Paterson (SC) Instructed by: Smith Tabata Inc.

Date heard:

02 June 2017

Judgment handed down:

28 September 2017

[1] 8 of 2005.

[2] 2004

(6) SA 222 (SCA) at para [26].

[3] At para [26].

[4] The Promotion of Administrative Justice Act 3 of 2000. It provides that administrative action is reviewable if it was taken ‘because irrelevant considerations were taken into account or relevant considerations were not considered’.

[5] “A Court or tribunal has the power to judicially review an administrative action if- (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with.”

[5] “A Court or tribunal has the power to judicially review an administrative action if-

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with.”

[6] 41 of 2003.

[7] 2014

(4) SA 474 (CC) at para [28] and the authorities referred to in fn 18 to 21 of the judgment. See also Natal Joint Municipal Pension Fund v Endumeni Municipality 2012

(4) SA 593 (SCA) at para [18].

[8] At para [28].

[9] Section 104(1)(b)(ii).

[10] Ex Parte Chairperson of the Constitutional Assembly: In re Certification of Amended Text of the Constitution of the Republic of

South Africa, 1996 1997 (2) SA 97 (CC).

[11] At paras [158] to [159].

[12] 23 of 2009.

[13] 2013

(9) BCLR 1091 (CC).

[14]. Section 8.

[15] Sections 2 and 2B.

[16] Sections 3, 3A, 3B, and 4B.

[17] Sections 4, 4A, and 4B.

[18] Sections 2B(5) and 7.

[19] Section 2(2).

[20] Section 11(1). A royal family is defined in section 1 to mean “the core customary institution or structure consisting of immediate relatives of the ruling family within a traditional community, who have been identified in terms of custom, and includes, where applicable, other family members who are close relatives of the ruling family.”

[21] Section 11(3) read with sub-section (4).

[22] Section 3(2)(c).

[23]. The subsections read as follows: “(1) Any traditional leader who was appointed as such in terms of applicable provincial legislation and was still recognised as a traditional leader immediately before the commencement of this Act, is deemed to have been recognised as such in

terms of section 9 or 11, subject to a decision of the Commission in terms of section 26. (3) Any ‘tribe’ that, immediately before the commencement of this Act, had been established and was still recognised as such, is deemed to be a traditional community contemplated in section 2, subject to – (a) the withdrawal of its recognition in accordance with the provisions of section 7; or (b) a decision of the Commission in terms of section 26.

- (4) A tribal authority that, immediately before the commencement of this Act, had been established and was still recognised as such, is deemed to be a traditional council contemplated in section 3 and must perform the functions referred to in section 4: Provided that such a tribal authority must comply with section 3(2) within seven years of the commencement of this Act.”

[23]. The subsections read as follows:

“(1) Any traditional leader who was appointed as such in terms of applicable provincial legislation and was still recognised as a traditional leader immediately before the commencement of this Act, is deemed to have been recognised as such in terms of section 9 or 11, subject to a decision of the Commission in terms of section 26.

- (3) Any ‘tribe’ that, immediately before the commencement of this Act, had been established and was still recognised as such, is deemed to be a traditional community contemplated in section 2, subject to –
- (a) the withdrawal of its recognition in accordance with the provisions of section 7; or
- (b) a decision of the Commission in terms of section 26.
- (4) A tribal authority that, immediately before the commencement of this Act, had been established and was still recognised as such, is deemed to be a traditional council contemplated in section 3 and must perform the functions referred to in section 4: Provided that such a tribal authority must comply with section 3(2) within seven years of the commencement of this Act.”

[24] Section 28(1) and (3).

[25] Sigcau and Another v Minister of Cooperative Governance and Traditional Affairs and Others (612/2016) [2017] ZASCA 80 (7 June 2017) at paras [3] and [4].

[25] Sigcau and Another v Minister of Cooperative Governance and Traditional Affairs and Others (612/2016)

[2017] ZASCA 80 (7 June 2017) at paras [3] and [4].

[26] It provided in section 25(2)(a) that the ‘Commission has authority to investigate either on request or of its own accord.’

[27] Section 2 provides: “The Commission must carry out its functions in a manner that is fair, objective and impartial.”

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- [28] Section 25(3)(a).
- [29] Section 25(3)(b)(ii)
- [30] Section 26(2)
- [31] Section 26A(4).
- [32] Section 26A(7) read with 26(2)(6).
- [33] Section 33(1).
- [34] Section 33(2).
- [35] See fn 15, and Sigcau (*supra*) at para [5].
- [36] Section 20(1).
- [37] Section 26 (4).
- [38] ‘Commission’ is defined in section 1 to mean a Commission as established by section 22 ‘and includes a committee established in section 26A’.
- [39] See paras [13] above.
- [40] The relevant provincial government and any other relevant functionary to which the recommendation of the Commission applies in accordance with applicable provincial legislation in so far as the consideration of the recommendation does not relate to the recognition or removal of a king or queen in terms of sections 9, 9A or 10
- [41] Sections 5 and 6.
- [42] Section 4(2).
- [43] Section 4(3).
- [44] In section 1 of the Provincial Act ‘ubukhosi’ is defined to mean ‘senior traditional leadership’ as recognised in accordance with custom. “ubukhosana” is a headmanship in accordance with custom.
- [45] See para [26] above.
- [46] The independent status of Ciskei and Transkei were not recognised outside South Africa.
- [47] Government Notice no. 30 dated 6 May 1983.
- [48] Act 4 of 1978.
- [49] 68 of 1951.
- [50] Section 2.

[51] 'The area in the district of Hewu bounded as follows:- From the beacon common to the farms Bushman's Krantz, Hopewell and High Meadow generally westwards along the boundary of the farm Bushman's Krantz to the point where it meets the Oskraal river; thence up the middle of the Oskraal river and along the western boundaries of the farms Bushman's Krantz, Pavet, Bushby Park, Yonda, Bold's Point, Prices Dale and Oxton to the northern most beacon of the farm Oxton; thence generally south eastwards along the boundaries of the farms Oxton and Haytor to the southern most beacon of the farm Haytor; thence generally westwards along the boundaries of the farms Haytor, Prices Dale, Bold's Point, Bushby Park and Bushman's Krantz to the point of commencement.'

[51] 'The area in the district of Hewu bounded as follows:-

From the beacon common to the farms Bushman's Krantz, Hopewell and High Meadow generally westwards along the boundary of the farm Bushman's Krantz to the point where it meets the Oskraal river; thence up the middle of the Oskraal river and along the western boundaries of the farms Bushman's Krantz, Pavet, Bushby Park, Yonda, Bold's Point, Prices Dale and Oxton to the northern most beacon of the farm Oxton; thence generally south eastwards along the boundaries of the farms Oxton and Haytor to the southern most beacon of the farm Haytor; thence generally westwards along the boundaries of the farms Haytor, Prices Dale, Bold's Point, Bushby Park and Bushman's Krantz to the point of commencement.'

[52] Section 2 of the Ciskeian Authorities, Chiefs and Headman Amendment Act 11 of 1981 (assented to on 19 October 1981).

[53] 37 of 1984. Its commencement date was 26 October 1984.

[54] 26 October 1984.

[55] Section 8 provides for the establishment of Regional Authorities and was later repealed by section 5 of Decree 29 of 1991.

[56] Sub-section

(2) reads as follows: 'A tribal, community or regional authority established as from the commencement of this Act by section 3 or 8, as the case may be, shall for all purposes be deemed to be the successor in law of the authority bearing the same name and in existence immediately prior to such commencement, and the chairman and councillors of every such existing authority shall continue in office until their seats become vacant by effluxion of time or they otherwise vacate their seats in terms of any provision of this Act.'

[57] [2017] JOL 38188 (CC).

[58] At para [41] to [42].

[59] Section 21 is not relevant for present purposes. It deals with 'a dispute or claim concerning customary law or customs . . . between or within traditional communities or other customary institutions on a matter arising from the implementation of this Act.'

[60] Sub-sections

(1) and (3).

[61] Section 26(4).

[62] ‘administrative action’ means any decision taken, or any failure to take a decision, by – (a) an organ of state, when – (i) exercising a power in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation; or (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect.”

[62] ‘administrative action’ means any decision taken, or any failure to take a decision, by –

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(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect.”

[63] 2011

(1) SA 327 (CC) at para [37].

[64] Minister of Home Affairs v Scalabrini Centre 2013 (6) SA 421 (SCA) at paras [51] to [52].

[65] It was not suggested that the word ‘must’ in subsection (3) should be interpreted any differently.

[66] Grey’s Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others [2005] ZASCA 43; 2005 6 SA 313 (SCA) at para [23].

[67] Bolisiki and Another v The President of the Ciskei in Executive Council (case no. 357/82 dated 7 August 1984).

[68] 1988

(4) SA 586 (A) at 603C – 606A.

[69] That framework was provided by the Promotion of Black Self-Government Act 46 of 1959, the National States Citizenship Act 26 of 1970 and the National States Constitution Act 21 of 1971. The list is not exhaustive.

[70] Government Notice R496 of 1961.

- [71] Proclamation R118 of 1971.
- [72] It was established by the Ciskei Constitution Proclamation No. 187 of 1972 (published in Government Gazette dated 28 July 1972) issued in terms of the National State Constitution Act (formerly the Bantu Homelands Constitution Act) 21 of 1970.
- [73] Republic of Ciskei Constitution Act 20 of 1981. Its territory consisted of the districts mentioned in Schedule 1 to the Act. Herschel was another district that was transferred to the Transkei. Both districts form part of what is known as Western Thembuland. Compare section (2) of Proclamation R187 of 1972 and Schedule A to the Status of the Transkei Act, 1976.
- [74] The relevant tribal authorities for Glen Grey are listed in section 3 of Proclamation 187 of 1972.
- [75] See section 3 of Proclamation 187 of 1972.
- [76] Section 25(1) of the Framework Act.
- [77] Fedsure Life Insurance v Greater Johannesburg Transitional Metropolitan council and Others 1990
- (1) SA 374 (CC) at para [58] to [59] and Pharmaceutical Manufacturers of South Africa: In re Exparte President of the Republic of South Africa [2000] ZACC 1; 2000
- (2) SA 674 (CC) at para [17].
- [78] See Affordable Medicines Trust and Others v Minister of Health of RSA and Another
- [2005] ZACC 3; 2006 (3) SA 247 (CC) at para [49] and Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Actin Campaign and Another as Amic Curiae) 2006
- (2) SA 311 (CC) at para [144].
- [79] Section 25(3).
- [80] 2000
- (2) SA 1 (CC).
- [81] At para [21].

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