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

CASE NO. 4715A/2019

NOSIPHE NONKANYISO DABULA - MBANGA	**Applicant**
and	
THE PREMIER OF THE EASTERN CAPE	**1st Respondent**
MEC FOR COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS, EASTERN CAPE	**2nd Respondent**
THE COMMISSION ON TRADITIONAL LEADERSHIP DISPUTES AND CLAMES	**3rd Respondent**
SIZINZO NQWILISO	**4th Respondent**
THE CHAIRMAN OF THE EASTERN CAPE HOUSE OF TRADITIONAL LEADERS	**5th Respondent**

JUDGMENT

LAING J

[1] This is an application for an order to review and set aside the decision of the first respondent ('the Premier') to dismiss the claim of the late Mr Phutumile Mbanga to chieftaincy[1] of the Qamata Basin Administrative Area. The applicant also seeks an order to review and set aside the decision of the second respondent ('the MEC') to recognize the fourth respondent ('Mr Nqwiliso') as the senior traditional leader for the Qamata Basin Administrative Area.

[2] Furthermore, the applicant seeks an order declaring unlawful the recommendations of the third respondent ('the Commission') to the Premier that Mr Mbanga's claim to chieftaincy be dismissed.[2]

[3] The application has been brought as a review application and the relevant respondents have delivered a record in accordance with the provisions of rule 53 of the Uniform Rules of Court.

BACKGROUND

[4] The applicant avers that she is an acting or regent senior traditional leader for the AmaZima community in the Qamata Basin Administrative Area, situated in the Cofimvaba district, and that she has been identified as such by the Mbanga Royal Family and endorsed by the Kingdom of the AbaThembu. She is the surviving spouse of the late Mr Mbanga, with regard to whom a claim for recognition as a senior traditional leader was lodged in 2009.

[5] A somewhat lengthy and complex description of the history that underpins the claim appears in the founding papers, large portions of which being unsubstantiated and based on hearsay. For reasons that will become clear, it would serve no purpose to repeat the averments made. Instead, it will suffice to state that the applicant readily

[1] The term, 'chieftaincy', appears as such in the applicant's notice of motion. The relevant national legislation, i.e. the Traditional Leadership and Governance Framework Act 41 of 2003, does not use the term but it has been retained here to reflect the relief that the applicant seeks.

[2] The applicant originally sought an order to review and set aside the Commission's recommendation that Mr Mbanga's claim be dismissed, but abandoned this prayer during argument.

admits that there has been a long-standing dispute between the Mbanga and Nqwiliso families[3] over the leadership of the AmaZima community.

[6] The applicant's husband, Mr Mbanga, passed away in 2012. Consequently, the Mbanga family's pursuit of the leadership claim fell to the applicant.

[7] For purposes of its investigation of the above claim, the Commission held public hearings in Cofimvaba in early 2015. From the applicant's papers, it is understood that both she and Mr Nqwiliso were in attendance. She avers that no-one, including Mr Nqwiliso, disputed the Mbanga family's claim and that no-one produced any certificate of recognition for Mr Nqwiliso's occupying the position of senior traditional leader for the Qamata Basin Administrative Area.

[8] Later that year, on 17 September 2015, the Premier, via his officials, informed the applicant that the late Mr Mbanga's claim had been dismissed. Hereafter followed what seems to have been a protracted period of acrimony between the Mbanga and Nqwiliso families, culminating in legal proceedings for interdictory relief. The applicant alleges that it was during such proceedings, on 21 November 2019, that she learnt for the first time that the Premier, alternatively the MEC, had recognized Mr Nqwiliso as a senior traditional leader for the Qamata Basin Administrative Area. This occurred when Mr Nqwiliso's legal representatives revealed the existence of a certificate of recognition, issued in terms of the applicable legislation.

APPLICANT'S GROUNDS FOR REVIEW

[9] The applicant avers that the Premier's decision to dismiss Mr Mbanga's claim was invalid for want of compliance with the requirements of section 140(2) of the Constitution. To that effect, the applicant argues that the provisions of both the Traditional Leadership and Governance Framework Act 41 of 2003 ('the TLGFA') and the Eastern Cape Traditional Leadership and Governance Act 4 of 2005 ('the Eastern Cape TLGA') required the MEC to have counter-signed the Premier's decision inasmuch as the former was the functionary to whom the applicable powers had been

[3] The use of the term 'royal' has been deliberately avoided, given the circumstances. This has been done with respect for the parties involved, knowing that each believes that their representative is the rightful heir to the leadership of the AmaZima community.

assigned. This never occurred. Moreover, argues the applicant, the Premier failed to comply with the requirements of both section 33 of the Constitution and section 3 of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') because he did not afford notice to the applicant of the Commission's recommendations and did not afford an opportunity to make representations prior to the making of his decision.

[10] With regard to the MEC's recognition of Mr Nqwiliso as a senior traditional leader, the applicant attacks the Commission's exercise of its powers in the making of its recommendations to the MEC. She argues that the Commission misconstrued the nature of its mandate by refusing to consider whether good grounds existed for entertaining the claim, inasmuch as it arose prior to 1 September 1927, as envisaged by the TLGFA. The applicant also argues that the Commission took into account irrelevant considerations and ignored relevant considerations in relation to events prior to the above date, e.g. the amalgamation of locations 31 and 32 in 1914, under Chief Nqwiliso. Accordingly, the Commission is accused of procedurally unfair administrative action. It is also accused of having failed to comply with section 25(3) of the TLGFA by not having considered and applied the customs of the relevant community.

[11] The applicant challenges the MEC's decision to recognize Mr Nqwiliso, saying that this was not done in accordance with the empowering legislation. She maintains that, having regard for the information to which the MEC had access, his decision was taken arbitrarily and was not rationally connected to such information. In her replying papers, filed subsequent to the delivery of the record, the applicant refers to a document authored by a certain Prof Jeff Peires,[4] dated 29 January 2015, and states that the Commission interpreted same selectively. In that regard, the Commission is alleged to have ignored Prof Peires's intimation that the appointment of Chief Nqwiliso upon the amalgamation of locations 31 and 32 was irregular. The applicant goes on to contend that Mr Nqwiliso ought to have been disqualified from having been recognised as a senior traditional leader by reason of his criminal conviction for the stabbing and killing of a certain Mr Gragra Maseti. She states that the MEC's decision to do so was irrational and unlawful.

[4] Prof Peires prepared the document under the auspices of the History Department at the University of Fort Hare. He is a well-known and respected scholar on the history of the isiXhosa.

DELAY IN INSTITUTION OF PROCEEDINGS

[12] The applicant concedes that her review application falls outside the time limit imposed under section 7(1) of PAJA.[5] She avers that the Premier's decision was communicated to her and the Mbanga family on 17 September 2015 but it was only subsequently, during the course of litigation between the Mbanga and Nqwiliso families in 2017, that the applicant was advised that she could challenge the Premier's decision legally. Financial constraints and the Premier's failure to have supplied the record of his decision allegedly prevented the applicant from instituting proceedings.

[13] With regard to the MEC's decision, the applicant points out that Mr Nqwiliso's certificate of recognition only came to light on 21 November 2019, as a consequence of the above litigation. Accordingly, argues the applicant, she was still within the PAJA time limit when proceedings were instituted.

ISSUES TO BE DECIDED

[14] This is essentially a review application, brought in terms of PAJA but subject to the usual provisions of rule 53. It is necessary for the court to decide: (a) the extent to which the applicant's delay in the institution of proceedings, which she has already admitted, affects the application itself; (b) if the above delay has no adverse impact, then whether the applicant has successfully established grounds upon which to review and set aside the decisions in question; and (c) whether the applicant has made out a case for a declaration to the effect that the Commission's recommendations were unlawful.

[15] It follows that if the court makes a finding to the effect that the applicant's delay is unreasonable and cannot be overlooked or condoned then it may well be unnecessary to deal with the remaining issues.

[5] In terms of section 7(1), proceedings for judicial review must be instituted without unreasonable delay and not later than 180 days after the date on which proceedings in terms of internal remedies have been concluded, alternatively on which the person concerned was informed of the administrative action, became aware thereof and the reasons for it or might reasonably have been expected to have become aware thereof and the reasons.

LEGAL FRAMEWORK

[16] The legal implications of a delay in the institution of review proceedings, as envisaged under PAJA, have been explored extensively in recent jurisprudence. A useful starting point is the views expressed by Nugent JA in *Gqwetha v Transkei Development Corporation and others* [2006] 3 All SA 245 (SCA) where the appellant had brought review proceedings in the Transkei High Court some 14 months after her dismissal from employment as a result of disciplinary proceedings. Nugent JA held, at [22] to [24], that:

> '[22] It is important for the efficient functioning of public bodies… that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale for that longstanding rule… is twofold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view more importantly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions. As pointed out by Miller JA in *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 41E-F (my translation):
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> > "It is desirable and important that finality should be arrived at within a reasonable time in relation to judicial and administrative decisions or acts. It can be contrary to the administration of justice and the public interest to allow such decisions or acts to be set aside after an unreasonably long period of time has elapsed- *interest reipublicae ut sit finis litium*… Considerations of this kind undoubtedly constitute part of the underlying reasons for the existence of this rule."
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> [23] Underlying that latter aspect of the rationale is the inherent potential for prejudice, both to the efficient functioning of the public body and to those who rely upon its decisions, if the validity of its decisions remains uncertain. It is for that reason in particular that proof of actual prejudice to the respondent is not a precondition for refusing to entertain review proceedings by reason of undue delay, although the extent to which prejudice has been shown is a relevant consideration that might even be decisive where the delay has been relatively slight (*Wolgroeiers Afslaers*, above, at 42C).
>
> [24] Whether there has been undue delay entails a factual enquiry upon which a value judgment is called for in the light of all the relevant circumstances including any explanation that is offered for the delay (*Setsokosane Busdiens (Edms) Bpk v*

Voorsitter, Nasionale Vervoerkommissie, en 'n Ander 1986 (2) SA 57 (A) at 86D-F and 86I-87A). A material fact to be taken into account in making that value judgment- bearing in mind the rationale for the rule- is the nature of the challenged decision. Not all decisions have the same potential for prejudice to result from their being set aside.'

[17] How to approach such delay, specifically within the context of section 7(1) of PAJA, was examined in *Khumalo and another v Member of the Executive Council for Education: KwaZulu-Natal* 2014 (3) BCLR 333 (CC), where the MEC challenged her own department's decision to promote the appellant and to provide another employee with a 'protected promotion'. The Constitutional Court observed, at [49], that:

> 'In *Gqwetha* the majority of the Supreme Court of Appeal held that an assessment of a plea of undue delay involves examining: (1) whether the delay is unreasonable or undue (a factual enquiry upon which a value judgment is made in the light of "all the relevant circumstances"); and if so (2) whether the court's discretion should be exercised to overlook the delay and nevertheless entertain the application.'

[18] The *Khumalo* test, as it has become known, endorses the approach previously adopted in *Gqwetha*. The Constitutional Court subsequently confirmed the approach in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (6) BCLR 661 (CC),[6] and indicated the principles that must be applied when assessing delay. The first principle is that there are differences between a review brought in terms of PAJA and a review brought on the basis of legality.[7] The second principle is that the reasonableness of the delay must be examined with reference to the explanation offered for the delay; where there is no explanation, the delay will necessarily be unreasonable. The third principle is that the reasonableness of the delay cannot be examined in a vacuum and the court must decide whether the delay ought nevertheless to be overlooked. In doing so, the court must take into account several

[6] The court in *Asla* held, at [48], that '[f]irstly, it must be determined whether the delay is unreasonable or undue. This is a factual enquiry upon which a value judgment is made, having regard to the circumstances of the matter. Secondly, if the delay is unreasonable, the question becomes whether the Court's discretion should nevertheless be exercised to overlook the delay to entertain the application.'

[7] The first of the differences is that PAJA contains a 180-day bar; there is no fixed time period under a legality review. The second difference is that delay in terms of PAJA requires an application for condonation; there is no corresponding requirement under a legality review. For immediate purposes, the first of the *Asla* principles, as described above is not relevant.

factors: (a) the potential prejudice to affected parties as well as the possible consequences of setting aside the impugned decision; (b) the nature of the impugned decision; and (c) the conduct of the applicant. The fourth principle is that, despite there being no basis upon which to overlook an unreasonable delay, the court may nevertheless be constitutionally compelled to declare state conduct unlawful.[8]

ASSESSMENT OF THE APPLICANT'S DELAY

[19] The two-stage enquiry, reduced to its essential elements, involves asking whether the delay was unreasonable and if so then whether it can be overlooked. Viewed within the context of the present matter, the court is required to apply the test to the applicant's delay of approximately four years in relation to the Premier's decision and a considerably longer period for the MEC's decision.[9] In doing so, the court must be guided by the principles discussed in *Asla*.

Explanation offered by the applicant

[20] Here, the applicant alleges that she was not legally represented at the time that the Commission held public hearings or when the Premier's decision was communicated to her on 17 September 2015. She avers that she was unaware that she could challenge the decision. Thereafter followed a period of two years which has not been explained by the applicant. Nevertheless, she seems to have been unhappy with the situation and became involved in litigation against Mr Nqwiliso during the course of 2017, presumably in relation to the decision itself although this is not specified. The applicant alleges that it was only then that her legal representatives indicated that a challenge was open to her but she would require a complete record of the proceedings. This was requested from the Premier. Apparently, the request was ignored. The primary cause for the delay, however, appears to be that she lacked the necessary financial resources to fund further litigation.

[21] A troubling aspect of the applicant's explanation is that there are large gaps in her account of what happened between 17 September 2015 and 13 December 2019,

[8] See the discussion in *Asla*, [44] to [72].

[9] Quite when the clock began to run with regard to the MEC's decision is not a straight-forward determination. The applicant alleges that she only became aware of it on 21 November 2019 when the certificate of recognition came to light. However, from the MEC's affidavit it seems that the decision to appoint Mr Nqwiliso had a much earlier genesis.

when she instituted these proceedings. Accepting for the moment that she was genuinely unaware, for a full two years, that she was able to launch a challenge, the applicant has simply failed to place any evidence before the court of the precise steps that she took during the following two years to request the record, to address the Premier's alleged failure to respond, to engage her legal representatives on what could be done, and to make a concerted effort to secure the necessary funding for the envisaged litigation. She has also not taken the court into her confidence about the nature of the prior litigation involving Mr Nqwiliso, which may have had a bearing on the delay. In short, her explanation is inadequate and the delay must be deemed unreasonable.

[22] Similar concerns affect the applicant's explanation for the delay with regard to the challenge brought against the MEC's decision to recognise Mr Nqwiliso. From the answering affidavit of Mr Mlibo Qoboshiyane,[10] it is apparent that the Acting Head: Traditional Affairs previously recommended the appointment of Mr Nqwiliso as headman of the Qamata Basin Administrative Area, which was approved by the MEC at the time on 7 March 2001. A certificate was allegedly issued to that effect, confirming the appointment. Several years later, the Superintendent-General: Local Government and Traditional Affairs recommended the disestablishment of the Qamata Traditional Council and the establishment of the new Qamata Basin Traditional Council, to be presided over by Mr Nqwiliso, who had been nominated to the position of chief.[11] The then MEC approved same on 19 March 2009, which was published in the Government Gazette shortly afterwards. Upon his occupying the office of MEC in turn, Mr Qoboshiyane issued a certificate of recognition to Mr Nqwiliso on 22 May 2013, certifying and recognising his appointment. A copy thereof is attached to the applicant's affidavit.

[23] Interestingly, the applicant avers that she only became aware of the above certificate on 21 November 2019, when Mr Nqwiliso produced the document for

[10] The deponent explains, at paragraph 3 of his affidavit, that 'the matter concerns activities that occurred under my watch.' It is understood from his affidavit that he had been MEC at the time that the certificate of recognition was issued to Mr Nqwiliso.

[11] The reference to 'chief' has been retained for purposes of reflecting the terminology used during communication between the various role players at the time, despite the exclusion of the term from the list of traditional leadership positions recognized under the provisions of the TLGFA 41 of 2003. See section 8 thereof in particular.

purposes of the litigation that was being conducted by the parties; no mention is made at all of when she first became aware of the *decision* made by the MEC at the time to recognise Mr Nqwiliso. There is a legal difference between the certificate and the decision, the former merely recording the existence of the latter. From the papers, it can certainly be argued that the decision to recognise Mr Nqwiliso was made as early as 7 March 2001, more than 18 years before the applicant's institution of these proceedings. For the applicant to maintain that she was unaware of the decision to appoint Mr Nqwiliso, be it with reference to the above date or to the decision made on 19 March 2009, or later, is implausible. It is simply untenable for the applicant to assert, in her capacity as an acting or regent senior traditional leader, presumably with sufficient knowledge of the details of her late husband's claim to have pursued it further after his passing in 2012, that she only knew of the decision to appoint Mr Nqwiliso when he produced a certificate during the course of litigation some seven years afterwards. The applicant's delay in relation to the MEC's decision is unreasonable, her explanation is unacceptable.

Whether the delay can be overlooked

[24] Notwithstanding the unreasonable nature of the delay in the institution of proceedings for both the Premier's and the MEC's decision, the second part of the *Khumalo* test entails an enquiry into whether such delay can be overlooked. To that effect the factors discussed in *Asla* must be taken into account.

Consequences of setting aside the decisions

[25] The first of these factors is to consider the possible consequences of setting aside the decisions in question. A key concern will be the extent to which this would create prejudice for the affected parties. If the Premier's decision to dismiss the late Mr Mbanga's claim is set aside, then this would have an immediate impact on Mr Nqwiliso; there cannot be two senior traditional leaders for the same community, especially where there is so much acrimony between the two families. Similarly, if the MEC's decision is set aside, then Mr Nqwiliso would be affected directly. He has occupied the position for a considerable length of time and the loss of the chieftaincy would undeniably result in personal disruption and upheaval.

[26] The setting aside of the decisions would have implications, too, for the Premier and the MEC inasmuch as it would set a precedent for similar challenges in the future, notwithstanding lengthy delays of several years before the institution of proceedings. Consequently, this could undermine the legitimacy and authority of the above functionaries in relation to the affected communities.

[27] However, it is possibly with regard to affected communities themselves that the most prejudice could be created in the long term. As was observed in *Gqwetha*, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions.[12] Similarly, it was observed in *Wolgroeiers Afslaers* that it can be contrary to the administration of justice and the public interest to allow such decisions or acts to be set aside after an unreasonably long period of time has lapsed.[13] The principle of *interest reipublicae ut sit finis litium*create applies. If the decisions of the Premier and the MEC are set aside, then it is unlikely that the dispute over traditional leadership of the community residing within the Qamata Basin Administrative Area will become resolved. The nature of such disputes is notoriously contentious and ongoing friction between and amongst various families can have an immensely divisive effect on a community, particularly in rural areas, where the stakes may be that much higher by reason of more limited access to resources. The setting aside of the decisions of the Premier and the MEC has the potential to exacerbate underlying tensions, lead to further uncertainty and instability, and ultimately create wider prejudice for the community in question. In contrast, the possible prejudice that would be caused to the applicant in the event that the decisions were not set aside would seem to be not as severe, especially when the lengthy delay is taken into account.

Nature of the decisions

[28] The second factor for consideration when deciding whether unreasonable delay can be overlooked, in terms of *Asla*, is the nature of the decisions themselves. Inevitably, this will entail an investigation of the merits of the matter. See *Khumalo* and the subsequent findings of the Constitutional Court in *City of Cape Town v Aurecon*

[12] *Gqwetha*, at [22].
[13] *Wolgroeiers Afslaers*, at 41E-F.

South Africa (Pty) Ltd 2017 (6) BCLR 730 (CC) and *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) BCLR 240 (CC).

[29] With regard to the Premier's decision, the applicant refers specifically to the provisions of the TLGFA, applicable at the time.[14] The Commission had authority in terms thereof to investigate and make recommendations on any traditional leadership dispute and claim, which such recommendations must be conveyed, under section 26(2)(b), to

> 'the relevant provincial government and any other relevant functionary to which the recommendations of the Commission apply 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…'

[30] The Premier represents the provincial government but the applicant asserts that the functionary responsible for traditional affairs in the Eastern Cape is the MEC. Consequently, argues the applicant, the Premier was required by section 140(2) of the Constitution to have ensured that his decision to dismiss the late Mr Mbanga's claim was counter-signed by the MEC inasmuch as the decision concerned a function assigned to the latter. This was never done.

[31] The TLGFA, in terms of section 26(2)(b), contemplated the possible delegation of powers and functions to a functionary such as the MEC. However, it is clear from the TLGFA that the Premier, in his or her capacity as the head of the executive for the province, remained the primary authority for any decisions taken in relation to the Commission's recommendations. Moreover, the Eastern Cape TLGA indicated unequivocally that the Premier enjoyed a broad range of powers and functions in relation to matters of traditional leadership and governance, including: the recognition of traditional communities and traditional councils (sections 6 and 7), the appointment of staff to traditional councils (section 12), the withdrawal of recognition (section 13), the recognition and removal of an iNkosi or iNkosana (sections 18 and 20), the recognition of regents (section 21), and so forth. Importantly, section 34 permitted the

[14] The TLGFA was subsequently repealed by the Traditional and Khoi-San Leadership Act 3 of 2019, with effect from 1 April 2021.

Premier to delegate to the MEC any power conferred in terms of the Eastern Cape TLGA, except the power to make regulations, but did not preclude the Premier from exercising such delegated power him or herself. See *Mgijima v Premier of the Eastern Cape Province and others* (949/2018) [2020] ZASCA 139 (30 October 2020), at [26] to [28].

[32] Under section 140(2) of the Constitution, a written decision of the Premier must be counter-signed by the MEC where such decision concerns a function assigned to the latter. The applicant has failed to demonstrate, however, that a decision in relation to the Commission's recommendations was ever assigned to the MEC. On the contrary, the erstwhile Premier, Mr Masualle MPL, asserts that he had authority to that effect. There was no need for the MEC to have counter-signed the Premier's decision to dismiss the late Mr Mbanga's claim.

[33] Upon the basis of the legislation in question and the facts presented in the papers, the applicant's argument is far from convincing.

[34] The applicant further asserts that the Premier's decision was unlawful because he did not provide the applicant with prior notice of the Commission's submission of its recommendations and failed to provide the applicant with an opportunity to make representations before he made the decision itself. Consequently, argues the applicant, the Premier contravened the requirements of section 3(2)(b) of PAJA and section 33 of the Constitution.

[35] The role of the Commission must be understood within the context of the dispute resolution provisions contained in chapter 6 of the TLGFA. In terms thereof, a dispute or claim that had not been resolved internally or by the provincial house of traditional leaders or by the Premier had to be referred to the Commission, which then had to investigate and make recommendations thereon.[15] Consequent to the Commission's conveyance of its recommendations, the relevant functionary was required to make a decision within 60 days and if his or her decision differed from the

[15] See sections 21(3) and 25(1) of the TLGFA. Under section 25(2), the Commission had authority to investigate and make recommendations on, *inter alia*, a traditional leadership position where the title or right of the incumbent was contested, as is the situation here.

recommendations then the functionary in question was obliged to provide written reasons for such decision.[16]

[36] The Premier has pointed out that ten days' notice of a public hearing was given to the applicant and others who supported the late Mr Mbanga's claim. Moreover, an indication was given that presentations could be made about the origins of the claim, when and how the traditional leadership position was lost, who occupied the position at the time, and why the late Mr Mbanga was the rightful successor. The hearing itself allowed the applicant and others to make the above presentations and to submit supporting documents where necessary, while emphasising that the Commission was not the final decision-maker. The above has not been disputed by the applicant and appears to be common cause.

[37] To have provided further notice before the Commission submitted its recommendations and to have provided a further opportunity to make representations prior to the Premier's making his decision seems entirely superfluous. This would have re-opened the issues to have been addressed previously at the hearing. It would have prolonged the contestation of the claim and hampered attempts to reach finality, notwithstanding the fact that the applicant had already been granted an opportunity to give substantial input to the Commission on the details of her claim.

[38] The dispute resolution provisions in chapter 6 of the TGLFA did not require further notice or further opportunity to make representations. There was simply no need to have done so and the applicant's assertions to that effect must be rejected.

[39] Turning to the MEC's decision, the applicant's argument appears to rest on the following basis: the Premier, not the MEC, was enjoined to recognise Mr Nqwiliso in terms of the provisions of the Eastern Cape TLGA; the decision was not rationally connected to the information before the MEC or the reasons provided in relation thereto, as envisaged under sections 6(2)(f)(ii)(cc) and (dd) of PAJA; and Mr Nqwiliso was disqualified from appointment by reason of his having a criminal record.

[16] Sections 26(3) and (4).

[40] In terms of section 18(3) of the Eastern Cape TLGA, the Premier was indeed required to have issued a certificate of recognition. However, section 34(1) provided that such a power could have been delegated to the MEC. The possibility that a delegation was made cannot be excluded, although neither the Premier nor the MEC has suggested that this was so. Crucially, however, a legal distinction must be drawn between the certificate and the decision itself to recognise Mr Nqwiliso. The certificate was merely evidence of such a decision. This, in turn, gives rise to the question: which decision? From the respondent's papers, it is apparent that there was more than one decision that could possibly have been challenged: the decision made on 7 March 2001 to recognise the appointment of Mr Nqwiliso as headman;[17] the decision made on 19 March 2009 to disestablish the Qamata Traditional Council and to establish the Qamata Basin Traditional Council, effectively recognising Mr Nqwiliso as the presiding chief; or the most recent decision. The applicant has not dealt with this issue but has simply attacked the certificate.

[41] Furthermore, the applicant has not demonstrated precisely what facts or details were before the MEC such that the latter's decision was not rationally connected thereto or to the reasons provided therefor. The applicant seems to suggest that the amalgamation of locations 31 and 32 in 1914 under the leadership of Chief Nqwiliso was 'seemingly irregular', to use the language of Prof Peires,[18] but absent an explanatory affidavit from the learned writer or some other historical evidence to corroborate and support such an assertion, it holds little evidentiary value. In the end, nothing much turns on it in relation to the nature of the MEC's decision.

[42] As to the applicant's argument that Mr Nqwiliso's criminal record prevented him from having been appointed, sections 12(1)(a) of the TLGFA and 20(1)(a) of the Eastern Cape TLGA stipulated that a senior traditional leader could have been removed from office on the grounds of, *inter alia*, conviction of an offence with a sentence of imprisonment for more than 12 months without the option of a fine. In the present matter, Mr Nqwiliso has admitted that he was convicted of culpable homicide in or about 1979 but was given the option of a fine, which he paid immediately.

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[17] This decision did, of course, precede the promulgation of the Eastern Cape TLGA. It is not clear whether either the Premier or the MEC was empowered to have made such a decision at the time.

[18] See paragraph 10 of the document prepared by Prof Peires, contained at pp 17-19 of the record.

[43] Overall, the applicant's challenge to the decisions made by the Premier and the MEC falls short of what would be necessary to demonstrate, on a balance of probabilities, that they were plainly unlawful. The applicant has simply failed to adduce sufficient evidence to that effect.

Conduct of the applicant

[44] The third factor to be considered, in terms of *Asla*, is the conduct of the applicant. Admittedly the applicant is not a functionary and the standard of conduct to be expected from an official attached to an organ of state, as described in cases such as *MEC for Health, Eastern Cape and another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (5) BCLR 547 (CC), is not of immediate application. Nevertheless, there is a minimum standard that a litigant must meet before a court can be in a position to overlook an unreasonable delay. Mindful of the lengthy nature of the delay, here, and the potential prejudice that could be created for the respondents and the affected community in particular, it would have been expected that the applicant would have ensured that the allegations made in her papers were properly substantiated. Assertions with regard to historical events should have been underpinned by proper reference to a written or verbal record or some other credible source, confirmed or supported by affidavit, and corroborated where necessary. The applicant's papers are inadequate in that regard. Instead, broad and sweeping allegations are made, without substantiation, placing the respondents at a disadvantage in knowing exactly what case to meet and complicating the task of the court.

[45] Accordingly, the conduct of the applicant has not served to assist. It has not served to persuade the court that the unreasonable delay can be overlooked.

Constitutional obligations

[46] The final consideration is whether, despite there being no basis upon which to overlook the applicant's unreasonable delay, the court may nevertheless be constitutionally compelled to declare the conduct of the respondents as unlawful. From the preceding paragraphs, there is no constitutional obligation on the part of the court

to set aside the decisions of the Premier or the MEC. Furthermore, there is no constitutional obligation to declare the Commission's recommendations unlawful, as will be seen below.

DECLARATOR IN RELATION TO THE COMMISSION'S RECOMMENDATIONS

[47] The applicant seeks an order to the effect that the Commission's recommendations to the Premier be declared unlawful.[19] Presumably the applicant adopted such an approach for purposes of obtaining alternative relief in the event that her application for the review of the Premier's decision was unsuccessful. The crux of the applicant's argument is the contention that the Commission misconstrued the nature of the powers granted to it under section 25 of the TLGFA.

[48] The Commission's recommendations to the Premier seem to have been based primarily on the understanding that the claim of the late Mr Mbanga pre-dated 1 September 1927, which served as a cut-off date for the ambit of the Commission's authority. This understanding, in turn, informed the Premier's decision. The applicant argues that the provisions of section 25(2)(a)(vi) of the TLGFA authorised the Commission to consider events before the cut-off date and that this was reinforced by the provisions of section 25(4).

[49] The relevant provisions of section 25 of the TLGFA read as follows:

> '(2) (a) The Commission has authority to investigate and make recommendations on-
>
> (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;

[19] In her pleadings, the applicant appears to conflate an application for a declarator with a review application. For immediate purposes, the relief sought in the notice of motion to the effect that the recommendations be declared unlawful informs an analysis of the merits of the applicant's case.

(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) 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

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

(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 claim and any other relevant information.

(c) The Commission may decide not to consider a dispute or claim on the ground that the person who lodged the dispute or claim has not provided the Commission with relevant or sufficient information or the provisions of section 21 have not been complied with.

(3) (a) When considering a dispute or claim, the Commission must consider and apply customary law and the customs of the relevant traditional community as they applied when the events occurred that gave rise to the dispute or claim.

(b) The Commission must-

(i) in respect of a kingship or queenship, be guided by the criteria set out in sections 2A(1) and 9(1); and

(ii) 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.

(c) Where the Commission investigates disputes resulting from the determination of traditional authority boundaries and the merging or division of "tribes", the Commission must, before making a recommendation in terms of section 26, consult with the Municipal Demarcation Board established by section 2 of the Local Government: Municipal Demarcation Act, 1998 (Act 27 of 1998) where the traditional council boundaries straddle municipal and/or provincial boundaries.

(4) Subject to sub-section (5) the Commission-

(a) may only investigate and make recommendations on those disputes and claims that were before the Commission on the date of coming into operation of this chapter; and

(b) must complete the matters contemplated in paragraph (a) within a period of five years, which period commences on the date of appointment of the members of the Commission in terms of section 23, or any such further period as the Minister may determine.

(5) Any claim or dispute contemplated in this chapter submitted after six months after the date of coming into operation of this chapter may not be dealt with by the Commission.'

[50] The original TLGFA was amended by the Traditional Leadership and Governance Framework Amendment Act 23 of 2009 ('the Amendment Act'), which replaced the old dispute resolution provisions in chapter 6. The new provisions took effect on 1 February 2010. Despite the applicant's allegations to the contrary, the date upon which the claim was lodged must be taken as 23 May 2011, in accordance with

the usual principles that govern disputes of fact.[20] See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), at 634H-635B, and also *Dhladhla v Erasmus* 1999 (1) SA 1065 (LCC), at 1072. The Commission made its recommendations to the Premier on or about 30 March 2015.

[51] The contents of section 25(2)(a)(vi) referred to disputes arising from the determination of traditional authority boundaries, which does not seem immediately pertinent to the applicant's case. On the assumption that the applicant intended to refer to section 25(2)(a)(vii), the provisions thereof are clear: the Commission's authority is limited to claims and disputes that arose *after* 1 September 1927. The applicant's claim rests on the alleged loss of traditional leadership when Chief Nqwiliso was appointed as headman of the amalgamated locations 31 and 32 in 1914, to constitute the Qamata Basin Administrative Area. This historical event, to the extent that it has been accurately described by the parties, lies at the heart of the claim pursued by the applicant and patently fell outside the authority of the Commission at the time.

[52] The applicant's reliance on section 25(3) does not take the matter further. The cut-off date prevented the Commission from investigating the claim.

[53] To the extent that the applicant relies on section 25(4), this is also of no assistance. On the contrary, when read with section 25(5), the provisions thereof appear to indicate that the Commission was never authorised to have dealt with the claim in the first place, by reason of its not having been before the Commission on 1 February 2010 or within six months after that date.

[54] Insofar as counsel for the applicant argued that the principles set out in *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims and Others* [2014] ZACC 36 are relevant, that case dealt with an investigation carried out in 2005 by the Commission with regard to the traditional leadership of the Bapedi

[20] The applicant states in her founding affidavit that the claim was lodged with the Premier, not the Commission, in 2009. The erstwhile chairperson of the Commission, Mr Nokuzola Mndende, points out that that the claim was lodged with the Commission on 23 May 2011, pursuant to a letter from the Superintendent-General: Department of Local Government and Traditional Affairs to the late Mr Mbanga, inviting him to lodge his claim with the Commission. The letter forms part of the record. In the circumstances, there is no real dispute of fact.

community, which culminated in a report that was submitted to the President in 2008.[21] The relevant time period preceded the changes brought about to the dispute resolution provisions of chapter 6 in terms of the Amendment Act. The case in question does not address the situation that applied under the amended TLGFA.

[55] Accordingly, there is no basis upon which to contend, as the applicant has done, that the Commission misconstrued the nature of the powers granted to it under the TLGFA. The recommendations of the Commission must stand.

THE PREMIER'S APPLICATION FOR CONDONATION

[56] The only remaining issue to be decided is the Premier's application for condonation with regard to the late filing of his answering affidavit. In terms thereof, he has provided a comprehensive account of the delay and properly addressed the question of good cause and the prospects of success in relation to opposition to the main application.

[57] The applicant has not opposed the application for condonation and the information contained in the answering affidavit has been essential for purposes of determining the main application, especially so in light of the deficiencies in the applicant's papers. There is no reason for the court to refuse condonation.

RELIEF AND ORDER TO BE GRANTED

[58] The delay in the applicant's institution of proceedings is indisputably unreasonable. Overall, upon application of the *Asla* principles, which include taking into consideration factors such as the possible consequences of setting aside the decisions, the nature of the decisions themselves, and the conduct of the applicant, the court is not prepared to overlook the delay. Furthermore, the court cannot find any constitutional obligation to set aside the decisions.

[21] See [25], [70] and [71].

[59] With regard to the Commission's recommendations, the applicant has failed to make out a case for a declaration to the effect that the recommendations be declared unlawful.

[60] Consequently, the relief sought by the applicant cannot be granted and the usual costs order must follow.

[61] In the circumstances, the following order is made:

(a) the main application is dismissed with costs; and

(b) the Premier's application for condonation is granted, but with no order for costs.

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JGA LAING
JUDGE OF THE HIGH COURT

APPEARANCE

Counsel for the applicant:	Adv L L Ngumle, instructed by L Jikela Attorneys, Mthatha.
Counsel for the 1st and 2nd respondents:	Adv A M Bodlani, instructed by the Office of the State Attorney, Mthatha.
Counsel for the 4th respondent:	Adv I S Gagela, instructed by Messrs Makade Inc, Mthatha.
Date of hearing:	20 January 2022
Date of delivery of judgment:	22 March 2022