FORM A
FILING SHEET FOR TRANSKEI DIVISION JUDGMENT

PARTIES**:**

MICHAEL GCINIKHAYA GWADISO **FIRST APPLICANT**
LINDELA GWADISO **SECOND APPLICANT**

And

MEMBER OF THE EXECUTIVE COUNCIL DEPARTMENT OF HOUSING, LOCAL GOVERNMENT AND TRADITIONAL AFFAIRS AND ANOTHER **FIRST RESPONDENT**
MHLABUNZIMA NWANTSU **SECOND RESPONDENT**

(2) Case Number: 1003/2007

(3) High Court: MTHATHA

(4) DATE HEARD: 23 SEPTEMBER 2008

DATE DELIVERED: 30 OCTOBER 2008

JUDGE(S): PETSE ADJP

LEGAL REPRESENTATIVES –

Appearances:

2. for the Applicant(s): ADVOCATE M. NONKONYANA
3.
4. for the Respondent(s): ADVOCATE F.S. GAGELA
5.

Instructing attorneys:

(i) Applicant(s): MPUMELELO NOTUNUNU & COMPANY
(ii)

(ii) Respondent(s): THE STATE ATTORNEY, EAST LONDON

CASE INFORMATION -

(i) *Nature of proceedings*:
(ii) Topic:
(iii) Key Words:

IN THE HIGH COURT OF SOUTH AFRICA

[TRANSKEI DIVISION] CASE NO.1003/2007

In the matter between:

MICHAEL GCINIKHAYA GWADISO
[obo KHONJWAYO TRADITIONAL COUNCIL] **FIRST APPLICANT**

LINDELA GWADISO **SECOND APPLICANT**

And

MEMBER OF THE EXECUTIVE COUNCIL : DEPARTMENT OF HOUSING, LOCAL GOVERNMENT AND TRADITIONAL AFFAIRS **FIRST RESPONDENT**

MHLABUNZIMA NWANTSU **SECOND RESPONDENT**

JUDGEMENT

PETSE ADJP:

THE PARTIES

[1] The first applicant is Michael Gcinikhaya Gwadiso who brings these proceedings in his representative capacity as Acting Chief and Head of the Khonjwayo Traditional Council established by virtue of Transkei Authorities Act 4 of 1965 ("Transkei") as read with section 4 of the Traditional Leadership and Governance Act 4 of 2005 (Eastern Cape) which came into operation on 1 April 2005.

[2] The second applicant is Lindela Gwadiso who has described himself as a duly appointed headman of Mamolweni administrative area in the district of Ngqeleni.

[3] The first respondent is the Member of the Executive Council responsible for the Department of Housing, Local Government and Traditional Affairs in the Province of the Eastern Cape.

[4] The second respondent is Mhlabunzima Nwantsu an adult male resident of Mamolweni administrative area in the district of Ngqeleni.

[5] The applicants instituted these proceedings against the respondents on 25 July 2007 and, despite opposition by the respondents, obtained a *rule nisi* on 4 October 2007 in the following terms :

"1. **THAT** the appointment of the 2nd respondent as headman of Mamolweni Administrative Area, Ngqeleni by the 1st respondent be and is hereby set aside.

2. **THAT** the 2nd respondent be and is hereby interdicted from assuming the position of headman of Mamolweni Administrative Area, Ngqeleni.

3. **THAT** the 2nd respondent be and is hereby restrained from interfering in the administration of the affairs of the community of Mamolweni Administrative Area, Ngqeleni.

4. **THAT** the appointment of the 2nd respondent as headman of Mamolweni Administrative Area, Ngqeleni be and is hereby declared null and void and of no force or effect whatsoever.

5. **THAT** the 1st respondent is hereby directed to reinstate the 2nd applicant as Acting Headman of Mamolweni Administrative Area, Ngqeleni on the same terms and conditions that existed prior to his termination or withdrawal of his appointment.

6. **THAT** the respondents pay costs of this application jointly and severally with one paying the other to be absolved."

[6] Both respondents are opposing the confirmation of the *rule nisi* aforesaid and to that end have filed answering affidavits in which they fully set out the bases upon which the grant of the relief sought by the applicants is resisted.

[7] Although the papers in these proceedings comprise some 223 pages it has turned out, on a reading thereof, that the issue that I am called upon to decide is confined to a narrow campass.

FACTUAL BACKGROUND :

[8] So as not to unduly overburden this judgment I have decided at the outset against repeating in any great detail the evidence presented in the affidavits filed of record in these proceedings. I shall merely content myself by capturing the main thrust of the case made out by the applicants in their founding and replying affidavits.

[9] The case of the applicants is simply this :

(i) that the second applicant was nominated and appointed as the headman of Mamolweni administrative area in accordance with custom and tradition of the Khonjwayo tribe after due consultation with the subjects (i.e. residents) of Mamolweni administrative area who unanimously agreed on second applicant being so appointed.

(ii) the appointment of the second applicant was duly recognised by the first respondent in accordance with the prescripts of applicable statutory law after the second applicant had been appointed by the Khonjwayo Tribal Authority as required in terms of sec 41 of the Transkei Authorities Act 4 of 1965.

(iii) despite the appointment of the second applicant the first respondent, when s/he realised that the appointment of the second applicant was "wrongful" because there had been no consultation with the "registered voters" (i.e. subjects) at Mamolweni administrative area, contended that the second applicant had simply been imposed on the subjects.

(iv) that although the first respondent had afforded the applicants the opportunity of making representations in regard to the need or otherwise of revoking the second applicant's appointment the applicants consciously and deliberately did not avail themselves of this opportunity for they considered that the first respondent had no legal competence to question and/or assail the appointment of the second applicant.

(v) the first respondent then revoked the appointment of the second applicant after having consulted the voters of the area and received confirmation that the first applicant had misrepresented to the Nyandeni Regional Authority under which the Khonjwayo Tribal Authority falls that the voters of the area had been consulted when in fact and in truth this had not been the case.

(vi) that notwithstanding the fact that the applicants had been invited by the first respondent to attend a meeting of the voters at which it was sought to ascertain the will of the voters they adopted the stance that they would not attend such a meeting contending that such a meeting was "irregular" and that any decisions adopted at such a meeting were

null and void for the power and/or authority to appoint a headman for Mamolweni administrative area vested in the first applicant.

(vii) it is thus contended by the applicants that it is not legally competent for the first respondent to review his previous decision recognising the appointment of the second applicant as headman and that the proper course that the first respondent should have taken was one of instituting judicial review proceedings to set aside the appointment of the second applicant.

[10] On the other hand the case of the respondents amounts to this :

(i) the first respondent had received a complaint channelled through the Nyandeni Regional Authority the effect of which was that the second applicant was appointed by the first applicant without proper consultation with the community of Mamolweni administrative area in that the first applicant had stifled debate on the issue and had in fact imposed the second applicant on the community as their headman.

(ii) that first applicant as Head of Khonjwayo Traditional Council had misrepresented to the Nyandeni Regional Authority that the second

applicant enjoyed the unanimous support of every member of the community in the area when in fact and in truth this was not the case.

(iii) that pursuant to this complaint the applicants were invited to make representations on the matter and more particularly to show cause why the appointment of the second applicant as a headman should not be revoked.

(iv) that the applicants failed to attend a meeting convened at the behest of the first respondent to gauge the views of the members of the community on the matter despite an invitation extended to them of which they were aware.

(v) that the Head of Nyandeni Regional Authority confirmed that it had supported the appointment of the second applicant under the misconception induced by the applicants' misrepresentation that the second applicant in fact enjoyed the unanimous support of the community of Mamolweni administrative area when in truth and in fact this was not the case.

(vi) having conducted investigations into the matter and thereby establishing the true state of affairs the first respondent called upon the

applicants to make representations to him as to why the appointment of the second applicant as headman should not be declared wrongful given the fact that there was no consultation with the community as required in terms of the law.

(vii) despite receiving the first respondent's letters inviting their representations the applicants failed and/or neglected to make any representations whatsoever.

(viii) after due consideration of all relevant factors the first respondent considered it his statutory duty and responsibility to revoke what he believed to be a wrongful appointment of the second applicant as headman when it became evident from, *inter alia*, the meetings of the community that the second respondent enjoyed overwhelming support for headmanship whereas the second applicant did not.

So much then for the respective contentions of the parties in these proceedings.

ARGUMENT :

[11] This matter was postponed from time to time and ultimately served before me on 23 September 2008. At the hearing Mr Nonkonyana who appeared for the applicants advanced two principal submissions which I set out below. He argued that :

(i) First : the power to appoint a headman vests in the royal family and/or the Tribal Authority under which such headman falls and no one else.

(ii) Second : that the Premier / Member of the Executive Council once s/he has accepted the appointment by the royal house/Tribal Authority and recognises the appointment s/he could not herself/himself some years into the future rescind her/ his act of recognition/appointment of the headman concerned for whatever reason because once recognition takes place the

Premier / Member of the Executive Council becomes *functus officio*. His/her remedy would be to institute judicial review proceedings in the courts of the land if s/he were to either entertain some doubt and/or form a definitive opinion that the recognition or appointment was wrongful.

[12] On his part Mr Gagela, counsel for the respondents advanced one simple submission the upshot of which is that the first respondent had the requisite statutory competence to revoke the appointment of the second applicant as headman and that such competence derived from sec 20(l) (c) of the Traditional Leadership and Governance Act 4 of 2005 ("the Act"). In elaboration Mr Gagela submitted that there was overwhelming evidence that the second applicant's appointment did not enjoy the support of the community of the area in respect of which he was appointed given the fact that the community was not consulted in accordance with the prescripts of the law.

[13] This application, on the view I take of the matter, hinges solely on the interpretation of sub-section (l) (c) of sec 20 of the Act upon which the respondents heavily rely in opposing the grant of the relief sought by the applicants *in casu*.

[14] With a view to facilitating a proper appreciation of the import and effect of sec 20(1) (c) of the Act it would, in my judgment, be convenient and advisable for reasons that will become more apparent later in this judgment if I were to set out the provisions of sec 20 of the Act in full despite the fact that the respondents have confined themselves to sub-section (1) (c) only. This section reads thus :

"20 Removal of iNkosi or iNkosana

(1) An iNkosi or iNkosana may be removed from office on the grounds of -

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

(b) physical incapacity or mental infirmity which, based on acceptable medical evidence, makes it impossible for that iNkosi or iNkosana 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*** *–*

(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 subsection (3).

(3) 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 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.

(4) Where an iNkosi or iNkosana is removed from office, a successor in line with custom may assume the position, role and responsibilities, subject to the provisions of this Act.

[15] I have put the introductory provisions of sec 20(2) of the Act above in parenthesis for a reason that will become more apparent later in this judgment.

[16] I consider it timely at this juncture to say a word or two about the proper approach to adopt when a court interprets a statutory provision. The general and elementary rule of statutory interpretation is that the first enquiry in interpreting

any legislation must be to ascertain the intention of the Legislature by reference to the language used with particular regard to the context of the legislation in question. See in this regard : **L C Steyn : Die Uitleg Van Wette – Fourth Ed; S v Gordonia Printing and Publishing Co. and Another, 1962 (3) SA 51 (CPD) at 54.**

[17] I emphasise the fact that whilst it is a well-established rule of construction that words used in a statute must be interpreted in the light of their context it must, however, be borne in mind that, in this regard, the 'context' :

'is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background.

. . .

(T)he legitimate field of interpretation should not be restricted as a result of an excessive peering at the language to be

interpreted without sufficient attention to the contextual scene.'

See in this regard : **Jaga v Dongen N.O. and Another; Bhana v Donges NO and Another 1950 (4) SA 653 (A)** at **662 G-H and 664 H**. This dictum from **Jaga 's** case has been quoted with approval by the Constitutional Court in, inter alia, **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others, 2004 (4) SA 490 (CC**) with that court remarking further with reference to **Thoroughbred Breeders' Association v Price Waterhouse 2001 (4) SA 551 (SCA)** in a passage appearing at **para [12]** of the concurring judgment by Marais JA, Farlam AJA and Brand AJA

that the emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous. The relevant passage from the **Thoroughbred Breeders' Association** case, supra, reads thus:

'The days are long past when blinkered peering at an isolated provision in a statute was thought to be the only legitimate technique in interpreting it if it seemed on the

face of it to have a readily discernible meaning. As was said in **University of Cape Town v Cape Bar Council and Another B 1986 (4) SA 903 (A) at 941D - E:**

'I am of the opinion that the words of s 3(2) *(d)* of the Act [the Admission of Advocates Act 74 of 1964], clear and unambiguous as they may appear on the face thereof, should be read in the light of the subject-matter with which they are concerned, and that it is only when that is done that one can arrive at the true intention of the Legislature.'

[18] As I have already alluded to above it has also long been recognised in our case law that the aim of statutory interpretation is to give effect to the object or purpose of the legislation in question. Thus, in **Standard Bank Investment Corporation Ltd v Competition Commission and Others; Liberty Life Association of Africa Ltd v Competition Commission and Others 2000 (2) SA 797 (SCA) para [16]** Schutz JA, writing for the majority of the court, stated that:

"Our Courts have, over many years, striven to give effect to the policy or object or purpose of legislation. This is reflected in a passage from the judgment of **Innes CJ in Dadoo Ltd and Others v Krugersdorp Municipal Council 1920 AD 530 at**

543. But the passage also reflects that it is not the function of a court to do violence to the language of a statute and impose its view of what the policy or object of a measure should be."

[19] The learned judge of appeal made reference in para [21] to the case of **Public Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd and Others 1990 (1) SA 925 (A)** as illustrative of the proposition that 'our law is an enthusiastic supporter of "purposive construction" in the sense stated by Smalberger JA' in that case as follows at **942I -944A**:

" The primary rule in the construction of statutory provisions is to ascertain the intention of the Legislature. It is now well established that one seeks to achieve this, in the first instance, by giving the words of the enactment under consideration their ordinary grammatical meaning, unless to do so would lead to an absurdity so glaring that the Legislature could not have contemplated it. . . . Subject to this proviso, no problem would normally arise where the words in question are only susceptible to one meaning: effect must be given to such meaning. In the present instance the words [which fell to be interpreted by the court] are not linguistically limited to a single ordinary grammatical meaning. They are, in their context, on a literal interpretation, capable of bearing the different meanings ascribed to them by the applicants, on the one hand, and the respondents, on the other. Both interpretations

being linguistically feasible, the question is how to resolve the resultant ambiguity. As there would not seem to be any presumptions or other recognised aids to interpretation which can assist to resolve the ambiguity, it is in my view appropriate to have regard to the purpose of [the statutory provision in question] in order to determine the Legislature's intention.

. . .

. . . Mindful of the fact that the primary aim of statutory interpretation is to arrive at the intention of the Legislature, the purpose of a statutory provision can provide a reliable pointer to such intention where there is ambiguity.

. . .

Be that as it may, it must be accepted that the literal interpretation principle is firmly entrenched in our law and I do not seek to challenge it. But where its application results in ambiguity and one seeks to determine which of more than one meaning was intended by the Legislature, one may in my view properly have regard to the purpose of the provision under consideration to achieve such objective."

[20] It is as well to bear in mind that not only must the words used in a statute be given their ordinary meaning but also that if the meaning of the words of an Act is clear that meaning must be given effect to unless to do so would result to an absurdity that is utterly glaring or is at variance with the intention of the Legislature as deduced from the words used and the overall content and general scheme of the Act concerned. See in this

regard : **Venter v R 1907 TS 910 – 915 TS 910** at **914 – 915; S v Shangase 1972 (2) SA 410 (N); Shenker v The Master & Another 1936 (AD) 136** at **143; New Rietfontein Gold Mines Ltd v Misnum 1912 (AD) 629** at **634; S v De Abreu 1981 (1) SA 417 (T)** at **421 A; Public Carriers Association & Others v Toll Road Concessionaries (Pty) Ltd and Others 1990 (1) SA 925 (A)** at **943**.

[21] It is also trite that when interpreting any statutory provision a court is not entitled to import words into a statute that do not appear therein nor limit the full import of such words if the meaning of the words used is clear and unambiguous save in exceptional circumstances recognised in law. See in this regard : **L C Steyn : Die Uitleg Van Wette 5th Ed;** at **p14 -16.** Equally trite is the proposition that the language of the statute must neither be extended beyond its natural sense and proper limits in order to supply omissions or defects, nor strained to meet the justice of an individual case. See in this regard :

Union Government v Thompson 1919 (AD) 404 at **425, R v Tebetha 1959 (2) SA 337 (AD)** at **346.**

[22] There can be no doubt in my judgment that on a proper construction of sec 20(1)(c) of the Act it clearly confers power on the first respondent to remove a headman whose appointment or recognition is considered to have been wrongful. There can thus be no room for the contention advanced by Mr Nonkonyana that the first respondent is not himself/herself empowered to remove a headman from his/her position on the basis that to do so amounts to a review by the first respondent of his / her own administrative action which, so went the argument by Mr Nonkonyana, is impermissible because it violates the *functus officio* principle.

[23] It is therefore my view that there is no substance in the argument that the first respondent should have instead instituted judicial review proceedings if s/he were of the view that the

appointment and/or recognition of the second applicant was wrongful.

[24] Although the papers are, as I have already intimated above, somewhat voluminous it soon became common cause between counsel during argument that the success or failure of the application hinged on two critical issues which are the following :

(i) First : the identity of the person/functionary upon whom the statutory power to terminate the appointment of a chief/headman vests as between the Premier/Member of the Executive Council on the one hand and the royal family on the other.

(ii) If this Court finds that such power vests in the Premier/Member of the Executive Council the next question that would arise for determination would be whether the applicants were afforded the opportunity by the

Premier/Member of the Executive Council to make representations before the decision to terminate the headmanship of the second applicant was taken. I digress to mention that it was conceded by Mr Nonkonyana that if it were found by this Court that the applicants were afforded the opportunity to make representations before the decision to terminate the second applicant's headmanship was taken the applicants would have no reason to be aggrieved if it was their choice not to avail themselves of such an opportunity.

[25] Counsel were agreed that if the issue referred to in (i) above were to be resolved in favour of the royal family *cadet quaestio* . On the other hand if such issue were to be resolved in favour of the Premier / Member of the Executive Council the question posed in (ii) above would then arise for determination by this Court. I now hasten to address those issues.

[26] Whilst Mr Nonkonyana was constrained to concede that the Member of the Executive Council had powers to rescind an

appointment of a chief / headman which s/he considered to have been made wrongfully within the purview of sec 20 (1) (c) of the Act he nevertheless contended that in exercising such powers the Member of the Executive Council was required to refer the matter to the royal family for investigation and report thereon. The foundation for this contention, so argued Mr Nonkonyana, was to be found in sec 18 (4) (c) of the Act. Thus Mr Nonkonyana submitted that sec 20(1)(c) has, regard being had to the rules of statutory interpretation, to be read with sec 18(4)(c) because both of them are contained in Chapter 4 of the Act which deals with recognition and removal of a chief/headman from office. It is my judgment that reliance by Mr Nonkonyana on sec 18(4)(c) of the Act is misplaced. Whilst it is so that both sections 18(4) (c) and 20(1)(c) of the Act are contained in Chapter 4 thereof the argument advanced by Mr Nonkonyana entirely overlooks the fact that the provisions that deal with recognition of a chief/headman are self-contained in sec 18 whereas sec 20 deals exclusively with removal of a chief/ headman from office. On a proper construction of sec 20(1)(c)

of the Act there is nothing that requires the Member of the Executive Council to refer the matter to the royal family for investigation and report thereon to him/her before the Member of the Executive Council can invoke the provisions of sec 20(1)(c). I am fortified in this view if proper regard is had to the introductory portion of the provisions of sec 20(2) of the Act to which reference has already been made in paragraph [14] of this judgment.

[27] It is my view that to uphold the submission forcefully advanced by Mr Nonkonyana on the circumstances of this case would violate a cardinal rule of statutory interpretation in that such a approach would amount to the *"extension beyond the natural sense and proper limits in order to supply omissions or defects"* perceived or real in sec 20(1)(c) of the Act. I therefore have no hesitation in declining Mr Nonkonyana's invitation to adopt that approach *in casu* for to do so would also violate the doctrine of separation of powers which is entrenched in our Constitution. Bearing in mind that the function of the Court is

to declare the law and not to make it, it must necessarily follow the Legislature to cure that. Speaking for myself though I venture to say that taking an objective view of the matter there can be no doubt regard being had to the 'overall content and the general scheme of the Act" that the Legislature was clearly conscious of what it was doing and sought to achieve its objectives by explicitly excluding section 20 (1)(c) from the realm of sec 20 (2) of the Act.

[28] Mr Nonkonyana also sought to persuade this Court that the meetings held by the officials of the first respondent to inquire into the substance of the complaint lodged with him/her relating to the appointment of the second applicant which claimed that the second applicant's appointment was not preceded by any consultation with the members of the community as was required in terms of the law governing such appointment (then in force) were not properly convened in that they were convened at the behest of the first respondent when,

as he put it, 'protocol required that only the Head of the Khonjwayo Tribal Authority had powers to do so.'

[29] It is my judgment that this contention is untenable for at least two reasons. First, it must be remembered that the complaint lodged with the first respondent was directed at the conduct of the applicants in flouting the law. It is thus no surprise therefore that the applicants adopted the stance they did, namely that there was no need to inquire into the question of whether the appointment of the second applicant was preceeded by consultation or not for they claimed that all was well. Second, the first respondent is the overall custodian of traditional affairs within the province and is thus under statutory duty to oversee the proper implementation of the Act. It would have been culpably remiss of the first respondent to leave it to the applicants whose interests were directly at stake to, in a manner of speaking, drive the process of conducting investigations into an impropriety attributable to them. Ultimately Mr Nonkonyana was constrained to conceded that

this Court could not simply turn a blind eye to what had transpired at those meetings despite his earlier contention that in holding such meetings the first respondent's officials "meddled" in the internal affairs falling exclusively within the domain of the applicants.

[30] Having come to the conclusion that it was the sole prerogative of the first respondent and not the royal family to act in terms of sec 20 (1) (c) of the Act it remains now to consider whether on the evidence presented before this Court the applicants were afforded the opportunity of making representations to the first respondent before the decision to rescind the recognition of the appointment of the second applicant as an acting headman was taken. Mr Nonkonyana argued that no such opportunity was accorded the applicants. On his part Mr Gagela contended otherwise.

[31] There can be no doubt that both applicants had made common cause with each other in relation to the complaint

against them. They had both showed common cause when allegations of impropriety on their part came to light. Both were sent letters by first respondent's officials advising them of the nature of the complaint lodged with the first respondent that implicated the applicants inviting them to make representations. The first applicant responded to say that there was no substance in the allegations and that no investigation into the matter was warranted. On his part the second applicant denies that he ever received any letter from the first respondent's officials inviting him to make representations. Whilst conceding that there was no proof that the second applicant had indeed received the letter addressed to him inviting him to make representations on the matter if he desired to do so Mr Gagela nevertheless argued that on the papers the inference was irresistible that the second applicant had in fact received such a letter and that his denial should accordingly be approached with great reserve.

[32] On reading the papers I could find nothing to indicate that the second applicant had not received the letter written to him

inviting his representations. The concession by Mr Gagela is not binding on the respondents it being a legal concession which has since turned out to have been erroneous. It is trite that the Court is not bound by a legal concession made by counsel if in the view of the Court such concession is clearly erroneous. In this regard the remarks of Ngcobo J in **Matatiele Municipality v President of the Republic of South Africa 2006 (5) SA 47 (CC)** are apposite. The learned Justice said the following at para [67] in articulating this principle :

"[67] Here, we are concerned with a legal concession. It is trite law that this Court is not bound by a legal concession if it considers the concession to be wrong in law….[T]his Court firmly rejected the proposition that it is bound by an incorrect legal concession, holding that, 'if that concession was wrong in law [it], would have no hesitation whatsoever in rejecting it'. Were it to be otherwise, this could lead to an intolerable situation where this Court would be bound by a mistake of law on the part of a litigant. The result would be the certification of law or conduct as consistent with the Constitution when the law or conduct, in fact, it is inconsistent with the Constitution."

Although this dictum has more to do with a legal concession it seems to me that by parity of reasoning it applies with equal force in a situation such as the present in which counsel made a concession as a consequence of his erroneous view in relation to the facts of the matter.

[33] Even if I am wrong in holding the view that the second applicant had received the letter inviting him to make representations but chose to ignore it there is in my view yet another basis upon which the argument advanced on his behalf on this score is unavailing. I have already alluded to the fact that there was from the outset an identity of interests between the applicants. In responding to the letter addressed to it the Khonjwayo Tribal Authority was in fact and in deed also advancing the cause of the second applicant in adopting the stance it did when it responded to the first respondent on the issue of the representations that it was invited to make, if so minded. It therefore can hardly lie in the mouth of the second applicant to contend that he never was afforded an opportunity

to make representations to the first respondent before his headmanship was terminated. It thus follows that the second applicant's denials in relation to this aspect of the matter are, in my view, at best for him disingenuous and at worst utterly contrived.

[34] Before concluding this judgment I am constrained to say a word or two about the failure and/or neglect of the respondents' legal representatives to file the respondents' heads of argument timeously as required in terms of the practice of this Division. The respondents' heads of argument were filed on the eve of the hearing of the matter. No explanation whatsoever was proffered for this flagrant disregard of this Court's practice. Before Mr Gagela, counsel for the respondents, addressed me on the merits of the application I raised this shortcoming on their part with him and intimated to him that when his turn came to present his argument I would expect him to address me on the question of whether this would not be a proper case to deprive the legal representatives of the respondents their fees for the day as a

mark of this Court's displeasure at their remissness. Mr Gagela availed himself of that opportunity and was candid enough to accept full responsibility for the respondents' camp remissness. He went on to submit that it would be too harsh a sanction for this Court to deprive them of their fees in respect of their appearance in Court on 23 September 2008. He then made a passionate plea that a severe censure short of depriving them of their fees would be an eminently reasonable sanction to impose given the fact that it was for the first time ever for him to find himself in such an embarrassing situation.

[35] After some anxious consideration I have to say that not without hesitation I have relented and thus decided against marking this Court's displeasure by imposing a sanction as severe as that which I had initially contemplated but instead feel that I should give counsel and his instructing attorney some respite in the hope that their remissness will not recur in the future. I trust that they will take this as a friendly warning that time will come when culpable remissness of the kind

obtaining in this case will in future receive the strongest censure from this Court and if need be on pain of counsel being deprived their fees as between themselves and their clients. So much for this unsavoury aspect of this matter.

[36] Reverting to the issue at hand it is therefore my judgment that in all the circumstances this application must fail.

[37] In the result the following order shall issue :

The application is dismissed with costs.

_____

X. M. PETSE

JUDGE OF THE HIGH COURT

HEARD ON : 23 SEPTEMBER 2008

DELIVERED ON : 30 OCTOBER 2008

COUNSEL FOR THE APPLICANTS : ADVOCATE M. NONKONYANA

INSTRUCTED BY : MPUMELELO NOTUNUNU & COMPANY

COUNSEL FOR THE RESPONDENTS : ADVOCATE F.S. GAGELA

INSTRUCTED BY : THE STATE ATTORNEY EAST LONDON