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

CASE NO. 3176/2018

In the matter between:

ZOLANI DINWA **APPLICANT**

And

DIRECTOR OF PUBLIC
PROSECUTIONS: TRANSKEI **FIRST RESPONDENT**

MEMBER OF THE EXECUTIVE
COUNCIL DEPARTMENT OF
ECONOMIC DEVELOPMENT,
ENVIROMENTAL AFFAIRS
AND TOURISM **SECOND RESPONDENT**

JUDGMENT

DAWOOD J:

[1] The applicant herein sought the following relief:

a) That section 39 (2)(c) of the Environmental Conservation Decree No.9 of 1992 (the decree) be and is hereby declared unconstitutional.
b) That the decision of the respondent to prosecute the applicant for the contravention of the decree (the decision) be and is hereby declared unlawful, set aside and of no force and effect.

c) That the decision be and is hereby reviewed and set aside.
d) That the respondent pays costs of this application.

[2] The applicant in his founding affidavit *inter alia* made the following averments:

a) That the Headman after consultation with the community and with their approval allocated him a site upon which he could build a house.
b) On 14 July 2018 he was arrested by members of the South African Police Service and members of the law enforcement of Mbhashe Local Municipality, for building a structure in a place which is prohibited in terms of the decree.
c) Upon the arrival of officers from the Environmental Affairs Department from East London and the case being called in court by the prosecutor, the prosecutor advised the court that the respondent had decided to prosecute him for contravening section 39 (2)(c) of the decree.

The applicant

[3] The applicant launched this application to challenge the decision to prosecute him in terms of section 39(2)(c) of the decree on the legal basis that the decree is only applicable in the former Transkei, being the product of the former Military Government of the then Republic of Transkei. Further, that it is irrational that there would be a law that merely targets people who reside in a particular area; that is no different from other areas in South Africa.

[4] The applicant contends that anyone who builds a structure in the same circumstances as himself anywhere outside the former Transkei would not be prosecuted in terms of the decree, if at all and that the decree discriminates between people who stay in the former Transkei and those who stay outside. Since South Africa is defined as one unitary whole, such discrimination is unfair in terms of the Equality Clause. Section 13(c) read with section 84(3) of the same decree has been found to be unconstitutional on a similar basis.

[5] The decision to prosecute him constitutes the exercise of a public power which when taken on the basis of an unconstitutional legislation can never be valid. The respondents' decision to prosecute him on the basis of the decree is unlawful for want of constitutionality since he is discriminated against. The applicant contended

that if section 13 of the decree has been found to be unconstitutional then all sections should follow suit and if section 13 is found to be discriminatory so should section 39.

[6] The applicant further contented that the decree violates his right to dignity since the discrimination makes him feel treated less than other human beings in a country where the right to dignity is a prized social norm. The summons in the criminal case read that he is guilty of contravention of section 39(2)(c) of the Environmental Conservation Decree No. 9 of 1992 in that he wrongfully erected a building within the Coastal Conservation Area at Nqabara without a permit.

The respondent

[7] The thrust of the first respondent's defence on the merits were *inter alia* that the section and decree are for the direct benefit of the coastal area of the former Transkei and that she is unaware of any other coastal areas in the country which face massive illegal land evasion and destruction of sensitive coastal habitats such as the area of the former Transkei.

The section and the decree serve a useful purpose while they are still on the statute books and it has not been amended or repealed and accordingly must continue to be in force and effect.

[8] The section and the decree needs to remain in force pending the enactment of new legislation and regulations by the provincial legislature. The respondent contends that the applicant is not entitled to the order that the decision to prosecute be declared unlawful, set aside and of no force and effect since until and unless it is declared unconstitutional or has been repealed or amended it remains valid. Furthermore, the decision sought to be reviewed is an administrative action and specific procedures need to be followed.

[9] On the merits the first respondent alleges *inter alia* that the applicant has failed to mention the name of the Headman or when these meetings took place; and she concedes that the decree does not apply anywhere else other than the former Transkei but re-iterates that until the decree has been repealed or amended, it remains a valid piece or statute which has to be enforced. The first respondent

denies that the facts relating to the killing of a vulture in terms of section 13(c) which was declared invalid is similar to the present application;

[10] Until the decree is repealed or amended it remains valid and cannot be said to be infringing on any of the applicant's rights. The second respondent upon being joined made the following averments in its affidavit filed on its behalf:

a) That the applicant has failed to aver that he has not been treated equally as other people under the same circumstances, namely the people in the Transkei area;
b) He does not state the nature of the differentiation that is alleged to be created by the decree;
c) He does not aver that the differentiation that may exist amounts to unfair discrimination;
d) The second respondent states that the applicant's basis for attacking the provisions of section 39(2)(c) is that the decree only applies to the erstwhile Republic of Transkei and nowhere else, and that it amounts to discrimination against him and persons living in the former Transkei; has no basis whatsoever;
e) Discrimination becomes unconstitutional if it creates differentiation that amounts to unfairness. According to the second respondent it will only be unfair if it applied to equally situated areas of Transkei and does not apply to other areas. Or that it does not have the applicant treated equally regarding others in similar circumstances namely, the coastal areas of Transkei;
f) Section 39(2)(c) has not been found to be unconstitutional and remains valid until set aside. The applicant has failed to prove that he has acquired the land lawfully or that the Headman had the power to allocate the land to him. She states that there is no differentiation between people or category of people who live or want to establish properties along the coast. The only differentiation is between the application of the decree in the area of Transkei and other areas of the republic. In light of that differentiation, there is a rational connection between the differentiation and the legitimate government purpose;
g) In terms of the Constitution, the laws that were in existence before the interim Constitution was promulgated remain in force until set aside. At present the

Integrated Coastal Management Act, 2008 (Act 24 of 2008) applies to coastal areas falling outside Transkei. Legitimate government purpose is to protect the environment;

h) The applicant does not aver that there is no legitimate government purpose. The differentiation of the area of application does not amount to unfair discrimination. The applicant in any event does not say so.

[11] In the further affidavit filed, the applicant merely dealt with the powers of the Headman to allocate sites and failed to deal with any of the averments raised by the respondents nor was a replying affidavit filed nor name of the Headman furnished nor was a confirmatory affidavit filed by the Headman.

[12] It is necessary to briefly set out the legal principles, legislation and authorities applicable for the determination of the issues pertinent to this matter.

Legal position

[13] Section 39(1)(2) of the Environmental Conservation Decree No. 9 of 1992 provides as follows:

> "…
>
> (2)
>
> Notwithstanding anything in any other law or in any condition of title contained, **no person** (including any department of State) **shall within the** coastal **conservation** area, **save** under the **authority of a permit issued by the Department** in accordance with the plan for the control of coastal development approved by **resolution of the Military Council**—
>
> (*a*)…
>
> (*b*) …
>
> (*c*) erect any building;"

[14] It is trite that the applicant has to prove his case as Coetzee AJ, in *Ndudula*[1], said [a]s regards *onus*, the applicants rightly conceded that the *onus* rests with them having regard to section 11(2) to prove the **existence** of the alleged **discrimination**

[1] *Ndudula and others v Metrorail PRASA (Western Cape)* [2017] ZALCCT 12; [2017] 7 BLLR 706 (LC); (2017) 38 *ILJ* 2565 (LC) (*Ndudula*).

and that such **discrimination is unfair"**.[2] "… [A]nd that the constitutional attack should properly be raised in the papers at the outset".[3]

[15] In *Phillips*[4] the Court held that:

"A declaration that legislation is inconsistent with the Constitution and invalid cannot be made by consent. A declaration in these terms is a substantial intrusion into the domain of the legislature and, as has been mentioned, should be made only by a court after careful consideration of all relevant issues. . . "

[16] Our equality clause[5] reads as follows:

"**Equality**

(1) Everyone is **equal before the law** and has the right to **equal protection** and **benefit of the law.**

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may **not unfairly discriminate directly or indirectly against anyone** on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth'.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair".[6]

[17] The Constitutional Court in *Harksen*[7] has formulated the test as follows:

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[2] Ibid at para 21. See also *Khumalo v University of Johannesburg* (JS533/16) [2018] ZALCJHB 31 (6 February 2018) at para 17.
[3] *Holomisa v Holomisa and another* [2018] ZACC 40; 2019 (2) BCLR 247 (CC) at para 25 (*Holomisa*).
[4] *Phillips and another v Director of Public Prosecution and others* [2003] ZACC 1; 2003 (3) SA 345 (CC); 2003 (4) BCLR 357 at para 12 (*Phillips*).
[5] Section 9 of the Constitution of the Republic of South Africa, 1996.
[6] Id.
[7] *Harksen v Lane N.O. and Others* [1997] ZACC 12; 1997 (11) BCLR 1489 (CC); 1998 (1) SA 300 (CC) at para 50 (*Harksen*). See also *Naidoo and Others v Parliament of the Republic of SA* (2019) 40 *ILJ* 864 (LC) at paras 37-8; Rósaan Kruger 'Equality and Unfair Discrimination: Refining the *Harksen* Test' (2011) *SALJ* 479 at 481; Chris McConnachie 'Transformative Unfair Discrimination Jurisprudence: The Need for a Baseline Intensity of Review' (2015) *SAJHR* 504 at 508.

"(a) Does the provision **differentiate** between people or categories of **people**? If so, does the **differentiation** bear a **rational connection** to a **legitimate government purpose?** If it **does not** then there is a **violation of section 8(1).** Even if it does **bear a rational connection**, it might nevertheless **amount to discrimination**.

(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:

(b)(i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon **whether, objectively**, the ground **is based on attributes and characteristics which have the potential to impair the fundamental human dignity** of persons as human beings or to **affect them adversely in a comparably serious manner**.

(b)(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a **specified ground**, then **unfairness** will be **presumed**. If on an **unspecified ground**, **unfairness** will **have to be established by the complainant**. The test of unfairness focuses primarily on the impact **of the discrimination** on the **complainant** and others **in his or her situation**. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).

(*c*) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision **can be justified under the limitations clause** (section 33 of the interim Constitution)".

[18] In *Gumede* the Constitutional Court further held that "… if discrimination is based on … one of the listed grounds, it is presumed to be unfair. What remains is to consider whether any justification has been advanced to save the unfair discrimination spawned by the impugned provisions'.[8]

Rationality and equality

[19] In of the case of *Phillips* it was held:

"20 The burden placed upon the state is no ordinary *onus*. The **state should place before** a court **evidence** and **argument** on which it **intends** to rely in **support of justification**. Although absence of this evidence and argument does not necessarily result in invalidity of the challenged provision, it may tip the scales against the state, but in appropriate cases only. It follows that the absence of evidence and argument from the state

[8] *Gumede (born Shange) v President of Republic of South Africa and others* [2008] ZACC 23; 2009 (3) BCLR 243 (CC); 2009 (3) SA 152 (CC) at para 36 (*Gumede*).

does not exempt the court from the obligation to conduct the justification **analysis** and to apply what was **described** by Somyalo AJ as "the **primary criteria enumerated in section 36 of the Constitution"**.

21 These criteria are:

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose".[9]

[20] Currie and de Waal argue that:

"The equality right does not prevent the government from making classifications and from treating some people differently to others. This is because, as we have seen, the principle of equality does not require everyone to be treated the same, but simply that **people in the same position** from a **moral point of view should be treated the same**. The government may therefore classify people and treat them differently to other people for a variety of legitimate reasons. Indeed, laws almost inevitably differentiate between persons. It is impossible to regulate the affairs of the inhabitants of a country without differentiation and without classifications that treat people differently and that impact on people differently".[10]

[21] As per practice if a distinction does exist the court should ask itself the following question posed by Froneman J in *Holomisa*:

"Is there any reason why Transkei women in the position of the applicant should be deprived of the benefits of a possible just transfer of assets on divorce in terms of section 7(3) of the Divorce Act? I can think of none. Tellingly, neither could the Minister, the second respondent.

It fails the test of rationality in terms of section 9(1) of the Constitution, namely whether the distinction drawn between women in this position in the Transkei and those in the rest of South Africa is connected to a legitimate governmental purpose. No legitimate **governmental purpose was proffered** by the representative of government, the Minister, and it seems almost impossible to conceive of one. As was suggested from the Bench

[9] *Phillips* (note 4 above) at paras 20-1.
[10] Currie & de Waal *The Bill of Rights Handbook* 5 ed (2005) at 239.

during oral argument, it is, in colloquial terms, a "no-brainer". Nothing more needs to be said on that score".[11]

[22] In *S v Khohliso* this Court held:

". . . That being the case, there can be no doubt but that the differentiation between people in the former Transkei area and the rest of the Eastern Cape **bears no rational connection to a legitimate government purpose**. It therefore **amounts to unfair discrimination which cannot be justified under the provisions of section 36** of the Constitution. For the aforementioned reasons I have no difficulty in finding that the provisions of **sections 13*(c)* and 84(13) of the Decree offend against the provisions of sections 9 and 10 of the Constitution**. The conviction of the appellant thus falls to be dismissed on this ground'.[12]

35 This Court has held that the laws passed by the Legislatures of the TBVC states are not Acts of Parliament as contemplated in the interim Constitution. Only the South African Parliament can pass an Act of Parliament. However, Ms Khohliso argues that Parliament's enactment of the Sea Fishery Amendment Act — which repealed Chapter 10 of Decree 9 — serves as evidence that parliament considered the entire Decree and elected to repeal Chapter 10. Parliament thereby endorsed the remainder. Ms Khohliso argued that this treatment of the Decree by the democratic parliament triggered the need for comity, thus requiring this court's imprimatur on the declaration of invalidity. …

36 No argument has been advanced as to how the intention or endorsement of Parliament could be transposed to a Provincial Legislature.

37 This argument is, in any event, not persuasive. …

45 The executive cannot make law, and Decree 9 remains existing law because of the preservation of pre-1994 legislation, subject to consistency with the Constitution. …

49 It is clear from *Weare, Mdodana* and this decision that — unless expressly embraced by post-democratic legislation — provincial laws emanating from the TBVC states will rarely have the status of a 'provincial Act'. A High Court's declaration that it is invalid will therefore not require this Court's confirmation".[13]

[23] The applicant has to *inter alia* establish:

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[11] *Holomisa* (note 3 above) at paras 23-4. See also *Gumede* (note 8 above) at para 36.

> "There can be no doubt the marital property system contemplated by the Kwa-Zulu Act and the Natal Code strikes at the very heart of the protection of equality and dignity our Constitution affords to all, and to women in particular. That marital property system renders women extremely vulnerable by not only denuding them of their dignity but also rendering them poor and dependent. This is unfair".

[12] *S v Khohliso* 2014 (2) SACR 49 (ECM) at para 17.

[13] *Kholiso v S and another* [2014] ZACC 33; 2015 (2) BCLR 164 (CC); 2015 (1) SACR 319 (CC).at paras 35-7, 45 and 49.

a) That the decree is irrational.

b) That the differentiation amounts to unfair discrimination.

c) That it violates his rights to dignity. The respondent would if the applicant succeeds in establishing this bear on evidentiary burden to prove that the decree serves a legitimate government purpose and is justified under the limitation clause.

[24] Therefore, the applicant in this case has failed to:

a) State whether or not there were existing laws in the Republic that dealt with erecting buildings within the coastal conservation areas; and

b) What criteria was applicable, and how different these provisions of the law were to the one under scrutiny even after it was alerted to the existence of the National Legislation that dealt with environmental issues.

c) The *onus* was on the applicant to demonstrate that there were different approaches and that this differentiation amounted to discrimination.

d) The second respondent referred to the existence of the Integrated Coastal Management Act 24 of 2008 albeit erroneously claiming that it was only applicable to areas outside Transkei

e) Even when alerted to the existence of this Act the applicant did not refer to sections of this Act that dealt with persons in a different manner from the decree.

f) He merely stated that there was a differentiation without stating what exactly the differentiation was, save that it only applied to persons within Transkei. The Constitutional Court made it clear in *Kholisa*[14] that the decree remains existing law because of the preservation of pre- 1994 legislation subject to consistency with the constitution.

g) Application or reliance on the provisions of the decree is accordingly permissible unless it is found to be inconsistent with the Constitution. The differentiation accordingly in the circumstances *per se* does not amount to discrimination. The applicant needs to establish how exactly the provision he is seeking to set aside falls foul of the relevant provisions of the Constitution.

[14] Id.

[25] The respondents were equally unhelpful in that they also failed to refer to the relevant provisions of the Integrated Coastal Management Act or the basis upon which they alleged that the differentiation was justifiable.

However, the onus rested upon the applicant to establish that the differentiation amounted to discrimination. It is self-evident that there is a differentiation, since in the rest of the Republic, the state would not have the election of either relying on the decree or the Integrated Coastal Management Act to charge an individual in the event of a violation of one of the provisions.

[26] However it is not sufficient for the applicant to simply allege a differentiation. The applicant would need to show that the differentiation is discriminatory and exactly in what respects it falls foul of the equality or other provisions of the constitution. The Court cannot *mero moto* infer unfair discrimination in circumstances where the applicant has not demonstrated that his conduct of allegedly constructing on a coastal conservation area is not a criminal offence; that may result in perpetrators being charged and prosecuted in the rest of the Republic. He has also failed to allege whether or not the penalty provided for in the decree is more onerous or that the state has unfair advantages where strict liability follows, as opposed to establishing their case beyond a reasonable doubt.

[27] Section 84(13) of the decree which created strict liability, even in the case of prosecution in this matter, has already been ruled unconstitutional and set aside in *Khohliso*'s case. The applicant's right to a fair trial and to be presumed innocent is thus protected, even whilst being prosecuted in terms of the decree at present as a result of the ruling in respect of section 84 (13) in *Khohliso*'s case. As indicated no provisions of the Integrated Coastal Management Act 24 of 2008 was referred to by any of the parties. It is for each party to plead and prove its case.

[28] The applicant has failed to plead crucial aspects that are necessary for the Court to determine whether or not there has been unfair discrimination, which falls foul of the equality clause or the right to dignity.

[29] It is most unfortunate that the prosecuting authority has chosen to rely on the decree even after Van Der Westhuizen J's findings, where he held in *Khohliso*[15]:

> "21…[R]egardless of its origin, all law that was in force before the Constitution, remained in force until amended or repealed. This covers any rule with the force of law, including any Ordinance or Decree, regardless of whether it originated from a Provincial Council, Military Council or President. **The Decree — like all legislation passed prior to 1994 — is undemocratic.** It was **born** in **constitutional sin**. At the time, democracy was the privilege of the white minority. The recognition of pre-1994 legislation was based **on the practical reality that law was in place regulating people's lives**.
> 22 While it cannot be said that the illegitimacy of the government of the Transkei renders its laws less valid or of a lower status than other legislation passed before 1994, Decree 9 is distinguishable from provincial Ordinances in that they were at least intended to apply to provinces. By contrast, **Decree 9 was intended to apply to a country** — albeit one whose independence was not internationally recognised".[16]

[30] I cannot conceive of any legitimate basis as to why pre-1994 legislation of a now non-existent "country" is still in existence and relied upon in 2020 more than a decade after the advent of democracy and the promulgation of legislation dealing with various aspects, including the environment. Be that as it may, it is also trite that regardless of its origin, all laws that were in force before the Constitution remained in force until amended or repealed, provided it passes constitutional muster. The applicant has failed to set out sufficient factors to have this Court make a ruling that this provision of the decree is unconstitutional on the grounds alleged.

[31] In *S v Khohliso*[17] the Court considered the following factors in order to declare sections 13(c) and 84(13) of the Environmental Conservation Decree 9 of 1992 (the Decree) invalid:

> "In the remainder of the Eastern Cape [P]rovince, legislation known as the Nature and Environmental Conservation Ordinance No 19 of 1974 (the Ordinance) is applicable. As will become apparent later in this judgment, there is a **considerable difference in what is viewed an offence in terms of the aforementioned two forms of legislation**".[18]

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[15] Id *Kholiso* (note 13 above).
[16] Ibid at paras 21-2. See also *Weare and another v Ndebele N.O. and others* [2008] ZACC 20; 2009 (1) SA 600 (CC); 2009 (4) BCLR 370 (CC) at paras 27-8.
[17] *Khohliso* (above note 12).
[18] Ibid at para 2.

The Court continued to say:

> "In a multi-pronged approach the appellant challenges her conviction on the **constitutional validity of said sections**, which in **effect create inequality** between the persons **of the former Transkei** and the **rest of the Eastern Cape.** Before us counsel for the appellant argued that, in areas where the **Ordinance applies**, the appellant would have been **prosecuted for possession of a carcass** of what is defined therein as an **'endangered species'** instead. Such 'endangered species' as defined in the Ordinance are species which **are rare**, compared with **'protected wild animal'**, as defined in the **Decree**. In this regard, a 'protected wild animal' is defined in the Decree as **'any wild animal** of the species mentioned in **Schedule 1**'. Schedule 1 to the Decree, in turn, and under the heading 'Birds', specifies all species, except for a relatively limited number of prolific species. She has argued further that the **Ordinance does not create strict liability in the same manner as the Decree.** Accordingly in a prosecution under the Ordinance, **more would be required of the state to secure a conviction**, for a **similar offence in terms** of the **Ordinance, than in a prosecution under the Decree**".[19]

[32] In this case none of the parties referred to any provincial legislation dealing with the coastal areas however, the National Environmental Management: Integrated Coastal Management Act No. 24 of 2008 as amended does deal with coastal areas and offences and penalties:

> "…that takes account of the functioning **of the coastal zone as a whole and that seeks to co-ordinate and regulate the various human activities that take place in the coastal zone in order to achieve its conservation and sustainable use.**"[20]

[33] Section 79 of Act 24 of 2008 states that:

> "…
>
> (2) A person is guilty of a category two offence if that person—
>
> …
>
> *(d)* **constructs,** maintains or extends any structure, or takes other measures on coastal public property to prevent or **promote erosion or accretion of the seashore** in contravention of section 15 (2);
>
> …

[19] Ibid at para 8.
[20] Preamble of the National Environmental Management: Integrated Coastal Management Act No. 24 of 2008.

(*f*) conducts an activity without a coastal authorisation required in terms of this Act;

. . .”

[34] The National Environmental Management: Integrated Coastal Management Act 24 of 2008 was amended by the National Environmental Management: Integrated Coastal Management Amendment Act 36 of 2014. None of the parties referred to the amended Act. The applicant was made aware of the existence of Act 24 of 2008 when the second respondent filed the answering affidavit. The applicant even at that stage failed to demonstrate the differentiation between the Acts and how in the circumstances, reliance on the decree against him in particular and persons in the former Transkei area in general amounted to discriminatory practices, and unequal treatment when compared with the enforcement of the provisions of Act 24 of 2008 or other related legislation.

[35] In *Khohliso*, the applicant set out the differences between the provisional legislation and the decree and discharged the *onus* resting upon the appellant in effectively challenging the impugned provision of the decree.

[36] In this case the applicant has made bare allegations to this effect without stipulating exactly how the law is irrational or amounts to unequal treatment with reference to what is applicable in the rest of the Eastern Cape or the Republic as a whole and how this amounts to unfair discrimination or offends his right to dignity in specific terms.

[37] The applicant would have needed to *inter alia*:

a) Plead whether or not his conduct would have been an offence under the National Environmental Management: Integrated Coastal Management Act 24 of 2008 as amended by Act 36 of 2014, which is applicable to the Republic as a whole or any other relevant law.

b) If it was not, then he would have to plead that the fact that the decree renders his actions criminal offends his right to dignity, demonstrates unequal treatment and amounts to unfair discrimination and irrationality and falls foul of the relevant applicable constitutional provisions, when viewed against and

compared to the law that is applicable and enforceable in the rest of the Republic.

[38] It would have then been incumbent upon the respondent to justify how the Act was rational instead of simply saying that it is rational and justified without setting out any facts. If there is a penalty attached to such conduct in the Act then the degree of differentiation needs to be pleaded.

[39] It is rather unfortunate that sufficient has not been pleaded to enable the Court to effectively and conclusively deal with the "offending" provision of the Decree.

[40] The application must unfortunately fail not because the applicant of necessity does not have a case but rather that he has failed to make out a case by failing to make the necessary averments and set out facts to establish that the relevant provision of the decree is in fact unconstitutional.

[41] The applicant was pursuing a legitimate constitutional right and should not be mulcted with a costs order against him.

[42] In the circumstances I make the following order:

i) That the application is dismissed; and
ii) Each party to pay their own costs.

_____

DAWOOD J
JUDGE OF THE HIGH COURT

DATE HEARD:	16 AUGUST 2019
DATE DELIVERED:	13 FEBRUARY 2020
FOR THE APPLICANT:	MR MASWAZI
APPLICANT'S ATTORNEYS:	MBABANE AND SOKUTU INC.

	NO 1 STANLEY NELSON DRIVE MTHATHA
FOR THE 1ST RESPONDENT:	MR D. V. PITT
FOR THE 2ND RESPONDENT:	V. S. NOTSHE SC (with Mr Madlanga)
RESPONDENT'S ATTORNEYS:	STATE ATTORNEY BROADCAST HOUSE NO 94 SISSION STREET FORTGALE MTHATHA REF: 1410/18-A2k (Mr Nyangiwe)