HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Not reportable
Not of interest to other Judges

CASE NO: 45462/2008

NYANDENI REGIONAL AUTHORITY	First Applicant
KING NDAMASE NDAMASE	Second Applicant
and	16/5/2017
COMMISSION ON TRADITIONAL LEADERSHIP DISPUTES AND CLAIMS	First Respondent
CHAIRPERSON OF THE COMMISSION ON TRADITIONAL LEADERSHIP DISPUTES AND CLAIMS	Second Respondent
QUAKENI KINGDOM OF EASTERN PONDOLAND	Third Respondent
KING MPONDOMBINI SIGCAU	Fourth Respondent

J U D G M E N T

MAKGOKA, J

[1] This is an opposed motion in which the first and second applicants (the applicants) seek an order for the review and setting aside of the decision of the first respondent, the Commission on Traditional Leadership Disputes and Claims (the commission) made on 15 January 2008, to the effect that Nyandeni Paramountcy is not a Kingship. That decision had the effect that the second applicant was not a King, and his status as a traditional leader had to be investigated.

[2] The commission was established in terms of s 22 of the Traditional Leadership and Government Framework Act of 2003 (the Act). The second respondent is the chairperson of the commission. He was appointed together with other members of the commission by the President in terms of s 23 of the Act with effect from 1 November 2004. In terms of s 25(2)(*a*)(i) the Act, the commission had the authority to investigate, either on request or of its own accord, a case where there is doubt as to whether a kingship, senior traditional leadership or headmanship was established in accordance with customary law and customs.

[3] During the period between 15 and 18 August 2005 and later on 18 July 2007, the commission conducted public hearings to determine whether the paramountcy of the Eastern Pondoland under the fourth respondent, Paramount Chief Mpondombini Sigcau (Paramount Chief Sigcau) and the paramountcy of the Western Pondoland under the second applicant, Chief Ndamase, were established in accordance with customary law and practice.

[4] On 15 January 2008 the commission made its decision and determined that in terms of customary law and the Act, Nyandeni Paramountcy is not a kingship. On 2 October 2008 the applicants launched this application in two

parts. In part A, an order was sought interdicting the commission from proceeding to investigate the status of King Ndamase pursuant to the decision referred to above. Part B was for the review of the commission's decision. The urgent application was struck off the roll with costs and was never pursued by the applicants. As a result, the investigation into the status of Chief Ndamase proceeded, and he was found to be a senior traditional leader. This decision has not been challenged by way of review.

[5] In part B, the applicants premised their review on four grounds, namely that:

(a) the decision was ultra vires the powers of the commission;

(b) the decision was based on a material error of law;

(c) the process by which the decision was arrived at, was procedurally unfair;

(d) the commission took into account irrelevant considerations and failed to consider relevant factors when it made the decision.

[6] Pleadings closed in January 2010 after the applicants had filed their replying affidavit. The applicants did not enrol the matter for hearing. On 17 February 2017, the attorneys acting on behalf of the commission and its chairperson enrolled the matter for hearing by serving a notice of set down on attorneys acting for the applicants. The matter was enrolled for the opposed motion roll for the week 8 - 12 May 2017. The applicants have not filed written submissions as required in terms of the practice directive of this division. The third and fourth respondents have not taken any part in the proceedings. When

the matter was mentioned on 8 May 2017, there was no appearance on behalf of the applicants. Mr *Arendse* SC, with *Matebese* appeared for the commission and its chairperson. They sought an order dismissing the application.

[7] On a broad reading of the papers, I find no merit in any of the grounds advanced by the applicants. I would summarily dismiss the grounds in (b); (c) and (d) referred to above. I need to express a few remarks though, on the ultra vires attack, as it involves the interpretation of a section of a statute. In that regard, the applicants argued that in terms of s 25(2) read with s 25(1) of the Act, there must be a dispute or claim before the commission can investigate, and the commission had acted outside its powers by investigating the kingship without a dispute. They argue that s 28(7), which mandates the commission to first investigate the issue of paramountcies and paramount chiefs in terms s 25(2), must be read to include s 25(1). To consider the argument, it is necessary to set out the relevant provisions of the Act.

[8] Section 25, in the relevant parts, reads:

'(1) The commission operates nationally and has authority to decide on any traditional leadership dispute and claim contemplated in subsection (2) and arising in any province.

(2)(*a*) The commission has the authority to investigate, either on request or of its own accord-

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

(ii) ....

(iii) ....

(iv) Where good grounds exist, any other matters relevant to the matters listed in this paragraph, including the considerations of events that may have arisen before 1 September 1927.'

(3) ...

(4) The commission has the authority to investigate all traditional leadership claims and disputes dating from 1 September 1927, subject to subsection (2)(*a*)(iv).'

[9] Section 28(7) of the Act, on the other hand, provides:

'The commission must, in terms of section 25(2) investigate the position of paramountcies and paramount chiefs that had been established and recognised, and which were still in existence and recognised before the commencement of this Act, before the commission commences with any other investigation in terms of that section.'

[10] From the above, it is clear that there is no merit to the applicants' contention. The language of s 28(7) is clear. It only refers to s 25(2) in terms of which the commission is expressly authorised, of its own accord, to investigate the existence and establishment of kingship, senior traditional leadership or headmanship. This power is exercised independent of the authority expressed in s 25(1). Section 28(7) makes no reference to s 25(1). There is also no basis, either contextual or purposive, to interpret the provision in the manner contended for by the applicants. I agree with the submission advanced by counsel for the commission and its chairperson that the interpretation contented for by the applicants would defeat the purpose and objects of the section.

[11] The residual argument on the ultra vires challenge is that the commission exceeded the limitation on its powers by investigating a matter which preceded 1 September 1927. Reliance was placed in this regard on s 25(4) of the Act which sets a limitation to the powers of the commission by confining its investigations to disputes or claims arising after 1 September 1927. According to the applicants, the dispute, if any, regarding the establishment of the Western Pondoland, arose in 1845. Therefore, according to the applicants, the commission did not have the power to investigate a dispute which preceded the cut-off date referred to above. Similarly, this argument lacks merit. The

commission's investigation is mandated by, and conducted in terms of, s 28(7) of the Act. Clearly, this section, properly construed, is not made subject to s 25(4), especially when regard is had to the fact that s 25(4) is subject to s 25(2)(*a*)(iv), which empowers the commission to consider events that may have arisen before 1 September 1927.

[12] In all circumstances, I am satisfied that the application has no merit and falls to be dismissed. The commission and its chairperson have sought the costs consequent upon the employment of two counsel. Given the nature and importance of the issues raised in the application, I am persuaded that the costs of two counsel are warranted.

[13] In the result the following order is made:

1. The application to review and set aside the decision of the commission on 15 January 2008 is dismissed;

2. The first and second applicants are ordered to pay the first and second respondents' costs, jointly and severally, the one paying the other to be absolved, such costs to include the costs consequent upon the appointment of two counsel.

TM Makgoka
Judge of the High Court

APPEARANCES:

For the First and Second Respondents: NM Arendse SC (with ZZ Matebese)

Instructed by:

Bhadrish Daya Attorneys, Pretoria

For the First and Second Applicants: No appearance

For the Third and Fourth Respondents: No appearance