IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

CASE NO. 6404/11

In the matter between:

SOLOMON MNGOMEZULU	1ST APPLICANT
TINDLA ORELIUS MNGOMEZULU	2ND APPLICANT
JABULANI SEVENDAYS MNGOMEZULU	3RD APPLICANT
BUYILE THANDIWE MNGOMEZULU	4TH APPLICANT
JAMESON MKHAWULI MNGOMEZULU	5TH APPLICANT
MNCANE W. MNGOMEZULU	6TH APPLICANT
AGNES MNGOMEZULE	7TH APPLICANT
THANDEKILE MNGOMEZULU	8TH APPLICANT
MKHETHWA MNGOMEZULU	9TH APPLICANT
and	
THE PREMIER OF THE PROVINCE OF KWAZULU-NATAL	1ST RESPONDENT
MEMBER OF THE EXECUTIVE COUNCIL OF THE PROVINCE OF KWAZULU-NATAL DEPARTMENT OF CO-OPERATIVE GOVERNANCE & TRADITIONAL AFFAIRS	2ND RESPONDENT
KWAZULU-NATAL DEPARTMENT OF LOCAL GOVERNMENT & TRADITIONAL AFFAIRS	3RD RESPONDENT
KHANYISA MKHIZE	4TH RESPONDENT

JUDGMENT Delivered on 17 November 2011

SWAIN J

[1] Albeit couched in a number of alternative ways in the notice of motion, the substance of the relief sought by the applicants as against the respondents, and in particular the first respondent, is that the first

respondent be compelled to recognise first applicant as Ibambabukhosi of the Mngomezulu Tribal Community of Ingwavuma and surrounds, in terms of Section 30 read together with Section 19 of the KwaZulu-Natal Traditional Leadership and Governance Act No. 5 of 2005 (the Act).

[2] It is therefore necessary at the outset to examine these sections of the Act. Section 30 provides as follows:

"30. Ibambabukhosi. – (1) *Ibambabukhosi* may only be identified and recognised where –

a) a successor to the leadership position concerned has not been identified;

b) the successor to the position of *Isilo* or *Inkosi* is a minor;

c) *Isilo* or *Inkosi* recognised as contemplated in sections 17 or 19, as the case may be, would be absent from his or her area of jurisdiction for a period of more than six months for –

i) the treatment of illness;

ii) study purposes; or

iii) any other lawful purpose but excluding circumstances contemplated in section 26 (1).

(2) The recognition of *Ibambabukhosi* must be reviewed by the Premier, after consultation with the responsible Member of the Executive Council, at least once every three years.

(3) For purposes of identification and recognition of *Ibambabukhosi,* the provisions of section 17 and 19 apply with the necessary changes.

(4) *Ibambabukhosi* must carry out the duties of office on behalf of *Isilo* or *Inkosi*, as the case may be, until such time that *Isilo* or *Inkosi* is in a position to assume office.

(5) For purposes of the removal *of Ibambabukhosi,* the provisions of section 21 apply with the necessary changes.

(6) If, within 30 days, *Ibambabukhosi* has not been identified, the Premier, may, after consultation with the Provincial House of Traditional Leaders and the Executive Council, appoint an appropriate person to function in the interim as *Ibambabukhosi* until such time that the Royal Family or *umndeni wenkosi* has identified *Ibambabukhosi".*

[3] It is apparent from subsection 3, that for the purposes of identification and recognition of Ibambabukhosi, the provisions of Section 17 and 19 apply with the necessary changes. On the facts of the present case the provisions of Section 17 are not applicable, dealing as they do with the recognition of Isilo as Monarch. Section 19 is however applicable as the present case is linked to the issue of the recognition of an Inkosi to the Mngomezulu Tribal Community.

[4] Section 19 of the Act reads as follows:

"**19. Recognition of an *Inkosi.***- (1) Whenever the position of an *Inkosi* is to be filled, the following process must be followed-

a) *Umndeni wenkosi* must, within a reasonable time after the need arises for the position of an *Inkosi* to be filled, and with due regard to applicable customary law and section 3-

i) Identify a person who qualifies in terms of customary law to assume the position of an *Inkosi* after taking into account whether any of the grounds referred to in section 21 (1) *(a), (b)* or *(d)* apply to that person;

ii) Provide the Premier with the reasons for the identification of that person as an *Inkosi;* and

iii) The Premier must, subject to subsection (3) of this section and section 3, recognise a person so identified in terms of subsection

(1) *(a)* (i) as *Inkosi*: Provided that if the reason for the vacancy is the death of the recognised *Inkosi, umndeni wenkosi* must, before identifying the person to be recognised as *Inkosi*, consider the content of the testamentary succession document referred to in section 19A.

[Sub-para. (iii) substituted by s 3 of Act No. 9 of 2007]

(2) The recognition of a person as an *Inkosi* in terms of subsection (1) *(a)* (iii) must be done by way of –

a) a notice in the *Gazette* recognising the person identified as an *Inkosi;* and

b) the issuing of a certificate of recognition to the indentified person.

(3) The Premier must inform the Provincial House of Traditional Leaders of the recognition or appointment of an *Inkosi.*

(4) Where there is evidence or an allegation that the identification of a person to be appointed as an *Inkosi* was not done in accordance with customary law, customs or processes, or was done in contravention of section 3 of this Act, the Premier-

a) may refer the matter to the Provincial House of Traditional Leaders for comment; or

b) may refuse to issue a certificate of recognition; and

c) must refer the matter back to *umndeni wenkosi* for reconsideration and resolution where the certificate of recognition has been refused.

(5) Where the matter which has been referred back to *umndeni wenkosi* for the reconsideration and resolution in terms of subsection (4) has been

reconsidered and resolved, the Premier must recognise the person identified by *umndeni wenkosi* if the Premier is satisfied that the reconsideration and resolution by *umndeni wenkosi* has been done in accordance with customary law.

(6) The recognition of an *Inkosi* as the senior traditional leader of a recognised traditional community takes effect on a date specified in a notice published in the *Gazette* by the Premier.

(7) Within three weeks after the date of recognition or the date of publication of the notice referred to in subsection (6), whichever is the later date, an *Inkosi* so recognised must furnish, in writing, to the Premier the names of *Induna* or *Izinduna* of that *Inkosi*, together with the date and names of all members present at the traditional council at which appointment of such *Induna*, or *Izinduna* was unanimously approved by the traditional council.

(8) *(a)* An *Inkosi* is deemed to retire from office upon his or her written request for retirement to the responsible Member of the Executive Council.

(b) On retirement, an *Inkosi* ceases to be recognised and appointed in terms of this Act".

[5] In order to place in context the present dispute it is necessary to set out certain of the background facts.

[5.1] There is a dispute within the Mngomezulu Tribal Community in relation to the succession to Inkosi Mndeni Eric Mngomezulu who died in 2003.

[5.2] The one contestant Bikizwe Edward Mngomezulu, is a minor who is presently ten years of age and was identified as Inkosi by certain members of the Mongomezulu clan. It is asserted by the applicants that Bikizwe was identified by umndeni wenkosi. The respondents however

assert that the individuals who comprise umndeni wenkosi, are not defined and will have to be determined before this body is able to identify the Inkosi, who is to succeed the late Inkosi Mngomezulu.

[5.3] The other contestant is Mpumelelo Ntunja who is alleged by the House of Ntunja, to be the legitimate successor to the late Inkosi Mngomezulu.

[5.4] On 24 July 2007, this dispute was referred to the Commission on Traditional Leadership disputes and Claims (the Commission) which was established in terms of Section 22 of the Traditional Leadership and Governance Framework Act 2003. The functions of the Commission are *inter alia*, to investigate and make recommendations on disputes about traditional leadership. Annexed as Annexure SM27 to the applicant's founding affidavit, are the submissions made on behalf of Bikizwe Mngomezulu. It is also alleged by the applicants that they made oral submissions to the Commission, in hearings that were conducted in Richards Bay on 04 August 2009.

[5.5] The Commission to date has not determined the dispute as to who the successor to the late Inkosi Umndeni Mngomezulu should be. The respondents contend that the individuals who comprise umndeni wenkosi will also have to be determined by the Commission.

[5.6] The applicants assert that the second to ninth applicants are members of the Mngomezulu Royal Family and the applicants, including the first applicant, act on behalf of umndeni wenkosi, which consists of the persons listed in Schedule "A", to the applicant's founding affidavit. The applicants allege that at a meeting held on 1st, 2nd and 3rd March 2009, the Mngomezulu Royal Family decided that the first applicant

should be appointed Ibambabukhosi and petitioned the second and third respondents, advising of their resolution that the first applicant should be recognised as such.

[5.7] The first respondent has not recognised the first applicant as Ibambabukhosi.

[6] The defence advanced by the respondents is that the first respondent:

[6.1] Cannot recognise Bikizwe as Inkosi, because the first respondent has to be satisfied in terms of Section 19 (4) and 19 (5) of the Act, that the identification was done in accordance with customary law. Whilst the issue of the competing claims to succeed as Inkosi, are pending before the Commission, the first respondent cannot be satisfied that the claim to Inkosi, advanced by Bikizwe is in accordance with customary law.

[6.2] The first respondent does not have the authority to recognise the first applicant as Ibambabukhosi, whilst the dispute between the Houses has not been resolved.

[7] The authority of the first respondent to recognise Ibambabukhosi, is to be found in Section 30 (1) (a), (b) and (c) of the Act. On the present facts it is clear that Section 30 (1) (a) has no application, because on the applicant's case, a successor to the leadership position concerned has been identified. I refer to the applicant's case, because the applicants could not contend that the first respondent is entitled to act in terms of

this section, where they contend that the successor has been identified. In any event, it is clear that the present case concerns the situation where it is alleged that two successors to the leadership position have been identified, and not the case where no successor has been identified.

[8] It is equally clear that Section 30 (1) (c) does not apply on the facts of the present case, because an Inkosi has not been recognised by the first respondent in terms of Section 19.

[9] The only remaining provision from which the first respondent may accordingly possess the power to recognise Ibambabukhosi, is where the successor to the position of Inkosi is a minor. Although Bekizwe is a minor, it cannot be said at this stage, while the dispute over who is the legitimate successor to Inkosi, has not been resolved, that Bekizwe is "the successor" to the position of Inkosi.

[10] When I put this proposition to Mr. Mngomezulu, who appeared on behalf of the applicants, he submitted that it was sufficient if "the successor" had been identified as such by umndeni wenkosi in terms of Section 19, even if the individual's right to succeed was subject to dispute. As pointed out however, the respondents dispute the composition of umndeni wenkosi as contended for by the applicants, and assert that this is an issue which will have to be resolved by the Commission. On the papers before me the dispute has to be resolved, in the absence of a request by the applicants for the matter to be referred for the hearing of oral evidence, on the facts stated by the respondents

and the admitted facts.

Plascon Evans Paints v Van Riebeck Paints
1984 (3) SA 623 AD at 634 E – 635 C

A referral to the hearing of oral evidence was not requested and consequently, the legitimacy of the composition of umndeni wenkosi, must be resolved in favour of the respondent. Consequently, it cannot be said that Bikizwe has validly been identified as Inkosi by umndeni wenkosi, in terms of Section 19 of the Act. In any event, it seems to me, that on a correct interpretation of Section 30 (1) (b) it could never have been the intention of the Legislature, that even where the legitimacy of the succession of the minor in question, to the position of Inkosi, was subject to dispute, the first respondent would nevertheless be entitled to recognise an individual as Ibambabukhosi. This is because it is clear in terms of Section 30 (4) that Ibambabukhosi must carry out the duties of office "on behalf of" Inkosi until such time that "Inkosi" is in a position to assume office. In the context of Section 30 (1) (b) I cannot see how the Ibambabukhosi can carry out the duties of office, on behalf of an Inkosi, whose right to assume office is in dispute. In addition, it is not without significance that the words used by the Legislature are "the successor", which clearly indicates a single successor and not a number of potential successors.

[11] For these reasons I am satisfied that on the facts of this case, the first respondent does not possess the necessary authority in terms of Section 30 (1) of the Act, to recognise the first applicant as Ibambabukhosi. The facts of this case have revealed a *lacuna* in the Act, with regard to the powers of the first respondent to recognise Ibambabukhosi, which may require legislative intervention.

[12] Mr. Mngomezulu submitted in the alternative, that the first respondent had the power in terms of Section 30 (6) of the Act, to appoint the first applicant as Ibambabukhosi. It is however quite clear that this section only applies where Ibambabukhosi has not been identified. As pointed out above, the applicants contend that the first applicant has been identified. Even if it is so that the identification of first applicant as Ibambabukhosi by umndeni wenkosi, has not been established on the papers, for the reasons set out above, it is quite clear that the power vested in the first respondent, to act in terms of Section 30 (6) of the Act is permissive and not directory. It is provided that the first respondent "may" appoint an appropriate person to function in the interim as Ibambabukhosi, after consultation with the Provincial House of Traditional Leaders and the Executive Council. It cannot be said in the context of Section 30 of the Act, that the power of the first respondent to act, was coupled with a duty to do so.

Baxter – Administrative Law pg 412

The first respondent possesses a discretion whether to act, or not, in terms of Section 30 (6), and is not obliged by a specific statutory duty to do so.

Baxter *supra* at pgs 690 – 691

The first respondent consequently cannot be compelled by way of *mandamus,* to decide whether to appoint Ibambabukhosi or not, in terms of Section 30 (6) of the Act.

[13] The conclusion which I have reached on the merits of the case, renders it strictly unnecessary to consider two further issues raised by the respondents, but I will do so, for the sake of completeness and because the resolution of these issues, has a bearing on the issue of the award of costs.

[14] The first issue is that the respondents contend that Mpumelelo Ntunja, is a necessary party to the present proceedings and should have been joined. It was initially contended by the respondents that the Commission, as well as umndeni wenkosi, were also interested parties and should have been joined, but these contentions were not persisted in by Mr. Dickson S C, who appeared for the respondents at the hearing.

[15] It is trite that the test is whether or not a party has a "direct and substantial interest" in the subject matter of the action, being a legal interest in the subject matter of the litigation, which may be affected prejudicially by the Judgment.

Erasmus, Superior Court Practice B1 – 94

In the case of

Amalgamated Engineering Union vs Minister of Labour
1949 (3) SA 637 (A) at 657

it was held that the question of joinder should not depend on the nature of the subject matter, but on the manner in which, and the extent to which, the Court's order may affect the interests of third parties. The

approach was that it first had to be considered whether the third party would have *locus standi* to claim relief concerning the same subject matter, and then to examine whether a situation could arise in which, because the third party had not been joined, any order the Court might make would not be *res judicata* against him, entitling him to approach the courts again concerning the same subject matter, and possibly obtain an order irreconcilable with the order made in the first instance.

See also

Gordon v Department of Health KZN
2008 (6) SA 52 (2) (SCA) at 529 D - F

[16] It is quite clear that the dispute to which Mpumelelo Ntunja is a party, is solely concerned with the appointment of Inkosi. The appointment of Ibambabukhosi has no legal effect upon the identification by umndeni wenkosi of the Inkosi, nor the recognition thereof by the first respondent. In terms of Section 30 (4), the position of Ibambabukhosi is temporary and only lasts until the Inkosi "is in a position to assume office". Mpumelelo Ntunja would not have *locus standi* to claim the appointment of another individual as Ibambabukhosi, as only the umndeni wenkosi is entitle to identify the Ibambabukhosi and request recognition of their choice by the first respondent. On this basis, it cannot be contended that the grant of an order, which would have the effect of appointing the first applicant as Ibambabukhosi, would prejudice the interests of Mpumelelo Ntunja. Although the appointment of the first applicant as Ibambabukhosi may have political significance in the context of the present dispute, it does not prejudice the legal interests Mpumelelo Ntunja to be appointed as Inkosi. In my view therefore, Mpumelelo Ntunja was not a necessary party to the present proceedings.

[17] The second issue is that the respondents contend that the applicants have failed to exhaust the internal remedies available to them in terms of Section 49 of the Act, which they were obliged to do in terms of Section 7 (2) of the Promotion of Administrative Justice Act No. 3 of 2000 (PAJA).

[18] Section 49 (1) of the Act provides as follows:

"**49. Dispute Resolution** – (1) Whenever a dispute concerning customary law or customs arises within a traditional community or between traditional communities or other traditional institutions on a matter arising from the implementation of the Act or otherwise, members of such a community or institution and traditional leaders with the traditional community or traditional institution concerned must seek to resolve the dispute internally and in accordance with customary law and customs".

[19] From the minutes of the meeting held between the Mngomezulu family and the second respondent on 20 November 2010 it is clear that the appointment of Ibambabukhosi was opposed by the Ntunja House. A dispute consequently exists concerning customary law or custom, between traditional communities being the Khathwayo House and the Ntunja House. The dispute consequently falls within the parameters of Section 49 of the Act.

[20] Section 6 of PAJA provides for the judicial review of an administrative action which includes a failure to take a decision by an organ of State, when exercising a public function. "Decision" includes any decision of an administrative nature "required to be made" "under an empowering provision". By reference to the definition of "failure" which in

relation to the taking of a decision includes a refusal to take the decision, omissions of all kinds are included.

The New Constitution and Administrative Law
Vol 2 Hoexter et al pg 101

[21] Section 49 (1) of the Act provides that the parties "must seek to resolve the dispute internally". Section 49 (2) provides that any dispute that cannot be resolved "must" be referred to the bodies and individuals described in the sub-sections. It is therefore clear that the applicants are obliged to exhaust these remedies before approaching this Court, as no application was brought by the applicants in terms of Section 7 (2) (c) of PAJA for exemption from the obligation to exhaust these internal remedies. This Court is accordingly precluded in terms of Section 7 (2) (a) of the Act, from reviewing any such administrative action.

[22] As regards the issue of costs of the application, by virtue of the fact that the applicants sought a judicial review of the "refusal" by the first respondent to make a decision on the issue of the recognition of first applicant as Ibambabukhosi, the applicants accordingly sought to assert a constitutional right, and consequently the general rule is that if the State is unsuccessful it pays the legal costs, but if successful, each party bears its own costs.

Biowatch Trust v Registrar Genetic Resources
2009 (6) SA 232 (CC) at 246 G – H

If however, an application is frivolous or vexatious, or in any other way

manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunise it against an adverse costs award.

Biowatch at page 247 A – B

[23] Mr. Dickson S C submits that the present application was frivolous and vexatious, because the applicants failed to consider the applicable legislation which was brought to their attention. It is submitted that they brought "a causeless case despite the pending determination of the dispute in the Commission". It is clear however that the defence raised by the respondents, was simply that because there was a dispute as to the appointment of the Inkosi, the first respondent had no authority to recognise the first applicant as Ibambabukhosi, because such recognition had to take place in terms of Section 19 of the Act. When I raised with Mr. Dickson S C, my views in regard to the apparent lack of authority on the part of the first respondent in terms of Section 30 of the Act, he agreed with the views I expressed. It cannot be said therefore that the basis upon which the applicants' claim, has failed in terms of the provisions of the Act, was previously brought to the attention of the applicants and despite such knowledge they nevertheless proceeded with the application. In addition as regards the points *in limine*, the respondents have not been totally successful. On the issue of the non-joinder of Mpumelelo Ntunja they were unsuccessful, although on the issue of the failure of the applicants to exhaust their domestic remedies, they were successful.

[24] When all of the above is considered, I am not satisfied that the general rule enunciated in Biowatch, should be disturbed, which will find

expression in the costs order, I intend making.

The order I make is the following:

a) The application is dismissed.

b) The parties are ordered to pay their own costs.

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SWAIN J

Appearances /…

Appearances:

For the Applicant	**:**	Mr. C. H. S. Mngomezulu
Instructed by	**:**	CHS Mngomezulu Attorneys C/o Lushaba J & Associates Pietermaritzburg
For the 1st – 3rd Respondents	**:**	Mr. A. J. Dickson S C
Instructed by	**:**	PKX Attorneys Pietermaritzburg
Date of Hearing	**:**	09 November 2011
Date of Filing of Judgment	**:**	17 November 2011