IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 11037/2011

In the matter between:

***UMNDENI WENKOSI* OF THE MKHWANAZI TRADITIONAL COMMUNITY AT MPUKUNYONI**	First Applicant
KHETHUKUTHULA DALISU SIPHELELE MKHWANAZI	Second Applicant
and	
THE PREMIER OF KWAZULU-NATAL	First Respondent
THE MEMBER OF THE EXECUTIVE COUNCIL FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Second Respondent
MZOKHULAYO MYSON MKHWANAZI	Third Respondent

ORDER

---

[1] The recognition of the Third Respondent as *Inkosi* of the Mkhwanazi Traditional Community at Mpukunyoni, KwaZulu-Natal by the First Respondent acting in terms of the provisions of s19 of the KwaZulu-Natal Traditional Leadership and Governance Act No. 5 of 2005 is hereby reviewed and set aside.

[2] The First Respondent is directed to consult with the Applicants (and where applicable, other persons identified as *uMndeni wenkosi* on the basis of traditional roles) concerning the identification of an *Inkosi* for the Mkhwanazi Traditional Community at Mpukunyoni, KwaZulu-Natal as provided for in terms of s19 of the Act and to recognise and appoint an *Inkosi* in compliance with the provisions of the Act.

[3] The First and Second Respondents are directed to pay the costs of the application, including any reserved costs, such costs are to include the costs occasioned by the employment of two counsel.

[4] The First and Second Respondents are directed to pay the costs occasioned by the application to intervene, including any reserved costs.

JUDGMENT

HENRIQUES J

Introduction

[1] The applicants[1] seek to review the decision of the Premier, the first respondent to recognise and appoint the third respondent as *Inkosi* of the Mkhwanazi Traditional Community at Mpukunyoni, KwaZulu-Natal acting in terms of s 19(2) of the KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005 ("the Act").

[2] Having regard to the founding affidavit, such review is premised in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") as such decision is flawed, alternatively not reasonable as the first respondent failed to apply his mind in the face of expert opinions, alternatively the common law.

[3] The applicants submit that the decision of the first respondent to appoint the third respondent was flawed as he did not apply his mind to the recommendations contained in the investigation report of Luthuli Sithole Attorneys, its own expert and failed to apply his mind having regard to the uncontested evidence presented by the second applicant and his expert Professor Maphalala. The decision is not rationally connected to the information before him and no reasonable decision maker could have come to such decision.

---

[1] In the Notice of Motion the applicant seeks the following relief:

1.

'The recognition of the Third Respondent as Inkosi of the Mkhwanazi Traditional Community at Mpukunyoni, KwaZulu-Natal by the First respondent acting in terms of the provisions of section 19(2) of the KwaZulu-Natal Traditional Leadership and Governance Act No. 5 of 2005 ("the Act") be and is hereby reviewed and set aside.

2.

First Respondent is directed to consult with the Applicant concerning the identification of an Inkosi for the Mkhwanazi Traditional Community at Mpukunyoni, Kwazulu-Natal as provided for in terms of section 19(1) of the Act and to appoint an Inkosi.'

An additional order is sought directing the First Respondent, being the Premier, to pay the costs incurred by the application irrespective of whether or not the relief is opposed.

The events preceding the application and the affidavits and reports filed

[4] It is necessary to set out briefly the background facts which led to the appointment of the third respondent and to deal with the affidavits filed in the matter as well as the investigation report and affidavits of Professor Maphalala in order to deal with the issues for determination.

[5] On the 29th of August 2007 the late *Inkosi* Minias Mzindeni Mkhwanazi died.

[6] The deponent to the founding affidavit alleges that she is the wife of the late *Inkosi* of the Mkhwanazi Traditional Community at Mpukunyoni ("the community") and is duly authorised to depose to the founding affidavit in terms of the customs and traditions of the community on behalf of the mother of the late *Inkosi*, Annah, his two wives to whom he was married by customary union and the direct descendants of the *Inkosi* who are his children.[2]

[7] After the death of the *Inkosi* in 2007 his successor was Siyabonga, who had the support of the *uMndeni wenkosi.* However before he could be nominated and appointed in terms of s 19 of the Act as successor, he died in a motor vehicle accident. After the death of Siyabonga, the next successor was the *Inkosi*'s other son Dalisu. He enjoyed the support of the *uMndeni wenkosi.*

[8] In April 2010 the second respondent was informed, informally, that the

[2] The deponent relies on the definition of *uMndeni wenkosi* as defined in s 1 of the Act and submits that the *uMndeni wenkosi* consists of the following persons namely Annah, Dalisu, Nomnotho, Zanazo, Ntando, Zama, Ntombenhle, Bafanyana Sibongiseni, Khulekani and herself.

uMndeni wenkosi recognised Dalisu as successor to the *Inkosi*. According to the deponent Dalisu who was acting in the role was subsequently interdicted from doing so by the first and second respondents in an application instituted under case number 8263/2011. A *rule nisi* was granted on 30 August 2011 by Vahed AJ. Such application was subsequently referred for the hearing of oral evidence by Lopes J on 20 August 2012.

[9] The second applicant and the third respondent were identified by certain factions within the Mkhwanazi Traditional Community to become the new *Inkosi*.

[10] The first and second respondents were made aware of the dispute between the two factions and the second respondent through its administrative department attempted to resolve the dispute, but as issues in respect of the second respondent's impartiality arose, the first respondent appointed Luthuli Sithole Attorneys (LSA) to investigate the dispute and compile a report and make recommendations to the first and second respondents.

[11] Pursuant to such appointment, an investigation report[3] was prepared and recommendations made. The first respondent recognised the third respondent as *Inkosi.*

[12] On 23 September 2011, the first respondent's decision was advertised in the Provincial Gazette in which it appointed the third respondent as *Inkosi*. On the 25th of

[3] Bundle Titled Investigation Report. The report is titled "Mkhwanazi Clan (Kwampukunyoni) Investigation and Mediation".

November 2011 the present review application was launched.

[13] In December 2011 after service of the application papers, the first and second respondent opposed the proceedings. On 4 January 2012 the first and second respondents served and filed a notice in terms of Rule 7(1) which stated as follows:

> '**KINDLY TAKE NOTICE** that the First and Second Respondents herein hereby challenge the authority of the Applicant to act and call upon each member of the Applicant (which are members of the eight Royal Houses namely; Baswazini Madwaleni, Mahujini, oPhondweni, Nomathiya, Hhohho, Nsolweni and Shikishela) to furnish powers of attorney authorizing the above mentioned attorneys to act on their behalf.
>
> **ALTERNATIVELY** the First and Second Respondents request the Applicant to furnish minutes accompanied by an attendance register to a meeting held by members of the Applicant (which are members of the eight Royal Houses: Baswazini Madwaleni, Mahujini, oPhondweni, Nomathiya, Hhohho, Nsolweni and Shikishela) authorising the above mentioned attorneys to act on their behalf.'

[14] On 6 March 2012, the attorneys filed a reply to the Rule 7(1) notice in response to the first and second respondents' attorneys challenging their authority to act for the applicant. Special powers of attorney were filed which are a matter of record. In the interim the third respondent had filed a notice to oppose on 22 December 2011.

[15] In the initial answering affidavit[4] on behalf of the first and second respondents, the first and second respondents raised two points *in limine* namely the lack of authority and *locus standi* of the applicant to institute the application and the non-

[4] Pages 31 to 48, index - volume 1, deposed to by Karl-Heinz Waldemar Kuhn.

joinder of the relevant houses comprising the royal family; the failure to comply with s 49(2) of the Act and the failure to comply with s 7(2) of PAJA.

[16] These were dealt with as follows in the affidavit.

Lack of authority and standing to bring the application / Non-joinder

[17] The first and second respondents contend that *uMndeni wenkosi* are the royal family of the traditional community. They are identified through custom and include other family members who are also close relatives of the ruling family and other persons identified on the basis of traditional roles. The *uMndeni wenkosi* is constituted differently in each clan.

[18] They rely on the Traditional Leadership and Government Framework Act 41 of 2003 which defines the royal family as 'the core customary institution or structure consisting of the immediate relatives of the ruling family within a traditional community, who have been identified in terms of custom, and includes, where applicable, other family members who are close relatives of the ruling family'.

[19] The first and second respondents submit that pursuant to an investigation there are eight houses which constitute *uMndeni wenkosi* being the Baswazini, Madwaleni, Mahujini, oPhondweni, Nomathiya, Hhohho, Nsolweni and Shikishela houses.

[20] The first and second respondents dispute the applicant's allegations that she

and her children, the children of the *Inkosi*'s two wives to whom he was married by customary union, Annah Mkwanazi the late *Inkosi*'s mother comprised the *uMndeni wenkosi* as the eight houses which constitute that of the royal family of the Mkhwanazi clan have not been joined.

[21] Having regard to the special powers of attorney filed the deponent has not obtained the authority from the eight houses and consequently does not have the authority to institute the application.

Non-compliance with s 49(2) of the Act

[22] Section 49(2) of the Act reads as follows:

> '(2) Any dispute contemplated in subsection (1) that cannot be resolved must be referred to-
>
> *(a)* the Provincial House of Traditional Leaders, which must seek to resolve the dispute in accordance with its rules and procedures within 30 days;
>
> *(b)* the responsible Member of the Executive Council, in the event that the Provincial House of Traditional Leaders is unable to or has failed to resolve the dispute, who may, subject to the provisions of 21 (1) *(b)* and 25 of the Traditional Leadership and Governance Framework Act, 2003, refer the matter to the Commission for its recommendation within 30 days; and
>
> *(c)* the Premier, in the event that the responsible Member of the Executive Council is unable to or has failed to resolve the dispute, who must resolve the dispute within 30 days after consultation with-
>
> (i) the responsible Member of the Executive Council;
>
> (ii) the parties to the dispute; and
>
> (iii) the Provincial House of Traditional Leaders.'

[23] The first and second respondents submit[5] 'that any dispute which cannot be resolved must be referred to the Provincial House of Traditional Leaders. If the Provincial House cannot resolve the dispute it is then referred to the Provincial Member of the Executive Council for Co-operative Governance and Traditional Affairs "the MEC". If the dispute remains unresolved it is thereafter referred to the First Respondent who must resolve the dispute within 30 days after consultation with the MEC, the parties and the Provincial House.'

[24] The first applicant has not followed and/or exhausted such alternative remedies and consequently it is not appropriate for the court to intervene in the dispute concerning the identification of the successor of the late *Inkosi*. This is based on the submission that the Act makes provision for the successor to the *Inkosi* to be identified by *uMndeni wenkosi*.

[25] The definition does not specify which relatives are part of the *uMndeni* as each clan or traditional community has its own custom and traditions which determine who constitute the *uMndeni*. The court ought not to deal with matters which relate to traditions and customs as it will require an investigation and determination in accordance with traditional customs and practice.

[26] An independent expert in customary matters has conducted an investigation and has compiled a comprehensive report. This report was considered by the first respondent who acted in accordance with such expert's recommendation after consulting the royal family. Based on the recommendation and the consultation with

[5] Paras 13, 14 and 15 answering affidavit, pages 55 to 57, index - volume 1.

the royal family, it is for this reason that the first respondent recognised the third respondent as *Inkosi* and successor to the late *Inkosi*.[6] It thus complied with s 19 of the Act.

Non-compliance with s 7(2) of PAJA

[27] The first and second respondents submit that the review of all administrative action falls under PAJA. PAJA must then be complied with in that an applicant must show firstly that it has exhausted all internal remedies available in terms of s 7(2) of PAJA and secondly it must establish one or more of the grounds for review as set out in s 6 of PAJA.

[28] As the applicant has not exhausted the internal remedy provided for in s 49 of the Act and there are no exceptional circumstances alleged by the applicant for not doing so, the applicant is thus disqualified from seeking to review the decision.

[29] In addition the applicant has not set out any grounds for the review as envisaged in s 6 of PAJA.

The second applicant

[30] In his founding affidavit[7] the second applicant in summary alleges the following:

[6] Para 15.6, answering affidavit, page 57, index – volume 1.
[7] Pages 167 to 196, index - volume 2.

[30.1] that he is the natural son of the deceased *Inkosi*, his mother is Gladness Phumzile Bongekile Mkhwanazi. As evident from his lineage he hails from the original line of amaKhosi and is a direct descendent of amaKhosi;

[30.2] the reason why the application to intervene was brought so late was due to the fact that he was unable to obtain funding to enter into the litigation as resources only became available at the end of August 2014;

[30.3] he was nominated, unbeknown to him, by his father prior to his death to be his successor;

[30.4] the first respondent disregarded all relevant and admissible evidence being the nomination of his father for him to succeed as successor;

[30.5] the decision of the first respondent to appoint the third respondent is not rationally connected to the purpose for which the legislation was promulgated;

[30.6] given the legislative meaning of "*uMndeni wenkosi*" which is the crucial qualifying clause in s 1 of the Act, the definition as contained in the Act was rendered nugatory by the first

respondent's interpretation of who constitutes *uMndeni*;

[30.7] the decision of the first respondent in appointing the third respondent is not supported by the investigation report as the recommendations specifically indicate that there ought not to be an appointment either of himself or the third respondent, his cousin.

The affidavit of Professor Jabulani Maphalala

[31] It is common cause that Professor is an expert in matters involving tradition, culture, custom and practice of the indigenous Zulu nation of KwaZulu-Natal. He is also well-versed in traditional practices and customs of appointing *Inkosi* and other cultural activities. He is regarded as a Zulu historian and professor of history. He has studied the history of the Mkhwanazi clan which dates back from 1870 and has in fact dedicated a chapter in a book he published dedicated to the Bakwanazi clan or tribe of KwaMpukunyoni.

[32] His affidavit deals in detail with the *uMndeni wenkosi* and the traditions followed in relation to the burial of the *Inkosi* and the selection of a successor in title.[8]

[33] He further confirms that it is an established practice of the Mkhwanazi, the Bakwanazi people that *Inkosi's* nominate their successors and the *uMndeni wenkosi* endorses or acknowledges the wishes of the deceased and further that the *Inkosi*

[8] Para 27, pages 204 and 205 of the indexed papers.

appoints a direct descendent to take over as *Inkosi*. Chieftainship cannot be transferred where there are descendants to the throne particularly when where one is not a blood son of the chief. Further, that it is an established practice, tradition and custom that a successor is appointed from a direct descendent of the *Inkosi*.[9]

[34] The first and second respondents filed a supplementary answering affidavit on 8th of December 2014 in which they acknowledged the *locus standi* of the second applicant to intervene in the proceedings. They reiterated their position insofar as the composition of the *uMndeni wenkosi* was concerned as stated in the initial answering affidavit filed. In addition they dispute the aspects raised in the second applicant's affidavit in relation to the provisions of the KwaZulu-Natal Amakhosi and Iziphakanyiswa Act 9 of 1990 as same had been repealed by the Act in terms of s 53(2) and schedule 3 thereof.

The third respondent

[35] The third respondent relies on the contents of his affidavit annexed to the investigation report.[10]

The investigation report of LSA

[36] It is common cause that the findings of attorneys Luthuli and Sithole, who prepared the investigation report, were the following:

[9] Para 23, page 25, index - volume 2.
[10] Pages 283 to 291, bundle titled Investigative Report.

‘

- Umndeni of the Mkhwanazi clan comprises of all the houses that emanates from Veyane. The houses that are prominent and recognised by the Mkhwanazi clan include Baswazini, Madwalweni, Mahujini, Phodweni, Nomathiya, Hhohho, Nsolweni and Shikishela. Hhohho and Nomathiya are the main houses that decide the issue of succession.[11] The other six (6) do not have the powers to change the decision taken by Hhohho and Nomathiya. If a deadlock occurs between Hhohho and Nomathiya, the view of the Hhohho takes precedent.
- In the Mkhwanazi clan the investigation cannot say for certainty that Inkosi descends patrilineally and according to the system of male primogeniture since according to the investigation, all the chiefs of the Mkhwanazi clan, except Mzondeni, had never had a female child as the first born child from the first wife, save to say that, possibly, the reason maNtengu's children were overlooked in the recognition of Mzondeni's successor was that they were both females which implies the principle of male primogeniture.
- In the appointment of Inkosi, Umndeni convene a meeting and recognise and confirm the erstwhile Inkosi's successor. Umndeni recognises and confirms the first born son of the senior (first wife) as the successor. If for a variety of reasons, ranging from incapacity, criminal records and so on, the first born child cannot be recognised and confirmed as Inkosi, the second born child of the first wife becomes Inkosi. If none of the children of the first wife qualify to be Inkosi then Umndeni consider the children of the second wife.
- The principle of even and odd numbers in the succession of Umndeni of the Mkhwanazi clan is not practiced. This principle is only talked about i.e. that the first wife is supported by the third wife and fifth wife and so on in the order of odd numbers. The second wife, fourth wife and the sixth wife and so on in order of even numbers do not under any circumstances take the throne as they are called (ama-khohlwa). In practice, in the Mkhwanazi clan custom and tradition IKhohlwa does become the successor.
- The majority of Umndeni denies that there were confidantes who carried the wishes of previous chiefs as to who should be recognised and confirmed as a successor among the children of those pervious chiefs. Accordingly, this line

[11] My underlining.

of recognition and confirmation of successor's by Umndeni through erstwhile Inkosi's confidantes' lacks substance.

- Hhohho and Nomathiya have no knowledge of Mzondeni's expressed wishes. All nine of Mzondeni's confidantes come from Baswazini Madwaleni and Phondweni. Mzondeni being a Hhohho himself and having ruled for 24 years in the Mkhwanazi clan knew or ought to have known that Hhohho and Nomathiya are the main houses with the power to recognise and confirm the successor. Accordingly, Mzondeni knew or ought to have known that if he does not inform Hhohho and Nomathiya of his wishes same would not be taken into consideration. In this regard, Mzondeni's expressed wishes bear no status.
- The resolution of Umndeni meeting held at Nomathiya on 23 March 2008, recognising Siyabonga, the first born son of Mzondeni with maZondi as Inkosi of the Mkhwanazi clan is no longer relevant since Siyabonga passed away.
- The resolution of Umndeni meeting maSibiya's faction, held on 12 July 2009 and 6 march 2010, recognising and confirming Khetukuthula as the successor of the Mzondeni and as Inkosi of the Mkhwanazi clan cannot be upheld as such as resolution was not in line with the custom and tradition practiced by the Mkhwanazi clan.
- The resolution of the Umndeni meeting held at Nomathiya on 11 October 2009, recognising and confirming Mzokhulayo as Inkosi of the Mkhwanazi clan cannot be upheld, as such resolution was (1) not in line with the custom and tradition of the Mkhwanazi clan in that Umndeni is only authorised to recognise and confirm the successor of the previous Inkosi and not to transfer chieftaincy from one line of Inkosi to another; (2) Succession should proceed through Umndeni line; (3) Mzokhulayo is not the first born child of Magweba; Celukwazi is and is alive and has two daughters; and (4) celukwazi could still bear a son, that would have to be recognised and confirmed as Inkosi since he already had two daughters.
- The Constitutional Court, not deciding on the issue, stated that it is possible for Umndeni to transfer Chieftaincy from one Inkosi to another. Accordingly, there is slight possibility that our courts, taking into consideration the reasons of Umndeni behind Mzokhulayo's recognition, may find the actions of Mkhwanazi clan not outside the custom and tradition practiced by them.'[12]

[12] Pages 43 to 45, bundle titled Investigation Report.

[37] It is common cause that the recommendations of LSA as contained in the investigation report, which recommendations the first respondent considered himself bound by were the following:

[38] In essence the recommendations can be summarised as follows:

> 'We recommend that the DLGTA or the Premier should:
>
> A. In terms of s19(4), refuse to recognise the recognition and identification of both Khethukuthula and Mzokhulayo as chiefs of the Mkhwanazi clan, on the basis that such recognitions were not done in accordance with custom and tradition practiced by the Mkhwanazi and were, possibly, in contravention of section 3 of the Act and must be referred back to Umndeni for reconsideration and resolution;
>
> B. Instruct Senior Counsel, with not less than ten years experience, to confirm LSA's legal view and furnish the Department with legal opinion on whether the Mkhwanazi clan can transfer, as it purported to do, chieftaincy from one line of Inkosi of another. If senior Counsel's opinion is in the affirmative, then the DLGTA should consider Umndeni's intention to restore lineage line to the correct house.
>
> C. Simultaneously, with the appointment of senior counsel, appoint a medical practitioner with relevant expertise to conduct an assessment on whether Celukwazi is mentally ill or not. If the practitioner's report is in the affirmative and Umndeni confirms that it applies the principle of male primogeniture then Mzokhulayo's recognition as Inkosi of the Mkhwanazi clan would stand. However, if the practitioner's report is not in the affirmative, then Celukwazi would have to be appointed Inkosi of the Mkhwanazi clan. If Umndeni resolves that the Mkhwanazi clan does not practice the principle of male primogeniture, even if Celukwazi is mentally ill, his eldest child should be recognised and as confirmed as Inkosi.'

[39] The instruction to LSA[13] reads as follows:

> 'The Department of Local Government and Traditional Affairs ("DLGTA") has instructed Luthuli Sithole Attorneys ("LSA") to investigate and mediate the Mkhwanazi succession dispute and determine, among the children of the late Inkosi Mzondeni, the successor.
>
> Further, LSA is instructed to investigate the cause of the dispute, analyse the genuineness of the process used by Umndeni in appointing Mzokhulayo as a successor, advise on the application of legislation dealing, in particular, with the customary law and on the violation of any constitutional rights (if any), and make recommendations on the findings of the above mentioned issues and any other issues that may have any bearing in a resolution of the above mandate.'

[40] Having regard to the executive summary contained in the investigation report[14] the following were considered by LSA namely:

(a) that the late *Inkosi* Mzondeni Mkhwanazi passed away on 29 August 2007. At the time of his death he had two undisputed wives being maNtengu being his first wife and maZondi (the second wife) and one disputed wife, maSibiya (the third wife);

(b) Siyabonga was the first born son of Mzondeni and maZondi, Khethukuthula was the first born son of maSibiya and Mzondeni; and Mzokhulayo was the second born son of Magweba;

[13] Page 10 of Investigation Report.
[14] Pages 5 to 9 of Investigation Report.

(c) the issue of succession proved that Umndeni were divided into two. One faction of Umndeni took sides with maZondi the other faction took sides with maSibiya on the basis that when Mzondeni was still alive he expressed a view to his confidantes that his successor was Khethukuthula. According to the custom and tradition practised by the Mkhwanazi clan, the first wife goes hand in glove with the third wife, the fifth wife in order of the odd numbers. The second wife, the fourth wife and the sixth wife and so in order of even numbers cannot under any circumstances be considered in the order of succession. As the first wife maNtengu did not bear any male children the wife who is supposed to step in the shoes of the first wife is the third wife maSibiya;

(d) On 23 March 2008, Umndeni maZondi's faction held a meeting and resolved to recognise Siyabonga, the first born son Mzondeni with maZondi as iNkosi of the Mkhwanazi clan. Siyabonga died in a motor vehicle accident soon after his identification as *Inkosi*;

(e) On 12 July 2009 Umndeni, maSibiya's faction, resolved that Khethukuthula, the first born son of maSibiya with Mzondeni, be recognised and confirmed as *Inkosi* of the Mkhwanazi clan;

(f) On 11 October 2009, Umndeni, maZondi's faction met and resolved that Mzokhulayo the second born son of Magweba be recognised as *Inkosi*;

(g) The DLGTA realised that there was dispute between *uMndeni Inkosi* of the Mkhwanazi clan as to who should be appointed *Inkosi*, investigated the cause of dispute and because its impartiality was questioned, resolved to appoint an independent investigator Luthuli Sithole Attorneys to investigate and determine the successor of Mzondeni;

(h) It established that *uMndeni* of the Mkhwanazi clan comprises all of the houses that emanate from Veyane ie Baswazini, Madwalweni, Mahujini, Phodweni, Nomathiya, Hhohho, Nsolwenin Shikishela. Hhohho and Nomathiya are the main houses that decide the issue of succession. The other six houses do not have powers to change the decision taken by Hhohho and Nomathiya. If a deadlock occurs between Hhohho and Nomathiya, the view of Hhohho takes precedent;

(i) The principal of even and odd numbers in the succession of *uMndeni wenkosi* of the Mkhwanazi clan was not practiced and the majority of *uMndeni* denied that there were confidantes who carried the wishes of previous chiefs as to who should be recognised. Consequently the confirmation of successors by *uMndeni* through the previous *Inkosi's* confidantes lacks substance;

(j) Because Hhohho and Nomathiya have no knowledge of Mzondeni's express wishes and all of his confidants have no knowledge of this Mzondeni knew or ought to have known that if he did not inform Hhohho and Nomathiya of his wishes this could not be taken into consideration;

(k) The resolution nominating Khethukuthula as *Inkosi* cannot be upheld as such resolution is not in line with the custom and tradition practiced by the Mkhwanazi clan as it was mainly based on Mzondeni's expressed wishes;

(l) The nomination Mzokhulayo also cannot be upheld as it was not in line with custom and tradition of the Mkhwanazi clan as the u*Mndeni* is only authorised to recognise and confirm a successor and not transfer Chieftaincy from one line of *Inkosi* to another, succession must proceed through the *uMndeni* line and he is not the first born child of Magweba his elder brother Celukwazi is.

[41] In consequence thereof 'the investigation recommended, among other things, that the DLGTA or the Premier should in terms of section 19 (4), refuse to recognise the recognition and identification of both Khethukuthula and Mzokhulayo as chiefs of the Mkhwanazi clan, on the basis that such recognitions and identifications were not done in accordance with custom and tradition practiced by the Mkhwanazi clan and was, possibly, in contravention of section 3 of the Act and must be referred back to

u*Mndeni* for reconsideration and resolution'.[15]

The issues for determination

[42] The issues for determination as set out in the respective heads of argument filed by the parties.[16] I borrow freely from these heads of argument for purposes of the judgment. On the applicant's case the issues that require determination are the following:

[42.1] Whether the first respondent's decision to appoint the third respondent as *Inkosi* was flawed, alternatively that he failed to apply his mind having regard to:

(i) The recommendations contained in the appointed expert's report;

(ii) The uncontested evidence presented by the second applicant;

(iii) The uncontested evidence by the expert, Professor Maphalala;

[42.2] Whether the first respondent erred in accepting the extent or composition of the *uMndeni wenkosi* where new *Inkosi* is to be identified having regard to:

(i) The uncontested evidence presented by the second applicant;

[15] Page 9 of Investigation Report.
[16] The third respondent has not filed heads of argument and chose to argue the matter and make submissions before the court on 5 February 2016.

(ii) The uncontested evidence of the expert Professor Maphalala.

[42.3] Whether the first respondent, in coming to his decision, had due regard to existing customs and traditions of the traditional community with specific reference to the uKuthela Amanzi-Ritual;

[42.4] Whether the existing relevant legislation and more especially s 19 of the Act fails to recognise, alternatively affords sufficient weight to the customs and traditions and more especially the uKuthela Amanzi Ritual where it involves the appointment of a new *Inkosi* following the death of a later *Inkosi*.

[43] The first and second respondents submit the issues for determination are the following:[17]

[43.1] Whether the first applicant has *locus standi* as allegedly composed; Is there a non-joinder of the full *uMndeni wenkosi*;

[43.2] is the case forwarded by the second applicant defective?

[17] It is common cause that in September of 2014 the now second applicant sought to leave to intervene in these proceedings. On 13 October 2014 an order was granted with the consent of the applicant, first, second and third respondents in terms of which he was granted leave to intervene as a co-applicant in the proceedings. His affidavit in the intervention application served as an affidavit in this application and he was granted leave to file his supplementary affidavit.

[43.3] Has the second applicant made out a case for review on the papers;

[43.4] Was the decision of the Premier taken regularly and was it so unreasonable that a reasonable decision-maker could not have reached it.

[44] It must be mentioned that even though the first and second respondents do not dispute the facts as set out in the applicant's heads of argument, they dispute that the uKuthela Amanzi Ritual is relevant as it is contrary to the Act and is not required to complete the appointment of an *Inkosi*. In addition the respondents submit that the *uMndeni* met on 11 October 2009 and identified the third respondent as the person to be the *Inkosi*.

Submissions of the parties

[45] At the hearing of the matter *Mr Kemp SC* who appeared for the applicants submitted that the review is in terms of PAJA, the common law and a legality review. In any event the submission is that if one has regard to the investigation report and the reasoning of the first respondent, it is clear that the decision of the first respondent was not objectively rational.

[46] Section 19 of the Act on a proper interpretation empowers the first respondent on the identification and nomination of a successor to conduct whatever investigations need to be done and then appoint the nominated individual. There is

nothing on the papers to say that the first respondent complied with the investigation report which it commissioned. It must be remembered that all the parties agreed to be bound by the decision or recommendations made emanating from the investigation report.

[47] As regards the provisions of s 49(2) these do not apply. The section on a proper interpretation does not envisage the first respondent in his capacity as a premier. In any event what the first respondent chose to do when faced with the dispute, was to appoint an independent committee to investigate, LSA and all parties agreed to be bound by the recommendations.

[48] As regards the point *in limine* in relation to non-joinder, the case of the first and second respondents is not that the applicant does not have *locus* in her own individual right but rather that she does not represent the full *uMndeni wenkosi* as the royal family being the members of the eight houses have not been joined. On the first applicant's interpretation of the definition, the first applicant has *locus* and consequently can be a party to the proceedings.

[49] *Mr Dickson SC* who appeared for the first and second respondents submitted that the applicants are restricted to the grounds of review as set out in their papers. Reliance is placed on PAJA and the grounds alleged in the affidavit. The applicants cannot now seek to introduce a 'new cause of action' by introducing the legality argument.

[50] In relation to the point *in limine* raised in respect of s 49(2) *Mr Dickson*

declined to make any submissions on this point *in limine* and confined himself to his heads of argument and the papers on this issue.

[51] In respect of the definition of who constitutes the *uMndeni wenkosi Mr Dickson* submitted that there is an irresoluable dispute of fact on the papers. If one considers what the first and second respondents say, the first applicant cannot be the full *uMndeni wenkosi.* She cannot say that she represents the *uMndeni wenkosi.* The investigation report says or mentions who the members of the *uMndeni wenkosi* are. The minutes filed also say who they are and consequently it cannot be said that the first respondent did not deal with the report of LSA or take into consideration the nomination of the full *uMndeni wenkosi*. He submitted that the first respondent did comply with s 19 of the Act and had regard to the minutes of the meeting held on 11 October 2009 in recognising the third respondent.[18]

[52] *Mr Kuboni* who appeared for the third respondent submitted the following, namely:

[52.1] He aligned himself with the submissions of the first and second respondents. He submitted that s 49(2) of the Act speaks about the implementation of the Act therefore there is no reason why this section cannot be invoked;

[52.2] The report mentions who the *uMndeni* are and consequently the third respondent aligns himself with the submissions of *Mr Dickson* in this regard. Even though the third respondent did not

[18] He relied on paras 91 and 92, page 74, index - volume 1.

file a formal affidavit, he relies on the one attached to the investigation report. The submission is that even the grandmother (Annah Mkwanazi) and the mother of the deceased were at a meeting when the nomination of the third respondent was made.

Analysis

[53] In respect of the first and second respondents' opposition to the application, specifically the points *in limine* relating to the *locus* of the first applicant and non-joinder of the eight houses of the Mkhwanazi community, this has to be considered in light of the interpretation to be attached to the definition of *uMndeni wenkosi* for purposes of this application.

[54] The applicants submit that the first respondent's decision is fatally flawed as he did not adhere to and comply with the recommendations as contained in the expert report alternatively did not apply his mind as he did not follow the recommendations of his own appointed experts. The overall conclusion being that the recognition and appointment of the third respondent is not rationally connected to its purpose, the information placed before the administrator, is fatally flawed and it is not a decision which a reasonable decision maker would have made.

PAJA

[55] Section 6 of PAJA which deals with the grounds for judicial review reads as

follows:

‘6 Judicial review of administrative action. -

(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

(2) A court or tribunal has the power to judicially review an administrative action if-

(a) the administrator who took it-

(i) was not authorised to do so by the empowering provision;

(ii) acted under a delegation of power which was not authorised by the empowering provision; or

(iii) was biased or reasonably suspected of bias;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action was procedurally unfair;

(d) the action was materially influenced by an error of law;

(e) the action was taken-

(i) for a reason not authorised by the empowering provision;

(ii) for an ulterior purpose or motive;

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

(iv) because of the unauthorised or unwarranted dictates of another person or body;

(v) in bad faith; or

(vi) arbitrarily or capriciously;

(f) the action itself-

(i) contravenes a law or is not authorised by the empowering provision; or

(ii) is not rationally connected to-

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator;

(g) the action concerned consists of a failure to take a decision;

(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

(i) the action is otherwise unconstitutional or unlawful.'

[56] *Mr Kemp* on behalf of the applicants submitted that the first respondent misconceived the correct legal position specifically in the application of s 19 of the Act, did not comply with the section and did not apply his mind to the relevant facts before him in that he misconstrued his own report, ignored aspects of the report and also aspects of the legislation.

[57] The first and second respondents' appointed attorneys, Luthuli and Sithole, to investigate the dispute between the two factions relating to the identification of a successor to the *Inkosi*. It is common cause that the investigators compiled a report based on the Mkwanazi clan's customs and traditions and took into account both factions' views, being the first applicant and the members of the eight houses, in relation to the identification of the third respondent. The first respondent considered himself bound by the recommendation of the independent expert.[19]

[58] In addition the first respondent submits that he has acted according to the independent expert's recommendation after consulting the royal family and has recognised the third respondent and as a consequence has published the provincial

[19] Para 15.5, answering affidavit, pages 56 to 57, index – volume 1.

notice on 23 September 2011.[20]

[59] The first respondent submits that the decision to recognise the third respondent was done in consultation with his colleagues in the executive council of the province of KwaZulu-Natal.[21] The applicants submit that having regard to the record of proceedings in respect of the first respondent's decision, there is no evidence to support that this in fact occurred. In consequence thereof, this decision is at odds with "its own structure of legality".

[60] It is clear that if one has regard to the investigation report that for purposes of investigating and making recommendations LSA considered not only the deponent to the affidavit and those on whose behalf she deposed to the founding affidavit, and the second applicant but also took into account the views of the eight houses, which comprised the Mkhwanazi clan.

[61] It would appear that LSA considered both the applicants as well as the first and second respondents' persons as comprising the *uMndeni wenkosi* for purposes of the definition as contained in s 1 of the Act as well as s 19. *Mr Dickson* acknowledged during argument that the report does not expressly say this neither does it give an indication as to precisely who constitutes the *uMndeni wenkosi*.

[62] I am of the view that having regard to the contents of the report that is so. It refers to the first and second applicants and members of the eight houses. I am

[20] Para 15.6, page 57, index – volume 1.
[21] Para 64, page 68, index – volume 1.

fortified in this view by a submission, *Mr Dickson* made in respect of the minutes of a meeting held on 11 October 2009 annexed to the papers. The report made it clear however that it is the Hhohho house and Nomathiya house which decide on succession in the Mkhwanazi clan and in the event of there being a difference in the views of these two houses it is the Hhohho house whose views take precedence.

[63] It is common cause that the applicants are members of the Hhohho house. The first and second respondents aver that no reliance can be placed on the report of Professor Maphalala. It is common cause that the investigation report is undated. During argument, *Mr Dickson* submitted that the first respondent did not consider the recommendations of LSA as the report came after the 11 October 2009 meeting. The minutes are annexed to the record. There was compliance with s 19 and the decision of a correctly composed *uMndeni wenkosi* as is evident from the minutes of the 11 October 2009 meeting. When the first respondent received the minutes of the 11 October 2009 meeting, which predated the receipt of the report, he then based, on those minutes made the appointment. He has thus complied with s 19.

[64] It is common cause that the LSA recommended that the identification of both the second applicant and the third respondent not be accepted and that the matter be referred back and no appointment be made. Once the first respondent acknowledges that it did not have regard to the recommendations, there is a procedural irregularity, and the decision of the first respondent is fatally flawed. Moreso what was the point of then commissioning LSA as he undertook to be bound by same. He did not consider same as it was received after the minutes of the meeting.

[65] The minutes of 11 October 2009, which predate the receipt of the report, cannot be relied on to justify the appointment of the third respondent. *Mr Kemp* is correct in submitting that there is no explanation as to why the recommendations contained in the investigation report were not implemented or why it was not given effect to in the papers. Clearly, it is as the recommendations, were not had regard to as the report came after the receipt of the 11 October 2009 meeting minutes. This was a submission made by *Mr Dickson* during argument. The appointment of Celukwazi could only be considered if a medical certificate had been obtained. It is common cause that this was not done as he declined to accept the nomination and subsequent appointment. And in any event the nomination and appointment of Celukwazi could only have been considered if the lineage was corrected and there is nothing to say that this was done.

[66] In addition having regard to the report of Professor Maphalala as well as the investigation report the custom is that the newly appointed *Inkosi* had to be a direct descendent or in the line of direct descendants of the former *Inkosi*. Once again there is no explanation as to why the first respondent decided not to follow this custom and tradition and to give effect to this.

[67] If one considers the provisions of s 19 which 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 an *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 appointed as an *Inkosi*, consider the content of the testamentary succession document referred to in section 19A.

(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 identified 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 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 of and names of all members present at the traditional council at which the 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.'

[68] Section 19(1) provides that where the position of an *Inkosi* is to be filled the following process must be followed. This is set out in paragraph *(a)* which provides that the *uMndeni wenkosi* must within a reasonable time and having regard to applicable customary law and s 3[22] identify a person who qualifies in terms of customary law having regard to s 21(1) *(a)*, *(b)* or *(d)*,[23] provide the Premier with reasons for the identification of that person and the Premier must[24] subject to subsection (3) and s (3) recognise a person so identified as *Inkosi*.[25]

[69] Having regard to subsection 3 there is no indication in the papers that the

[22] Section 3 reads as follows: A traditional community must transform and adapt customary law and custom so as to comply with the principals enshrined in the Constitution, in particular by - *(a)*, *(b)* and *(c)*.

[23] '21 Removal of traditional leader

(1) A traditional leader 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* to function as such;

(c) wrongful appointment or recognition;'

[24] My underlining.

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

Premier informed the Provincial House of Traditional Leaders of the recognition or appointment of the third respondent.

[70] Secondly s 19(4) and (5) read as follows:

> '(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 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.'

[71] Section 19(4) provides for the first respondent where there is evidence or an allegation that the identification of a person was not done in accordance with customary law, customs or processes or in contravention of s 3 to refer it to the Provincial House of Traditional Leaders for comment or refuse to issue the certificate of recognition and refer the matter back to *uMndeni wenkosi* for reconsideration and resolution where the certificate of recognition has been refused.

[72] This subsection makes it quite clear that as in this instance where there

appeared to have been a difference in the identification of the *Inkosi* and where it appeared that it may not have been done in accordance with customary law, customs or processes the Premier was required to either refer the matter to the Provincial House of Traditional Leaders for comment, refuse to issue a certificate or refer it back to the *uMndeni wenkosi* for reconsideration ad resolution. Nowhere in the papers is there any indication that this was done.

[73] In fact what transpired as that LSA was appointed to conduct an investigation and the first respondent agreed to be bound by such recommendation. Despite this however the first respondent then on his own appears to have recognised the third respondent. If one then considers the basis upon which the first respondent says he recognised the third respondent, such recognition was flawed and he did not have regard to all the information placed before him. He did not have regard to the recommendations of LSA. Had he done so he would have followed the recommendations and not recognised and appointed the third respondent. The appointment of the third respondent was flawed.

[74] At the hearing of the matter *Mr Kemp* argued that it was the legality of the decision by the Premier and the implementation thereof was in dispute. *Mr Dickson* indicated that the applicants were confined to the grounds of review stated in the founding affidavit namely s 6 of PAJA. He submitted that PAJA is the only method by which the administrative action of the Premier is reviewable.

[75] In *Bato Star Fishing (Pty) Ltd v Minster for Environmental Affairs and Others*[26] the court held the following:

> 'The provisions of s 6 divulge a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA. The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past. And the authority of PAJA to ground such causes of action rests squarely on the Constitution. It is not necessary to consider here causes of action for judicial review of administrative action that do not fall within the scope of PAJA. As PAJA gives effect to s 33 of the Constitution, matters relating to the interpretation and application of PAJA will of course be constitutional matters.'
> (Footnote omitted)

[76] The basis for submitting that this was not an application to have the decision of the Premier set aside based on the principal of legality was that this was not pertinently a ground raised in the papers. The test which would apply should the review be based on the principle of legality would be whether or not the decision made was objectively rational. For this proposition he relied on *Merafong Demarcation Forum v President of the RSA*[27] where the court held the following:

> 'The exercise of public power has to be rational. In a constitutional State arbitrariness or the exercise of public power on the basis of naked preferences cannot pass muster. Judgments of this court suggest that, objectively viewed, a link is required between the means adopted by the legislature and the end sought to be achieved.'
> (Footnote omitted)

[77] In *Bato Star*[28] the court held that the test for review of administrative action is whether or not such administrative action was reasonable and whether or not the

[26] 2004 (4) SA 490 (CC) para 25.
[27] 2008 (5) SA 171 (CC) para 62.
[28] Paras 44 and 45.

procedure was fair. The decision would be reviewable if 'it is one that a reasonable decision maker could not reach'.

[78] The court must in deciding whether or not such action was reasonable and procedurally fair must exhibit deference to the administrative authority whose decision is being challenged.[29] I am of the view that the applicants have based their application on s 6 of PAJA.

[79] Of relevance to the application is whether the legal requirements of the Act were complied with;[30] and of relevance to this is the composition of the *uMndeni wenkosi* and the interpretation of the definition in the context of the facts of this application.

Rules of interpretation

[80] It is now settled law that the process to be followed when interpreting a statute document or contract is that as laid down by the SCA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*.[31]

[81] This approach was subsequently confirmed in *Bothma-Batho Transport (EDMS) Bpk v S. Bothma and Seun Transport (EDMS) Bpk*[32] where the court at paragraph 12 held the following:

[29] *Bato Star* para 46.
[30] *uMndeni (Clan) of Amantungwa & Others v the MEC for Traditional Affairs and Another*, case number. 513/09 [2010] ZASCA (142) unreported.
[31] 2012 (4) SA 593 (SCA).
[32] 2014 (2) SA 494 (SCA).

> ‘That summary is no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts or other documents, such as statutory instruments or patents. Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is “essentially one unitary exercise”. Accordingly it is no longer helpful to refer to the earlier approach.’
> (Footnotes omitted)

[82] Section 1 defines “*uMndeni wenkosi*” as follows:

> ‘*umndeni wenkosi* means the immediate relatives of an *Inkosi,* who have been identified in terms of custom or tradition, and includes, where applicable, other persons identified as such on the basis of traditional roles.’

[83] The first respondent defines *uMndeni wenkosi* on the papers before me to mean the eight houses of the Mkhwanazi clan. The definition as contended for by *Mr Kemp* of behalf of the applicants is the following. If one has regard to the definition it refers to the immediate relatives of an *Inkosi* who have been identified in terms of custom or tradition. Immediate relatives I agree would refer to the wives of the *Inkosi* and the children born of such relationship be it a customary union or civil union. The definition goes further and reads and includes, where applicable, other persons identified as such on the basis of traditional roles. I agree with the submission that what is envisaged here are not only the immediate relatives but also more persons who may be included on the basis of any traditional roles as identified.

[84] Professor Maphalala in his report indicates that *uMndeni wenkosi* means different things in different contexts. This is also the view of the first respondent. This fits in with the Act where it refers to and includes where applicable other persons identified as such on the basis of traditional roles. It is clear that the applicants are the immediate family of the deceased *Inkosi* his wives his children and his mother. In addition they belong to the Hhohho house. The first respondent also acknowledges that the second applicant has locus in the application. It must then follow that I do not agree that there is an irresoluable dispute of fact.

[85] Both the first and second applicants base the review on PAJA. On the other hand the first respondent in the papers takes the point that as the *uMndeni wenkosi* also constitutes the eight houses of the Mkhwanazi clan as they are not joined in the application, the first applicant does not have standing as she says she is the *uMndeni wenkosi.* He also then goes on to rely on the minutes of the 11 October 2009 meeting and attendance register which confirms that the *uMndeni wenkosi* was properly constituted.

[86] Such interpretation cannot be correct for purposes of establishing her standing. She has in her own right, and on her interpretation of who constitutes the *uMndeni wenkosi* standing to launch the application acting on behalf of the persons mentioned in her affidavit.

[87] Consequently, it must follow then that as the definition of *uMndeni wenkosi* includes the immediate relatives of an *Inkosi* the first applicants have locus as they do constitute the immediate family. This interpretation of giving the definition a

meaning to include the applicants together with the eight houses appears to also be consistent with the contents of the investigation report. The investigation report considered not only the views of the applicants but also that of the eight houses. The first applicant has standing in this application.

Non-compliance with s 7(2) of PAJA and s 49 of the Act

[88] Section 7(2) of PAJA reads as follows:

> '(2) *(a)* Subject to paragraph *(c)*, no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
>
> *(b)* Subject to paragraph *(c)*, a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph *(a)* has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.
>
> *(c)* A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.'

[89] The section places an obligation on a party seeking to review the conduct of an administrator in terms of s 6 to exhaust all the internal remedies available and in the event of it not doing so to satisfy the court that there are extraordinary reasons for not complying with the provisions of s 7(2). In this regard the first and second respondents refer to s 49 of the Act which relates to the dispute resolution mechanisms and/or internal remedies which they submit were available to the

applicants and which were not complied with.

[90] Section 49 of the Act reads 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 this Act or otherwise, members of such a community or institution and traditional leaders within the traditional community or traditional institution concerned must seek to resolve the dispute internally and in accordance with customary law and customs.
>
> (2) Any dispute contemplated in subsection (1) that cannot be resolved must be referred to-
>
> *(a)* the Provincial House of Traditional Leaders, which must seek to resolve the dispute in accordance with its rules and procedures within 30 days;
>
> *(b)* the responsible Member of the Executive Council, in the event that the Provincial House of Traditional Leaders is unable to or has failed to resolve the dispute, who may, subject to the provisions of 21 (1) *(b)* and 25 of the Traditional Leadership and Governance Framework Act, 2003, refer the matter to the Commission for its recommendation within 30 days; and
>
> *(c)* the Premier, in the event that the responsible Member of the Executive Council is unable to or has failed to resolve the dispute, who must resolve the dispute within 30 days after consultation with-

(i) the responsible Member of the Executive Council;

(ii) the parties to the dispute; and

(iii) the Provincial House of Traditional Leaders.'

[91] I agree with the submissions of *Mr Kemp* that if one has regard to the section the *lis* is between the applicants and the Premier. The Premier cannot be described as "a traditional institution". In addition once a decision is made the provisions of s 49 are not open to an applicant. The only basis to deal with it is by of review to set the decision aside.[33]

[92] The procedures envisaged in s 49 could only have been embarked upon or available had the first respondent not recognised the third respondent and gone ahead and issued the certificate of recognition. Consequently, this point too must fail.

Is the decision of the first respondent reviewable in terms of PAJA or in terms of the principle of legality?

[93] It is correct that the applicants refer to a review in terms of PAJA alternatively the common law. During argument *Mr Dickson* pertinently raised the fact that the review based on legality was not pertinently raised in the papers and consequently the applicants are confined to a review in terms of PAJA.

[94] *Mr Kemp* submitted however that having regard to the papers and authorities he referred to, the principle of legality could be raised by the applicants and was in

[33] *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC); *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA).

fact raised by the applicants in their papers although not pertinently stated as such.

[95] Where a decision maker or an administrator takes into account irrelevant considerations or disregards relevant considerations, such decision is subject to review. This is in terms of the provisions of s 6(2)*(c)* and 6(2)*(e)*(iii) of PAJA.[34]

[96] The first respondent did not consider relevant matters, namely:

[96.1] the recommendation of LSA not to appoint the second applicant and the third respondent;

[96.2] did not properly consider the definition of "*uMndeni wenkosi*" as it appears in s 1 of the Act but more importantly that LSA in considering who composed *uMndeni wenkosi* considered the views of the eight houses together with that of the first applicant and the persons she indicated comprised the *uMndeni*.

[97] In addition the appointment of the third respondent was not rationally connected to the information before the first respondent, is fatally flawed, and is thus reviewable in terms of s 6(2)*(f)*(ii)*(cc)*.

[98] It is worth mentioning that at paragraph 9 of the *Eskom* judgment Cloete JA in referring to the principle of legality held the following:

---

[34] *Littlewood and Others v Minister of Home Affairs and Another* 2006 (3) SA 474 (SCA); *Director-General: Department of Home Affairs and Another v Mavericks Revue CC* 2008 (2) SA 418 (SCA); *Eskom Holdings Ltd and Another v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA) para 6.

> 'The principle of legality would require that an invalid administrative decision be set aside.'

[99] In dealing with the provisions of s 8 of PAJA the court referred to the decision in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*[35] where the court said the following:

> 'It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collide. Each remedy thus has its separate application to its appropriate circumstances and they ought not to be seen as interchangeable manifestations of a single remedy that arises whenever an administrative act is invalid.'

[100] The first respondent's decision is so fatally flawed and is consequently subject to review as he did not properly consider the composition of the *uMndeni wenkosi*. In *Chairpersons' Association v Minister of Arts and Culture and Others*[36] the court was of the view that where an administrator takes a decision based on irrelevant considerations or fails to consider relevant considerations, same is reviewable in terms of s 6(2)*(e)*(iii) of PAJA.

[101] In addition the court quoting from a decision in *Pepcor Retirement Fund and Another v Financial Services Board and Another*[37] held that the principle of legality requires that a power conferred on a functionary to make decisions in the public interest should be exercised properly i.e. on the basis of the true facts. In

---

[35] 2004 (6) SA 222 (SCA) para 36.
[36] 2007 (5) SA 236 (SCA).
[37] 2003 (6) SA 38 (SCA) paras 47 and 48.

Chairpersons' Association the court was of the view that the legal position as set out in the *Pepcor* case based on the principle of legality still applies under PAJA as s 6(2)*(e)*(iii) provides that administrative action taken because irrelevant considerations were taken into account or relevant considerations were not considered can be set aside on review. Where decisions based on a material misstatement of fact, it is clear that the subparagraph applies.

[102] Thankfully I need not decide whether the applicants are non-suited as I am of the view that given the contents of the affidavits the review falls within the ambit of s 6 of PAJA. For all the reasons mentioned above I am of the view that the appointment and recognition of the third respondent was not rationally connected to the information before the Premier. In addition the decision is not one a reasonable decision maker in the position of the Premier would have made. The appointment is consequently reviewable in terms of s 6 of PAJA. On the first respondent's own version as submitted in argument a well, when making the appointment of the third respondent, he did not have regard to the recommendations in the report of LSA and relied on the minutes of the meeting of 11 October 2009 which predate the report and receipt thereof.

Costs

[103] It is trite that a successful party is entitled to their costs. In the founding affidavit the first applicant sought an order directing the first respondent to pay the costs occasioned by the application irrespective of whether or not the relief was opposed. The relief was opposed by the first and second respondents, as well as the

third respondent.

[104] Even though the third respondent did not file any affidavits and *Mr Kuboni* who appeared, argued the matter on the basis of the affidavit annexed to the investigation report, it is common cause that the third respondent was the person recognised and appointed by the first respondent in terms of s 19 of the Act and was, in my view, entitled to "defend his appointment".

[105] A court has a discretion which must be exercised judicially when awarding costs. Given the nature of these proceedings and the issues involved, and the complexity of the matter, I am satisfied that the employment of two counsel was warranted. I am also satisfied that there is no basis to deviate from the normal rule in respect of costs. Consequently, the applicants are entitled to the costs occasioned by the application including any reserved costs.

[106] A further matter warranting attention relates to the application to intervene. The costs of the application to intervene were reserved by Van Zyl J on 13 October 2014. A notice to oppose the interlocutory application for leave to intervene was filed by the first and second respondents. No answering affidavit was filed and it would appear that the matter which was enrolled for hearing on 13 October 2014 on the unopposed roll also necessitated the main application be adjourned. It is clear, having regard to the affidavit of the second applicant, that at the time the application to intervene was launched he had a direct and substantial interest in the proceedings warranting the application for him to intervene. In addition the first and second respondents concede that the second applicant has the necessary *locus standi* to

bring the application and it was for this reason that they subsequently consented to the order granted on 13 October 2014. This much is evident from paragraph 9.[38]

Conclusion

[107] Having satisfied myself that s 6 of PAJA was not complied with, in the premises, the orders I issue are the following:

[107.1] The recognition of the Third Respondent as *Inkosi* of the Mkhwanazi Traditional Community at Mpukunyoni, KwaZulu-Natal by the First Respondent acting in terms of the provisions of s19 of the KwaZulu-Natal Traditional Leadership and Governance Act No. 5 of 2005 is hereby reviewed and set aside.

[107.2] The First Respondent is directed to consult with the Applicants (and where applicable, other persons identified as *uMndeni wenkosi* on the basis of traditional roles) concerning the identification of an *Inkosi* for the Mkhwanazi Traditional Community at Mpukunyoni, KwaZulu-Natal as provided for in terms of s19 of the Act and to recognise and appoint an *Inkosi* in compliance with the provisions of the Act.

[107.3] The First and Second respondents are directed to pay the costs of the application, including any reserved costs, such costs are

[38] First and second respondents' supplementary answering affidavit, page 277, index - volume 2.

to include the costs occasioned by the employment of two counsel.

[107.4] The First and Second respondents are directed to pay the costs occasioned by the application to intervene, including any reserved costs.

_____

HENRIQUES J

Case Information

Date of hearing	:	5 February 2016
Date of judgment	:	17 August 2017

Appearances

Counsel for Applicants	:	Adv. K. J. Kemp SC with Adv. E.S. Crots
Instructed by	:	Ngwenya & Zwane Attorneys c/o Yashica Chetty Attorneys Suite 1, 365 Long Market Street Pietermaritzburg (T) 033-394 9818 (F) 033-394 9819 Ref: Mr Zwane/ACZ 2143/13/SDM Email: info.emp@ngwenyazwane.co.za Zondi and Shangase Attorneys (Second Applicant's Attorneys) 160 West Street Pietermaritzburg
Counsel for First and Second Respondents	:	Adv. A. J. Dickson SC
Instructed by	:	PKX Attorneys Suite 36, 3 on Cascades Crescent Montrose Pietermaritzburg (T) 033-347 5354 (F) 033-347 3572 Ref: M Govender Email:mail@pkx.co.za
Counsel for Third Respondent	:	Adv. W. S. Kuboni

Instructed by	:	Mchunu, Bulose & Partners c/o Lushaba J & Associates Suite 207 – 209 2nd Floor, ABC Building 9 Gallway Lane Pietermaritzburg (T) 033-345 1080 (F) 086 107 4027 Email: mchunu@webmobile.co.za