IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MTHATHA)

CASE NO.: 2227/2023

In the matter between:

MTHETHO HLAMANDANA	**1st Applicant**
BHEKAMEVA ROYAL FAMILY	**2nd Applicant**
and	
PREMIER, EASTERN CAPE PROVINCIAL GOVERNMENT	**1st Respondent**
MEC FOR COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS, EASTERN CAPE	**2nd Respondent**
ISIKELO TRADITIONAL COUNCIL	**3rd Respondent**
ADV.N. JAMES N.O	**4th Respondent**

JUDGMENT

ZONO AJ:

Introduction

[1] The applicants approached this court on urgent basis on 30th May 2023 and an interdictory relief against first, second and third respondents was granted by consent between the parties pending finalization of review application sought in Part B of the application. The urgent relief was effectively interdicting the implementation of fourth respondent's decisions respectively dated 12th August 2021 and 28th February 2022 pending review application. Nothing now turns on the urgent relief granted by this court.

[2] Serving before this court is a review application which is set out in Part B of the same application. The review is couched in the following terms:

> "*Be pleased to take notice that the applicants will on a date to be determined by the Registrar of this Honourable court apply for orders in the following terms:*
>
> *"1. Reviewing and setting aside the decision of the first respondent dated the 08th May 2023 that confirmed the findings and a sanction imposed by the fourth respondent that relieved the first applicant from his duties as a Headman of Isikelo Administrative Area, Bizana.*
>
> *2. Reviewing and setting aside the findings and decisions of the fourth respondent dated 12th August 2021 and fourth respondent's decision on sanction dated 28th February 2022.*
>
> *3.Granting applicant's costs of suit.*
>
> *4.Granting further and/ or alternative relief." (all sic)*

[3] The application is opposed by the respondents. In so doing the respondents have delivered their answering affidavit deposed to by the state attorney Mr Hanise. The replying affidavit is deposed to by Mthetho Hlamandana, the first applicant herein. I propose to refer to the first respondent as Premier, the second respondent as MEC, the third respondent as Traditional Council, the

fourth respondent will be referred to as the chairperson. The first applicant is described in the papers as the headman and traditional leader of Isikelo Administrative Area, Bizana.

[4] The first applicant contends that pursuant to charges for the alleged misconduct having been preferred against him, the chairperson found him guilty of misconduct on 12th August 2021. The fourth respondent was a duly appointed chairperson of the disciplinary hearing against the first applicant. The first applicant sought to be legally represented during the mitigation and aggravation of sentence. For this purpose, a transcribed record was sought to enable first applicant's counsel to understand and follow the proceedings.

[5] Apparently few postponements were granted by the chairperson for the first applicant to be furnished with the transcribed record. However, the chairperson of the enquiry delivered a sanction on 28th February 2022 in terms of which it was recommended that the first applicant be relieved of his duties as the Headman of Isikelo Administrative Area, Bizana. The sanction was delivered in first applicant's absence and without hearing the first applicant in mitigation. It is contended that such a failure was in contravention of section 31(12) of Act 1 of 2017.

[6] The first applicant apparently lodged an appeal against the finding of guilt and sentence with the Premier on 16th March 2022. The appeal was concluded on 08th May 2023. The outcome of the appeal dated 08th May 2023 was forwarded to the first applicant on 11th May 2023. The Premier confirmed the findings and recommendation of the chairperson of the hearing and consequently relieved the first applicant of his duties as the headman of Isikelo Administrative Area, Bizana with effect from the date of receipt of the outcome of appeal.

[7] In addition to chairperson's failure to afford the first applicant an opportunity to present his case on mitigation, the first applicant impugns the chairperson's decision on sentence on the basis that the chairperson failed to furnish the first applicant's legal representatives with the transcribed record for them to

familiarise themselves with the proceedings to inform their submissions on sentence.

[8] It arises from the first applicant's founding affidavit that the recordings were served by Mr Parkies to Mr Linyana, first applicant's legal representative. It appears as follows:

> *"15. On 15th November 2021 the fourth respondent sent an email to my former attorneys, a copy of which is annexed hereto marked HM12. In terms of this email the fourth respondent says that the recordings were duly served by Parkies on Mr Linyana, my former attorney.*
>
> *16. On the 17th November 2021 my former attorneys responded to the fourth respondent's email above mentioned by way of a letter and I annex hereto a copy of the said letter and a copy of an email to which the said letter was attached marked HM13 and HM14.*
>
> *17. In the above mentioned letter my former attorney is saying that they were not furnished with the transcribed record and it would appear from the letter that what in fact was given to them is a recording and not the transcribed record."(All sic)*

[9] Chairpersons recommendations[1] is impugned on the further basis that it is not prescribed by section 31(14) of Act 1 of 2017 as one of the sanctions that may be imposed by the chairperson. Secondly it is contended that section 31(14) of the Act gives power to him as the chairperson to impose a sanction and not to make a recommendation. Statutorily prescribed sanctions do not include a recommendation to relieve a traditional leader of his duties. Accordingly, it is contended that the chairperson misconstrued the powers statutorily bestowed upon him.

[1] It is recommended that Mr Hlamandlana be relieved of his duties as the Headman of Isikelo Administrative Area, Bizana.

[10] With regards to the appeal decision by the Premier, the first applicant impugns the Premiers' decision dated 08th May 2023 for it lacked reasons. The Premier confirmed chairperson's decision without providing any reasons for such decision.

[11] The first applicant contends that chairperson's decision was influenced by a material error of law, contrary to what it sets out, it is not in terms of the provisions of section 24 read with section 31(18) of the Act. Premier's removal of first applicant as headman amounts to usurpation of the function of the Royal Family and falls to be reviewed and set aside on that basis.

[12] The above presents a fair summary and summation of applicant's case. I intend to deal with respondent's case as I discuss relevant aspects of the applicant's case. However, the first applicant further impugns chairperson's decision on the basis that there is no rational connection between the findings made by the chairperson and the evidence tendered. That assertion is based on the contention that the chairperson failed to evaluate the evidence and evidential material before him including assessment on credibility of evidence and witnesses. His findings were arbitrary.

Chairperson's Decision

Failure to provide Transcribed Record by the Chairperson

[13] The applicants impugn chairperson's decision relating to sentence on the basis that, notwithstanding request for transcribed record, the chairperson failed to furnish same. The applicant contends that the transcribed record was necessary for the applicant's counsel to prepare for mitigation of sentence. The applicants rely on the provisions of section 31(6) of **Eastern Cape Traditional Leadership and Governance Act No 1 of 2017 (the Act)** which provides as follows:

> *"6. The chairperson must keep record of the notice of an inquiry and its proceedings."*

[14] I have alluded in paragraph 8 above to the fact that the first applicant was aware of respondent's version that the recordings were sent to Mr Linyana, first applicant's legal representative, by Mr Parkies. The answering affidavit records the following:

> *"10.2 for the record, mechanical recordings were sent to Mr Linyana the attorney on record on 08th September 2021 by Mr Parkies who was recording secretary in the hearing." (all sic)*

[15] In this regard, nothing further is said in the replying affidavit. Both applicant and respondent rely in the papers on the respondent's email of 15th November 2021 which reads in relevant parts as follows:

> *"The requested recordings were duly served by Mr Parkies to Mr Linyana the respondent's counsel on 18th October 2021, as requested by Linyana."*

[16] What appears to be common cause is that mechanical recordings were given to first applicant's legal representatives. The applicants seem to be making an issue with the fact that transcribed records were not given. However, the applicants do not contend that the mechanical recordings that were given free of charge, could not achieve a purpose that would be achieved by the transcribed record, had it been given to the first applicant. I find this argument to be preposterous and to be without merit. Mr Linyana or the first applicant's counsel are not on record to say they could not use the provided mechanical recordings to prepare for mitigation. That point cannot be upheld.

[17] The aforesaid argument is unmeritorious for other reasons. The applicants do not make out a case on their founding papers that the chairperson was in possession of a transcribed record. Reliance on section 31(6) of the Act is misplaced in this regard. The section only enjoins the chairperson to keep a record of the notice of an enquiry and its proceedings. No transcribed record is mentioned in the provisions. The record of proceedings referred to in the

empowering provision is what was given to Mr Linyana in the form of mechanical recordings. The applicants were only clutching at straws in this regard.

[18] Having said the above the respondents are on record to say the following in their answering affidavit:

> *"31.5 Furthermore, the 4th respondent is not a transcriber of records."*

[19] No contrary suggestion is given by the applicants in their replying affidavit. There is simply no basis, both in fact and in law, for the complaint about chairperson's failure to provide transcribed record. Had the first applicant wanted transcribed records, he should have done it himself by making use of the mechanical recordings given to him through his attorney, I therefore decline to uphold this point.

[20] Mr Linyana or first applicant's counsel accepted the mechanical recordings as a servant of the first applicant and not for his own interest. He received same for purposes of preparation for first applicant's case and preparation of those records was apparently on request by applicant's legal representative[2].

Chairperson's failure to give first applicant opportunity to represent his case in mitigation of sentence

[21] The applicants seek to impugn chairperson's decision on sentence on the basis that the first applicant was not given an opportunity to present his relevant circumstances in the mitigation of sanction. They further seek to assail chairperson's decision on a further basis that same was taken in the absence of the first applicant. Reliance sought to be placed on the provisions of section 31(12) of the Act which provides:

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[2] ***Feldman v Mall and Samer v Duursema*** 1951 (2) SA 22 (O) 25 A.

"Before deciding on the sanction, the chairperson must give the Traditional leader an opportunity to present relevant circumstances in mitigation…"

[22] The respondents record in their answering affidavit that the chairperson afforded both parties time to submit their written submissions on aggravating and mitigating factors. The other party complied and submitted his written submissions on aggravation of sentence. The applicant failed to do so and ignored all chairperson's reminders to submit written submission in mitigation of sentence.

[23] In support of their submission the respondents put up an evidence in the form of an email transmitted by chairperson to the first applicant dated 15th November 2021 which reads as follows in the relevant parts:

"This email serves to remind that the respondents/Mthetho Hlamandana has not yet filed it mitigating factors in this matter. The mitigating factors and aggravating circumstances were due on the 22nd October 2024….an email was again sent as a reminder to submit the mitigating factors at the end of October, nothing has been received only the aggravating has been since received…..I once again urge you to submit the same. The expected dated is 19th November 2021." (all sic)

[24] It is not in dispute that the aforesaid email was received by or on behalf of the first applicant; neither do the applicants explain their reason to ignore this email and other emails preceding it. It is not gainsaid or seriously disputed that chairperson's endevours to elicit and obtain mitigating factors from the first applicant were in compliance with the provisions of Section 31(12) of the Act. No argument was made on behalf of the applicants explaining the manner in which the provisions of Section 31(12) of the Act were contravened in the context of the facts of this case[3]. I therefore come to a conclusion that the first applicant was given sufficient opportunity to present his circumstances

[3] ***Aktebolaget Hassle and Another v Triomed (Pty) Ltd*** 2003 (1) SA 155 (SCA) Para 1. "*In law context is everything."*

in the mitigation of sentence. The empowering provision does not provide the manner in which such opportunity must be given. I, however, conclude that the purpose of the provisions was satisfied. Accordingly, this point too, cannot be upheld.

Lawfulness of chairperson's recommendations to the Premier's decision dated 28th February 2022

[25] It is contended that the recommendation made by the chairperson to the Premier for first applicant to be relieved of his duties is unlawful as it is not provided for by relevant empowering provisions. Reliance is placed on the provisions of Section 31(14) of the Act which provides as follows:

> *"(14) The chairperson may impose on a traditional leader one or more of the following sanctions-*
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> *(a) a formal warning;*
>
> *(b) a final warning;*
>
> *(c) a reprimand;*
>
> *(d) a suspension without pay for no longer than three months;*
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> *(e) a fine not exceeding an amount equal to three months remuneration, which may be recovered from the remuneration paid to a traditional leader concerned in terms of the Remuneration of Public Office Bearers Act, 1998 (Act No. 20 of 1998), in such instalments as may be determined, which must be paid into the Provincial Revenue Fund; or*
>
> *(f) referral of the matter to the royal family with an instruction that the matter be dealt with in accordance with section 24 of this*

Act, if a presiding officer is satisfied that the matter falls within the ambit of the referred section.."

[26] The provision confers power on the chairperson to impose sanction(s) in circumstances where the Traditional leader has been found guilty of misconduct. The nature of the sanctions to be imposed are statutorily circumscribed and prescribed. They are statutorily listed. The maxim of interpretation *"expressio unius est exclusio alterius."* applies. It means in simple terms: "*express mention of one thing is an exclusion of the other*[4]*."* Express mention of the listed sanctions in section 31(14) of the Act excludes the possibility of another sanction (not specifically prescribed by the Act) to be imposed by the chairperson. Any act to the contrary would be an act beyond the scope of the power statutorily conferred on the chairperson.

[27] Judicial review is concerned with determining whether the impugned acts were made within the ambit of empowering legislation and in accordance with the precepts of such law, in particular and the constitution, in general. The primary function of the courts is to ensure that those who are charged with the duty to perform public functions in terms of legislation act within the parameters of the law.[5] A repository of power may exercise no power and perform no function beyond that conferred upon it by law[6] and must not misconstrue the nature and ambit of the power. Courts have a duty to ensure that the limits to the exercise of public power are not transgressed. An official functionary is not entitled to arrogate to himself powers which have not been conferred on him by law.[7]

[28] In the final analysis I come to the conclusion that the chairperson's decision dated 28th February 2022 recommending that the first applicant be relieved of

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[4] ***Ndaba v Ndaba*** 2017 (1) S 342 (SCA) Para 51 (and the relevant footnote); GM Cockram: Interpretation of statute, 3rd Edition, page 151-153.

[5] ***Mwelase v Minister of Social Development and Others*** (CA74/16) [2018] ZAECMHC 12 (22 March 2018) Para 24-25.

[6] ***Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others*** 1999 (1) SA 374 (CC) Para 58.

[7] ***Minister of Social Development and another v Mpayipheli*** (CA135/16) [2018] ZAECMHC 33 (21 June 2018) Para 17-18.

his duties as the headman of Isikelo Administrative Area, Bizana is unlawful and liable to be reviewed and set aside.

Lawfulness of the Chairperson's decision dated 12th August 2021

[29] This decision was presupposed by charges relating to:

(1) allocation of plots without the knowledge of the traditional council;

(2) abuse of power and extortion;

(3) disobedience of the traditional leaderships institutional support;

(4) insults;

(5) breach of code of conduct

The chairperson found the first applicant guilty of offences referred to in charge 1,3,4 and 5. The first applicant was found not guilty of an offence referred to in charge 2 which relates to abuse of power and extortion.

[30] The applicants seek to review and set aside the decision dated 12th August 2021. No distinction is made in the relief sought between the decision finding the first applicant guilty; and the one that finds the first applicant not guilty. The entire decision of 12th August 2021 is entirely sought to be reviewed and set aside. The decision of 12th August 2021, as it is made up of two sub-decisions, namely the one finding the applicant guilty, and the other finding him not guilty; it is not entirely clear why the decision finding the first applicant not guilty is sought to be reviewed and set aside.

[31] The general reason for seeking to set aside the decision dated 12th August 2021 is that the chairperson failed to apply an established technique applicable to two conflicting versions. It is contended that the chairperson was faced with two conflicting versions but failed to apply this technique to

establish which one of the versions is reliable. The chairperson is criticized for failing to demonstrate on his reasoning why he rejected one version and preferred the other. That rendered this finding to be flawed and his decision for that reason falls to be reviewed and set aside. The conclusion is that, based on the aforesaid, the chairperson's findings are not rationally connected to the evidence. The applicants further state that for the aforesaid reasons the chairperson committed a gross irregularity.

[32] The applicant contends that the chairperson's finding in this regard are not rationally connected to the evidence that was placed before him. The basis for this contention is that the chairperson failed to evaluate the evidence placed before him and assess witness's credibility and reliability to resolve the divergent and conflicting versions of the parties. There's no meaningful dispute that the chairperson failed to evaluate evidence.

[33] Proper analysis, evaluation and assessment of evidence with proper reasons is to rationalise the finding made and the reason of the decision maker. Evaluation, analysis and assessment of evidence go hand in hand with the necessity to give reasons. Failure to give proper reasons is a failure to properly rationalize the decision. There cannot be any proper reasons without proper analysis, evaluation and assessment of evidence. Failure to evaluate, analyse and assess parties' versions is akin to refusal to give reasons for the decision.

[34] Baxter: Administrative Law at Page 228 puts it thus:

> *"In the first place a duty to give reasons entails a duty to rationalize the decision. Reasons therefore help to structure the exercise of discretion, and the necessity of explaining why a decision is reached and requires one to address one's mind to the decisional referents which ought to be taken into account. Secondly, furnishing reasons satisfies an important desire on the part of the affected individual to know why a decision was reached. This is not only fair- it is also conducive to public confidence in the administrative decision making process. Thirdly- and probably a*

major reason for the reluctance to give reasons-rational criticism of decision may only be made when the reasons for it are known."

[35] The above sentiments apply with equal force where the decision-maker has failed to weigh two divergent and conflicting versions against each other and explain why one evidence is preferred over the other. It is necessary to explain to the losing party why his or her evidence is rejected. That is obviously a process of rationalizing the decision. I reiterate that the process of evaluating parties' evidence does not only entail a duty to give reasons but is also intertwined with the process of giving the reasons for the decision.

[36] On this point, I come to the conclusion that chairperson's decision dated 12th August 2021 is irrational for want of evaluation of parties' evidence and proper reasoning. Accordingly, it cannot survive the judicial scrutiny of review and setting aside.

Lawfulness of the Premier's Decision dated 08th May 2023

[37] The Premier, assuming appeal authority penned a letter incorporating the outcome of the appeal in the following terms:

"**Outcome of Appeal**

I refer to the above matter and to your notice of appeal submitted on your behalf by your legal representative, Mr Linyana dated 11 March 2022.
I have considered all the facts as presented to me and I have decided in terms of section 31(18) and 24 of the Eastern Cape Traditional Leadership Ac, 2017 (Act No 1 of 2017) to confirm the finding and sanction of the Presiding officer of the Hearing.
I therefore relieve you of your duties as Headman of the Isikelo Administrative Area in the district of Bizana, with effect from the date of receipt of this letter…" (all sic)

The Premier took an independent decision to relieve the first applicant of his duties as Headman of Isikelo Administrative Area, Bizana.

[38] The decision purports to have been taken or made in terms of section 31(18) and 24 of the Act. It is therefore apposite to quote the text of section 31(18) of the Act. Section 31(18) of the Act provides as follows:

> *"18. The Premier may, after having considered the appeal, confirm, set aside or vary the decision of the presiding officer and inform the relevant traditional leader as well as the presiding officer and inform the relevant traditional leader as well as the presiding officer of the outcome of the appeal".*

[39] The appeal referred to in section 31(18) of the Act is the one that has been lodged by a Traditional leader in terms of section 31(17) of the Act which section reads as follows:

> *"17. A traditional leader who has been warned, reprimanded, or suspended, or whose matter has been referred to the royal family in terms of paragraph (a), (b), (c), (d), (e) or (f) of subsection (14), may within seven days of having been notified of the decision of the presiding officer, appeal to the Premier in writing, setting out the reasons on which the appeal is based*".

It is now plain that it is the aggrieved traditional leader who must appeal the decision to trigger the operation of section 31(17) and 18 of the Act. The Traditional leader must have been aggrieved by the prescribed types of sanctions. That did not happen as no reference is made to the prescribed sanctions in the Premier's decision. The Premier lacked the jurisdictional fact to consider the appeal. The first applicant has not been sanctioned in terms of section 31(14) and (17) of the Act.

[40] Because the provisions of section 24 of the Act are referred to in the Premier's letter, it is opposite to quote that section herein, especially subsection 1(e) which refers to section 31. Section 24(1)(e) of the Act provides:

> *"(1) A traditional leader may, subject to the provisions of the Promotion of Administrative Justice Act, 2000 (Act No.3 of 2000), be removed from office on the grounds of-*
> *(a)……*
> *(b)……*
> *(c)……*
> *(d)……*
> *(e)misconduct as contemplated in section 31".*

[41] Section 24 of the Act applies only when the Royal Family has recommended the removal of the Traditional leader to the Premier,[8] in instances where any ground for removal referred to in section 24(1) has come to its attention. The second instance is when it has come to the attention of any person that there is a legal ground for the removal of the traditional leader, that person must inform the Premier of such ground who, in turn, must refer the matter to the Royal Family concerned for investigation, recommendation and a report.[9] When it has been recommended by the Royal Family that a Traditional leader be removed, the Premier must apply the rules of natural justice, especially *audi alteram partem* rule and inform the Traditional leader, Royal Family concerned and the Provincial house of Traditional of his decision.[10] If the decision is that of removal of Traditional leader the Premier must publish the particulars of the Traditional leader in the provincial gazette.[11]

[42] It is important to note that one of the sanctions the chairperson may impose is *"referral of the matter to the Royal family with an instruction that the matter be dealt with in accordance with section 24 of this Act, if the presiding officer is satisfied that the matter falls within the ambit of the referred section."*

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[8] Section 24(2)(a) of the Act.
[9] Section 24(b)(1) of the Act.
[10] Section 24(3) of the Act.
[11] Section 24(3)(d) of the Act.

Harmonious reading of section 24 (1)(e) and 31 (14)(f) of the Act demonstrates that once the Premier or chairperson / Presiding officer harbours a view that a sanction of removal has to be meted out to the traditional leader, he must refer the matter to the Royal family with instructions that section 24 of the Act must be invoked

[43] The upshot of this is that if a Traditional leader has to be removed in terms of section 24 read with section 31, it has to be by and as a result of a recommendation made by the Royal family. Premier's decision, by all means, must follow a recommendation of the Royal family. A recommendation of a royal family is a precondition without which a power to remove cannot be exercised by the Premier.

[44] In the administrative law parlance the Premier's power to remove a traditional leader under section 24 and 31 of the Act is therefore dependant on the jurisdictional fact of a recommendation by the Royal Family. Under common law, necessary preconditions that must exist before an administrative power can be exercised, are referred to as jurisdictional facts. In the absence of such preconditions or jurisdictional facts the administrative authority effectively has no power to act at all.[12]

[45] Jurisdictional facts refer broadly to preconditions or conditions precedent that must exist prior to the exercise of the power and procedures to be followed, or formalities to be observed, when exercising the power: substantive jurisdictional facts in the case of preconditions and procedural jurisdictional fact in the case of procedural requirements and formalities. These facts are jurisdictional because the exercise of power depends on their existence or observance as the case may be [13].

[46] It is true that we sometimes refer to lawfulness requirements as jurisdictional facts. So the absence of a jurisdictional fact does not make the action a nullity.

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[12] ***Kimberly Junior School and another v head of the Northern Cape Education Department and Others*** 2010 (1) SA 217 (SCA); 2009 (4) ALL SA 135 (SCA) Para 11-12**.**

[13] Cora Hoexter: Administrative Law in South Africa, Second Edition, Page 290.

It means only that the action is reviewable usually on the grounds of lawfulness (but sometimes also on the grounds of reasonableness). Our courts have consistently treated the absence of jurisdictional fact as a reason to set the action aside, rather than as rendering the action non-existant from the outset.[14]

[47] Where a statute prohibits the doing of something unless something else is done as a condition precedent to doing the thing prescribed, it is a general rule of interpretation that the provisions of the Act are obligatory and not directory.[15]Statutory requirement construed as peremptory usually needs exact compliance for it to have the stipulated legal consequences and any purported compliance falling short of that is a nullity[16]. Provisions of section 24 and 31 of the Act are peremptory and they require exact compliance by the Premier to have the stipulated legal consequences. Failure to comply with peremptory statutory provision is fatal.

[48] In the preceding paragraphs I have already found that the chairperson has no power to make a recommendation to the Premier for the removal of the first applicant. It is only the Royal family that is statutorily empowered to make such a recommendation. In upholding, confirming, following that recommendation the Premier did not only take a decision to relieve the first applicant of his duties following unauthorised or unwarranted dictates of the chairperson,[17] he took decision that contravenes the Act and which is not authorized by the empowering provisions.[18]Accordingly and for that reason Premier's decision is reviewable under section 6(2) of PAJA. It matters not that the matter was brought before the Premier under the guise of an appeal. The matter of the fact is, the Premier took a decision removing a Traditional leader without the necessary recommendations of the Royal family concerned. In so doing he acted in contravention of the act.

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[14] ***MEC for Health, Eastern Cape and another v Kirland Investments (Pty) Ltd*** 2014(3) SA 481 (CC) Para 98-99; ***Walele v City of Cape Town and others*** 2008(6) SA 129 (CC) Para 72.
[15] G.M Cocram: Interpretation of Statute, 3rd Edition, Page 162.
[16] ***Shalala v Klerksdorp Town Council & another*** 1969 (1) SA 582 (T) at 587 A-C.
[17] Section 6(2) (e) (iv) of Promotion of Administrative Justice Act 2 of 2000 (PAJA).
[18] Section 6(2) (e) (f) of PAJA.

[49] As a functionary exercising a public power or performing a public function in terms of the legislation, the Premier is an organ of state.[19] State functionaries, no matter how well-intentioned may only do what the law empowers them to do. That is the essence of principle of legality, the bedrock of our constitutional dispensation, and has long been enshrined in our law.[20]

[50] Langa CJ[21] observed as follows:

> "*68….. The doctrine of legality, which requires that power should have a source in law, is applicable whenever public power is exercised. Private power, although subject to the law and in certain circumstances the Bill of Rights, does not derive its authority or force from law and need not find a source in law. Public power on the other hand can only be validly exercised if it is clearly sourced in law."*

[51] Provisions of section 24 read together with section 31 of the Act demonstrably stipulates that the Premier may exercise power only if there are recommendations from the Royal family, not from the chairperson; otherwise the Premier would not have power. On the facts of this case the Premier's power to remove the first applicant as traditional leader was not sourced in law. In the circumstances stipulated in section 31(14) (f) of the Act, *to wit,* where the royal family has recommended to the Premier that a Traditional leader be removed, that recommendation ignites a process where *Audi alteram partem* principle to be invoked. I say this only "*en passant*" because it is a situation which comes to play when there is a recommendation from the Royal family concerned. In this case that is not the position.

[52] The law cannot and does not countenance an ongoing illegality. The courts have a concomitant duty to uphold the doctrine of legality, by refusing to

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[19] Section 239 of the Constitution.

[20] ***Head of Department, Department of Education, Free State Province v Welkom High School and another; Head of Department, Department of Education, Free State Province v Harmony High School and another*** 2014 (2) SA 228 (CC) Para 1.

[21] ***AAA Investments (Proprietary) Limited v Micro Finance Regulation Council and another*** 2007(1) SA 343 (CC) Para 68.

countenance an ongoing statutory contravention.[22] Courts have a duty to ensure that the doctrine of legality is upheld. They are constrained by the doctrine of legality to enforce the law and to uphold the rule of law.[23] If this court were to allow Premier's decision dated 08 May 2022 to stand, it would otherwise be promoting unlawfulness and lending its aid to the enforcement of an illegal act. On this point Jafta J in the Constitutional Court[24] observed as follows:

> *"77. …. It is a basic principle of our law that a court can never lend its aid to the enforcement of an illegal Act."*

Remedy

[53] The applicants sought the chairperson's decision dated 12 August 2021 and 28 February 2022 to respectively be reviewed and set aside. I have made my view clear in the preceding paragraphs about the chairperson's decisions of 12 August 2021 and 28 February 2022 and the flaws surrounding those decisions. I don't intend to repeat here the flaws affecting those decisions.

[54] With regard to the chairperson's decisions dated 12th August 2021 and 28 February 2022 I have found that the decisions are reviewable and they should be set aside. The practical effect of setting aside only the decisions is that the proceedings from which the decisions emanate are still extant before the tribunal[25]. It is so because they have not been challenged in the instant proceedings.[26] The best order to make in those circumstances is to remit the matter for a lawful decision to be taken within the stipulated time limits[27].The adverse effects of not giving directions to the chairperson regarding the

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[22] ***Lester v Ndlambe Municipality*** 2015 (6) SA 283 (SCA) Para 23,27 and 28.
[23] ***Cools Ideas 1186 CC v Hunnard and another*** 2014 (4) SA 474 (CC) Para 99; ***Lester v Ndlambe Municipality*** 2015 (6) SA 283 (SCA) Para 24,26 and 28.
[24] ***Cools Ideas 1186 CC V Hubbard and another*** 2014(4) SA 474 (CC) Para 77.
[25] ***Matiwane v President of the Republic of South Africa and others*** 2019 (3) ALL SA (ECM) Para 27
[26] ***Fischer v Ramahlele*** 2014(4) SA 614 SA (SCA) Para 13.
[27] ***Boqwana v Road Accident Fund Appeal Tribunal and others*** (3823/2018) [2019] ZAECMHC 67 (12 November 2019 Para 16.

proceedings giving rise to the decisions of 12th August 2021 and 28th February 2022 will be to stymie the proceedings. This approach is not unusual.[28]

[55] Premier's decision, effectively relieving the first applicant of his duties, is successfully challenged and deserved to be reviewed and set aside. It had no basis in law. He did not follow the legislated legal process. The Rule of law does not permit an organ of state to reach what may turn out to be a correct outcome by any means. On the contrary, the Rule of law obliges an organ of state top use the correct legal process.[29]

[56] In my discretion the Premier and the chairperson are found liable to pay applicant's costs, jointly and severally one paying the other to be absolved.

Order

[57] In the result I make the following order:

57.1 The fourth respondent's decisions dated 12th August 2021, finding the first applicant guilty of misconduct is hereby reviewed and set aside.

57.2 The fourth respondent's decision dated 28th February 2022 is hereby, reviewed and set aside.

57.3 The first respondent's decision dated 08th May 2022 is hereby reviewed and set aside.

57.4 The fourth respondent is directed to finalize the proceedings from which the decision of 12th August 2021 and 28th February 2022 emanated within 180-days from the date of the service of this order.

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[28] ***Road Accident Fund v Duma and Others*** 2013(6) SA 9 (SCA), ***May v Health Professionals Council of South Africa and others*** (1996/2016) [2017 ZAGPHC 739 (28 November 2017).

[29] ***Head of Department, Department of Education, Free State Province v Welkom High School and another; Head of Department, Department of Education, Free State Province v Harmony High School and another*** (CCT103/12) [2013] ZACC 25;2013(9) BCLR 989 (CC); 2014 (2) SA 228 (CC) Para 86.

57.5 The first and fourth respondents are hereby directed to pay applicants' costs on a party and party scale jointly and severally one paying the other to be absolved.

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A.S ZONO

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

For the Applicants	**:**	**Adv Ngumle**
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For the Respondents	**:**	**Adv Mdodana**
Instructed by	**:**	**STATE ATTORNEY** **94 Session Street** **Fortgale** **Mthatha** **Ref:943/22-A8H** **Email: XHanise@justice.gov.za**
Matter heard on	**:**	**21 November 2024**
Delivered on	**:**	**04th February 2025**