"LAZ 21"

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

REPUBLIC OF SOUTH AFRICA

REGISTRAR OF THE NORTH GAUTENG HIGH COURT PRETORIA
PRIVATE BAG/PRIVAATSAK X67
2013 -02- 22
T. M. LEGODI
PRETORIA 0001
GRIFFIER VAN DIE NOORD GAUTENG HOË HOF PRETORIA

CASE NO: 3829/2011

In the matter between:

MPISANE ERIC NXUMALO Applicant

and

(1) REPORTABLE: ~~YES / NO~~

(2) OF INTEREST TO OTHER JUDGES: ~~YES / NO~~

12/11/12
DATE

SIGNATURE

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA First Respondent

CHAIRPERSON OF THE COMMISSION ON TRADITIONAL LEADERSHIP AND CLAIMS Second Respondent

MINISTER OF COOPERATIVE GOVERNMENT AND TRADITIONAL AFFAIRS Third Respondent

NATIONAL HOUSE OF TRADITIONAL LEADERS Fourth Respondent

LIMPOPO HOUSE OF TRADITIONAL LEADERS Fifth Respondent

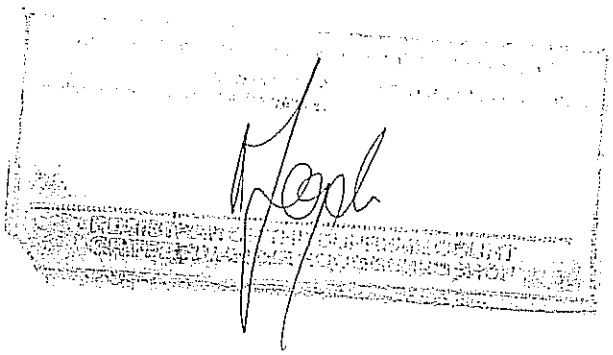
PREMIER OF LIMPOPO PROVINCE Sixth Respondent

---

**JUDGMENT**

---

Tuchten J:



ME
MC
E.E.S.

1 The applicant is a direct descendent of Soshangane, a general of northern Nguni ethnic decent. In the 1820s, war raged for control of the resources in the area which came to be known as KwaZulu-Natal and beyond. The major protagonists in this conflict were the leaders Shaka of the amaZulu and Zwide of the amaNdwandwe. Shaka prevailed. Enormous disruptions to the social fabric of these regions took place. Communal institutions were destroyed and created. Great migrations of peoples, fleeing the terror of the conflict, ensued. Generals in both the defeated and the victorious armies defected and migrated to new lands beyond the reach of the potentates they left behind, subjugating those peaceful and often defenceless communities they encountered and appropriating their resources.

2 At the same time, European imperial powers, in particular Britain and Portugal, sought to expand into southern Africa and competed with those who were there when they came or arrived more or less simultaneously with them. To add to this complex mix, an indigenous ethnic group of largely European descent who became known as the Afrikaners or Boers trekked north from British controlled southern Africa in an attempt to dominate the resources and communities of territories beyond the reach, so they hoped, of the British.

MG
MG

3 Alliances were formed and broken. Communities were destroyed and created. Some communities and remnants of communities fled the reach of their self-proclaimed rulers and sought, in search of a better life, to establish themselves under the protection of rulers who, the refugees hoped, would be powerful enough to resist the efforts to dominate of those from whom they fled.

4 Soshangane and his followers formed one of the Nguni groupings which migrated northwards, into and through what is today Mozambique, to achieve independence from and escape the wrath of the most successful Nguni potentate, Shaka Zulu. These Nguni groupings, which were highly militarised, proceeded to subjugate the people they encountered. The latter were not ethnic Nguni. In the territories conquered by Soshangane, they were characterised primarily by their language, xiTsonga,[1] and their more or less common adherence to customs and systems of customary law which differed from those of their Nguni conquerors in several important respects. One of those differences, which as I shall show would become significant, related to the chiefly succession.

---

1 The papers show that xiTsonga is a family of languages or dialects. To what extent, they are mutually comprehensible is not clear from the papers. Communities whose mother tongue is xiTsonga are known collectively as vaTsonga. Within the vaTsonga, there are many other groupings or subgroupings, the precise delineation of which is not readily accessible except no doubt to experts in the field.

5 At the heart of the societies presently under consideration, stood the institution of the chief. The incumbency of this institution usually but not invariably descended through the male line.

6 Through military power, Soshangane and his northern Nguni speaking warriors established a polity described variously in the papers as the empire, kingdom or kingship of amaShangana or Gaza in the lands hitherto under the control of a number of xiTsonga speaking communities. In this judgment, I shall refer to it as the kingdom. As with the other powers seeking to dominate in the region, some of the indigenous people welcomed, or submitted without resistance to, Soshangane while others from time to time actively resisted or fled from his rule.

7 Soshangane died and was succeeded by Mawewe. This did not suit powerful interests within the ruling class and power was wrested from Mawewe by his half-brother Mzila in 1862. The manner in which this coup d'etat was legitimised is significant: Mawewe was the son of the *timamollo*,[2] while Mzila was the son of the senior wife. Under Nguni custom, the succession devolves through the line of the *timamollo*

---

[2] The *timamollo* (*candle wife*; literally *she who extinguishes the fire)* is chosen by the tribal council to be a wife of the chief. Her primary task is to bear the chief a male heir, thus securing the chiefly succession. This beautiful custom requires that before the *timamollo* arrives in the village, all fires must be extinguished. The *timamollo* takes a candle or taper and tours the village, igniting all the fires as she goes.

while under vaTsonga custom, succession is through the senior wife. Established in his position through military force, Mzila proclaimed that the Nguni custom hitherto followed would be abandoned and the vaTsonga custom would henceforth prevail.

8 Significantly for present purposes, the followers of the deposed Mawewe did not submit to the rule of Mzila but fled to lands under the control of Mswati, the king of the amaSwazi. Over time and for various reasons, other xiTsonga speakers also fled. In this connection, I mention those who fell, or placed themselves, under the authority of chiefs Maluleke and Mhinga, who established themselves in the then north-eastern Transvaal where there descendants reside to this day.

9 In addition, there are those who grouped themselves around Joao Albasini, a Portuguese speaking merchant and diplomat of southern European descent. A substantial number of xiTsonga speakers and other refugees placed themselves under the authority of this controversial figure. Controversial as Albasini is, it is clear that he was regarded by a substantial grouping as a chief in the sense I use that term in this judgment and that Albasini formed a focus of resistance to the rule of the kingdom.

10 I make these observations because even at the height of the power of the kingdom, a substantial number of vaTsonga sought to place themselves beyond its territorial reach.

11 Mzila was succeeded by Nghunghunyani, under whose rule the kingdom fell into decline. Nghunghunyani was forced to come to terms with the rising power of the Portuguese. In so doing, he ceded aspects of his power to Portugal. While this was, probably correctly, regarded as a mere tactical move, things did not go the way of Nghunghunyani. In 1895, abandoned on the field of battle by a significant section of his xiTsonga speaking regiments, Nghunghunyani was defeated by a coalition of military forces under the control of the Portuguese, which included at least one xiTsonga speaking grouping, the vaChopi. Nghunghunyani, two of his sons (Godide and Buyisonto) and others, surrendered to the Portuguese and were taken into exile in the islands of the Azores, then under Portuguese control. The kingdom ceased to exist as a polity and was divided administratively into districts under Portuguese rule. In 1897, remnants loyal to Nghunghunyani under his erstwhile general, Magigwana Khosa, rose in revolt against their Portuguese conquerors. The revolt, and any hope of revival of the kingdom of Gaza, were crushed in a decisive battle on 21 July 1897.

12 At this juncture, we move into what conveniently may be labelled the modern era. Nghunghunyani's uncle and regent, Mpisane Nxumalo, the royal household and a contingent of supporters moved from the lands controlled by Portugal to Bushbuckridge, a district which fell into the Zuid-Afrikaanse Republiek of the Boers. Other erstwhile subjects of the once and former king moved to areas controlled by the Portuguese.

13 Mpisane was recognised by the Boers as a senior traditional leader and was given lands consistent with this status. In 1910, Mpisane renounced his regency in favour of Thulamahashe Msinganyela Nxumalo. But their authority at no stage extended beyond their immediate followers.

14 Nghunghunyani and Godide died in exile. But Buyisonto was restored to his people in Bushbuckridge and his chiefly honours amid great rejoicing. Whether the rejoicing extended to the greater body of xiTsonga speakers or of the former subjects of the kingdom is, however, contentious. The applicant is the linear descendent of and successor to Buyisonto.

15 The imperialism of the British was succeeded by the racial domination of South Africa by ethnic Europeans (whites) to the exclusion of ethnic blacks and the marginalisation of other ethnic groups. This period of domination and exclusion was demarcated by two crucial socio-political legislative initiatives: firstly the various statutes reserving to white people the ownership and occupation of 87% of the surface of South Africa and the creation or recognition of tribal trust lands which culminated in the Bantustan policy of a former regime; secondly, the Administration Acts which appointed the head of the white controlled South African state as the paramount chief of all black groupings within its borders and recognised certain identified such groupings and their traditional leaders as authority figures within those groupings. Certain kingly figures were recognised as such and, where the authorities regarded it as appropriate, appointed. In this process, distortions were created to advance perceived white interests. It may safely be said that in the era of what became to be known first as Native, then Bantu and ultimately Black Administration, these appointments were designed to advance the interests of the ruling white class.

16 In the course of this process, the Bantustan of Gazankulu (literally *Great Gaza*) was created, a number of detached areas supposedly intended to serve as a homeland within which xiTsonga speakers

were to exercise their political rights and which ultimately, its creators gave out they hoped, would become an independent state. But the rulers of greater South Africa did not seek to co-opt the house of Nxumalo into a leadership role in this process and the status of the descendants of Nghunghunyani remained, as before, no more than that of a senior traditional leader.

17 Times changed; and the evils of a former regime yielded to the just and wise supremacy of the Constitution of 1996 with its prime purpose as proclaimed in its preamble, to

> Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
> Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
> Improve the quality of life of all citizens and free the potential of each person; and
> Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

18 In that spirit, Chapter 12 of the Constitution provided for the institution and roles of traditional leaders:

> 211 Recognition
> (1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
> (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.
> (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.
> 212 Role of traditional leaders
> (1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.
> (2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law-
> (a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and
> (b) national legislation may establish a council of traditional leaders.

19 To that constitutional end, the legislature enacted the Traditional Leadership and Governance Framework Act, 41 of 2003 ("the old Act"), which came into force on 24 September 2004. The measure provided, amongst many other things, for the recognition of traditional

communities by identified organs of provincial government and of king- or queenships[3] and for the establishment and functioning of the Commission on Traditional Leadership and Claims, the present second respondent. The old Act was amended by the Traditional Leadership and Governance Framework Amendment Act, 23 of 2009 ("the new Act"). At the time relevant to the present application, the Commission was empowered to investigate, of its own accord, under s 25(2) of the old Act, a number of different types of situations relevant to the purposes of the old Act and including, in s 25(2)(a)(vi):

> Where good grounds exist, any matters relevant to the matters listed in this paragraph, including the consideration of events that may have arisen before 1 September 1927.

20 On 4 November 2004, in terms of s 22 of the old Act, the Commission was appointed, with instructions to perform two tasks: firstly, to investigate the legitimacy of the then twelve paramountcies established under the Administration statutory regime, to decide how many of them qualified as kingships and to identify the king of each such kingship; and secondly, to determine matters brought before it under the provisions of s 25(2) of the old Act.

---

[3] In what follows, I shall refer merely and for convenience to kingships.

21 In April 2005, the applicant applied to the Commission for the restoration of the "Shangaan/Vatsonga[4] Kingship" and its royal territory in the province of Limpopo and, consequentially, the recognition of the applicant as the king of the restored kingship. This claim was one of the matters that came before the Commission under s 25(2)(a)(vi) of the old Act.

22 The Commission released its findings on the status of the twelve paramountcies in April 2008 without pronouncing on the rights and status of the incumbent paramount chiefs.

23 The Commission duly convened and began its public hearings into the applicant's claim in two separate sittings in March 2006. Under s 23(1) of the Act, the members of the Commission must be knowledgeable regarding customs and the institutions of traditional leadership. It is not in dispute that they were, and are. The Commission duly heard the applicant, through his representative, and other interested persons. It received, mainly from the applicant, a large body of documentary material bearing on the issue. Some of that material is in xiTsonga. I have read all the material, with great interest, except that in xiTsonga,

---

4 The conjunction of the terms *Shangaan* and *Vatsonga* presaged a dispute that lies at the heart of the issue placed before the Commission: whether the kingdom ruled over all, or merely some, xiTsonga speakers. The case for the applicant was that the terms are synonymous and that *all* xiTsonga speakers owed allegiance to the kingdom and its ruler.

a language of which, I regret, I am ignorant. The factual conclusions in this judgment are taken largely from the material put before the Commission.

24 The Commission then adjourned and undertook its own researches. It reconvened on 8 December 2008 to canvass with the applicant the information gathered by the Commission during its own researches.[5] The Commission finished its work on 21 January 2010. Its report was handed to the President of the Republic and the Minister of Cooperative Development and Traditional Affairs on 9 February 2010.

25 I mention these dates firstly because a point has been made of the fact that in terms of its statutory mandate, the Commission was bound to complete its mandate by 31 January 2010 and, secondly, because the new Act came into force on 25 January 2010. So although the Commission finished its work while the old Act was in force, its report actually reached the President and the Minister after the amending Act (the new Act) came into force.

---

5 During this period three members of the Commission, including its chairperson, resigned and its work continued under the acting chairmanship of Professor Moleleki.

26 The Commission found against the applicant. It found that the kingdom had been destroyed in the period 1895-1897 and was never resuscitated. It found that there was no good ground, more than a century after the event, for the restoration of the kingdom.

27 There is no provision for appeal against a decision of the Commission. However, because decisions of the Commission such as this one are administrative actions, the decision may be reviewed by the court under the provisions of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA").

28 The applicant seeks to review both the decision of the Commission to which I have referred and what he describes as the decision of the President to approve the decision of the Commission and, by doing so, translate the Commission's decision into law. The application is opposed by the first, second and third respondents, whom for convenience I shall describe in this judgment as the opposing respondents. The other parties cited as respondents abide the decision of the court.

29 In relation to the President, the submission on behalf of the opposing respondents was that at this level the president does not make a decision. That is correct under the law as it stood prior to its

amendment by s 20 of Act 23 of 2009 on 25 January 2010. Under s 26(2) of the old Act, the President and all other relevant functionaries were obliged immediately to implement decisions of the Commission. Under s 26 of the new Act, the Commission makes not a decision but a recommendation which the President and other relevant functionaries may decide to implement or reject, in both cases in whole or in part. When the Commission delivered its report, the old Act was in force. By the time the President applied his mind to the report of the Commission, the new Act was in force.

30 On 7 April 2010, the President accepted the Commission's report in President's Minute no 144. The President publicly communicated his acceptance of the report on 29 July 2010.

31 It is clear from a letter dated 10 May 2011, written by the President's attorney to the attorneys for the applicant, that the President understood his powers and competences to be those provided for under the Act as amended (ie the new Act). In my view, the President erred in this regard. The common law principle is that no statute is to be construed as having retrospective effect unless an intention to that effect can clearly be determined from the amending statute.[6] It could

---

6 *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission, and Others; Transnet Ltd (Autonet Division) v Chairman, National Transport Commission, and Others* 1999 4 SA 1 SCA para 12

never have been the intention of the legislation that the President should make a decision on whether or not to implement the findings (to use a neutral term) of the Commission on the basis that those findings constituted a recommendation, when the Commission had in fact, perfectly properly, made not a recommendation but a decision. The President was thus, in my view, called upon to implement the decision under consideration as if the new Act had not been passed and had come into force. The only limitations, if such they may be called, on the power of the President to implement are those contemplated by the principle of legality, ie that the power had to exercised in good faith and for the purposes for which it was conferred.

32 Be that as it may, the President in fact applied his mind to the Commission's report. He concluded, as appears from the President's attorney's letter to which I have referred and the text of his public statement of 29 July 2010, that the Commission had confirmed facts in relation to the applicant's claim that "have generally been known all along historically".

33 The President's reasons for accepting the Commission's report were thus, firstly, that he agreed with the factual findings of the Commission and, secondly, that he agreed with its reasoning.

34 That in fact the President applied his mind to the reasoning of the Commission, and came to the conclusion that it was correct, is in my view of no consequence. I have found that the President had a statutory obligation to implement the decision of the Commission. He did so. It is not the applicant's case that the President's conduct offended against the principle of legality. There is accordingly no basis upon which to impugn the conduct of the President.

35 It was further submitted on behalf of the applicant in counsel's heads of argument that the fact that the report and decision of the Commission were *transmitted* to the President after the expiry of the Commission's mandate invalidated the Commission's decision. This proposition has only to be articulated to be rejected. The decision was made during the currency of the mandate of the Commission. It was therefore (at this level) valid. What happened *after* this (at this level) valid decision was made cannot conceivably invalidate it.

36 There is a further reason why this submission cannot prevail. A court which reviews administrative action under s 6 of PAJA is empowered under s 8 to grant any order that is just and equitable. It would be neither just nor equitable to set aside a decision such as that under consideration, otherwise validly made after a protracted, fair and costly process because there was tardiness, if such there was, on the

part of the decision making functionaries in conveying the decision to the implementing functionaries. It is unnecessary to consider what relief, if any, might have been granted if the submission were to have been sustained.

37 The way is accordingly clear to deal with the substance of the applicant's attack on the decision of the Commission.

38 The grounds upon which the decision of the Commission is attacked appear from the founding and supplementary affidavits of the applicant. They are, firstly, that the Commission was factually incorrect in finding that pursuant to the treaty of 1885, Nghunghunyani ceded his land and thus sovereignty to the Portuguese; and, secondly, that after the defeat at the hands of the Portuguese, the kingdom disintegrated and was at no stage re-established.

39 The applicant contends that the mere fact that the kingdom was defeated by the Portuguese colonialists did not put an end to the kingdom, any more than it did in relation to any other kingdom defeated by colonial powers. The applicant further takes issue with the finding that the kingdom disintegrated and was not thereafter re-established. In this regard, the applicant points to the triumphant restoration of Buyisonto in 1922.

40 In relation to the treaty of 1885, the finding of the Commission as contained in paragraph 7.3.15 of its report was that the effect of the treaty was to compromise the sovereignty and independence of the kingdom. The case made trenchantly in argument on behalf of the applicant in this regard was not that the treaty had not, as a fact, diminished the power and prestige of the kingdom but that as a colonial-style treaty, the underlying agreement was invalid and void for a number of reasons. In this regard, I was referred by counsel to a scholarly article titled *Why Redraw the Map of Africa? A Moral and Legal Inquiry* by Dr Makau wa Mutua published in vol 16:1113 of the Michigan Journal of International Law.

41 Counsel for the applicant also criticised the report of the Commission for internal contradiction. The conclusion presently under attack was, as set out in paragraph 7.4.7 of the report, that after regent Mpisane Nxumalo with his followers and elements of the royal family settled at Bushbuckridge,

> ... the kingship of AmaShangana had already disintegrated. Neither Mpisane Nxumalo nor his successors re-established the AmaShangana kingdom that was destroyed by the Portuguese.

42 In carrying out its task, the Commission was required under s 25(4) of the Act before amendment to investigate traditional leadership claims and disputes which arose after 1 September 1927, subject to s 25(2)(a)(vi), which empowered the Commission to investigate any matters relevant, *inter alia*, to those under consideration including the consideration of events that may have arisen before 1 September 1927.. This date is clearly linked to the date of commencement of the measure currently on the statute book titled the Black Administration Act, 38 of 1927.

43 The legislative policy behind the cut off date of 1 September 1927 is to be found in the preamble to the Act. The Act has amongst its purposes to restore the integrity and legitimacy of traditional leadership in line with customary law and practices and to promote the institution of traditional leadership so as to enhance tradition and culture and to promote nation building and harmony and peace among people. Bearing this in mind, in my view, the legislature determined that unless a compelling case was made ("good cause shown"), the administrative efforts to redress the injustices of the past would become ineffectual if every such act of alleged injustice, going back hundreds of years, were to be investigated. By importing the element of good cause, the Act required the applicant to make a compelling case for investigation.

44 It is in this light that the attack on a further finding of the Commission, in paragraph 7.4.8 of its report, must be evaluated. This paragraph reads:

> The claim for the restoration of the kingship of the amaShangana predates 1 September 1927. No good grounds have been furnished for the restoration of the kingship that was lost long before 1 September 1927.

45 The applicant maintains that the finding that the kingdom disintegrated and was not re-established is erroneous. He points out that in paragraph 4.1.21 of its report, the Commission found that in 1922, Buyisonto

> ... joined the royal family at Bushbuckridge, where he assumed the position of king of the amaShangana.

46 The applicant locates his grounds of review in ss 6(2)(e)(iii), 6(f)(ii)(cc) and 6(2)(h) of PAJA. These grounds translate respectively to the propositions that the Commission took irrelevant considerations into account or did not consider relevant considerations, that the Commission's decision was not rationally connected to the information before the Commission; and that the decision was so unreasonable that no reasonable person could have come to the same conclusion.

47 The opposing respondents' answering affidavit was deposed to by Professor Moleleki, the acting chairperson of the Commission. He enlarged on the reasons given by the Commission in its report for coming to its conclusions relevant to the present proceedings. Counsel for the applicant took issue with what was described in argument as the further reasons presented in the answering affidavit.

48 Counsel for the applicant drew my attention to *National Lotteries Board and Others v SA Education and Environment Project and Another* [2012] 1 All SA 451 SCA para 27, where the SCA referred to the duty of an administrator to give reasons and held that

> ... the failure to give reasons, which includes proper or adequate reasons, should ordinarily render the disputed decision reviewable. In England, the courts have said that such a decision would ordinarily be void and cannot be validated by different reasons given afterwards - even if they show that the original decision may have been justified. For in truth the later reasons are not the true reasons for the decision but rather an *ex post facto* rationalisation of a bad decision. Whether or not our law also demands the same approach as the English courts do is not a matter I need strictly decide. [footnote omitted]

49 Building on this foundation, counsel for the applicant submitted that I should not have regard to any reason for the decision put up in the answering affidavit which is not also found in the Commission's report. I do not think that this is a case where the reasons given in the report are improper or inadequate in the sense those terms were used by the SCA. I have explained how the Commission came to refer to the date 1 September 1927 and the conclusion that the applicant had failed to provide good grounds for the restoration of the kingdom. The applicant's complaint was that the Commission had erred in concluding that no good grounds had been shown for the restoration of the kingdom.

50 In essence the applicant's case, as made out in the founding affidavit and presented to me in argument is this:

50.1 The kingdom was brought down by the force of the arms of a colonial power, Portugal, and in 1895 its legitimate king, Nghunghunyani, and his sons were taken prisoner and sent into exile.

50.2 In 1897, the king's uncle, Mpisane, and the remnant of the royal family left the regions controlled by Portugal and, with the consent of the Boers, settled in Bushbuckridge where he was recognised as a chief.

50.3 One of the sons of Nghunghunyani, Buyisonto, survived the ordeal of exile and, at Bushbuckridge, was restored in triumph as king of the kingdom.

50.4 The applicant is the lineal descendent of Nghunghunyani and, indeed, of Soshangane, the founder of the dynasty, himself.

50.5 Given the purposes of the Act, which are predominantly redressive and transformative, it is no legitimate answer to the applicant's case that the destruction of the kingdom was accomplished at the hands of a colonial power and the applicant has indeed made out a compelling case for the restoration of the kingdom and the recognition of the applicant itself as his king.

51 The material in the answering affidavit which the applicant submits constitutes new reasons, improperly relied upon, are in my view not in fact new reasons. The material constitutes reasoning designed to

justify the reasons given in its report which are under attack in these proceedings. To the extent that the reasoning in the answering affidavit is based on material which was before the Commission when it made its decision, I think that the Commission is entitled to refer to that material. I therefore find that the Commission is not precluded from relying on that material in the present context.

52 In argument, counsel for the opposing respondents submitted that the reference to the treaty of 1885 arises from material presented to the Commission by the applicant's representative not merely as material for the Commission to consider, but as the case for the applicant. In his submission to the Commission, the applicant's representative, with reference to the treaty of 1885, said:

> Treaties were signed. Unfortunately some of the treaties that were signed compromised the empire.

53 In my view, the submission is well founded. The Commission cannot be faulted for finding, in accordance with the submission before it on behalf of the applicant, that the treaty compromised the kingdom. No point was made before the Commission on behalf of the applicant of the manifest injustice that more often than not accompanied the colonial treaty making procedure. It is abundantly clear from the material before the Commission that it was aware of this fact. The

Commission was at pains to point out in paragraph 1.1(b) of its report that the institution of traditional leadership had ben distorted by imperialism, colonialism, repressive and apartheid laws, [so-called] self-governing states and pseudo-independent enclaves.

54 Moreover, in the proceedings before the Commission, the applicant did not make the factual case that Nghunghunyani had been misled into entering into the treaty of 1885. He did so on the advice of some of his chiefs and as a deliberate act of policy.

55 The reference to the treaty by both the applicant's representative and the Commission was in the context of *realpolitik*. It was in that context that the applicant asked that the conduct of his ancestor be judged; it was in that context that the Commission made its pronouncement. As I have said, no doubt the treaty was a tactical move on the part of Nghunghunyani. Nobody disputes that as an historical fact, things worked out badly and the prestige of the kingdom suffered as a result.

56 I find merit in the submission on behalf of the applicant that there is a contradiction between the Commission's conclusion that Buyisonto was restored to the throne and its conclusion that the kingdom disintegrated and thus ceased to exist.

57 But in my view, that contradiction is at a textual level and is thus more apparent than real. When the Commission found that the kingdom disintegrated, what it meant, on my analysis of the material before it (I leave out of consideration the material in xiTsonga which, as I have said, is not accessible to me) was that it no longer constituted a viable kingdom. That is an historical fact and its acceptance by the applicant is implicit in his claim for the *restoration* of the kingdom. While Mpisane and his successor were regarded by loyalists as regents and Buyisonto and his successors were regarded by loyalists as kings of AmaShangana, they did not exert that power without which, according to *wa Mutua, op cit*, an independent state cannot exist, ie sovereign authority.

58 The grounds upon which the opposing respondents rely for the conclusion in the report that no good cause exists for the restoration of the kingdom may be summarised thus:

58.1 Most of the kingdom was located outside the borders of the Republic of South Africa.

58.2 Colonisation distorted the role customary leadership played in pre-colonial Africa. Entirely new and, in many cases, non-customary functions were assigned to the institution.

58.3 The pernicious laws of the colonial and apartheid eras malformed traditional leadership into a species of local government designed to serve as a source of cheap labour for mines, farms and urban industries. Most traditional leaders eagerly complied with government policy although some became the focus of resistance.

58.4 The institution of traditional leadership contemplated by the Constitution required transformation to ensure, *inter alia*, that the institution responds and adapts to change, is in harmony with the Constitution, promotes democracy and its values, freedom, human dignity, equality and non-sexism, is grounded in applicable customary laws and practices, enhances tradition and culture, respects the spirit of communality and promotes unity and peace amongst people.

58.5 Soshangane and his descendants were of Nguni descent and ruled over ethnic vaTsonga.

58.6 The subjugation of the kingdom was preceded by a number of factors, including dissent among Nghunghunyani's own chiefs, who approached the Portuguese to intervene in the conflict with Nghunghunyani.

58.7 The applicant's own case was that by the 1880s the kingdom was already in decline for various reasons; that Nghunghunyani was the last ruler of the kingdom; that the colonists who planned and executed the subjugation of the kingdom made sure that no one would revive it again; and that after the defeat of Nghunghunyani, none of his descendants was recognised as king.

58.8 The defeat of Nghunghunyani in 1895 was precipitated by the defection of a substantial body of his ethnic vaTsonga regiments, some 30 000 fighting men.

58.9 A distinction is to be drawn between ethnic amaShangana, who are of Nguni origin, and ethnic vaTsonga.

58.10 The applicant is regarded today as a senior traditional leader, as opposed to a king.

58.11 A substantial body of those ostensibly defeated by Soshangane remained rebellious to the kingdom and other groups living within the area claimed as part of the kingdom were not incorporated at all.

58.12 The kingdom did not exercise effective jurisdiction in the area around present day Tzaneen. The applicant's submission to the Commission took no account of the Bolubedu who were in that area when the kingdom sought to expand into it.

58.13 The Bangwanati people, although ethnic vaTsonga, disputed paying allegiance to or having been subjugated by the kingdom.

58.14 The Great places of the kingdom, ie Bileni, Musapa, Chayimithi and Mandlakazi, are all in present day Zimbabwe or Mozambique.

58.15 The descendants of Soshangane were recognised in South Africa as chiefs, not kings. The kingdom is not recognised as such in present day Mozambique.

58.16 After the defeats of 1895 and 1897, the kingdom was scattered; the remnants of the royal household and a contingent of supporters moved to Bushbuckridge.

58.17 It does not appear that the authority of the regents at Bushbuckridge extended beyond their immediate followers.

58.18 Buyisonto was not recognised as a king by the government of South Africa or by that of Gazankulu.

59 The conclusion of the Commission was that the kingdom was destroyed in the period 1895-1897; that the royal family today enjoys the support of only a fragment of the [descendants of the] former subjects of the kingdom and that there was no evidence before the Commission to show that Buyisonto [and, I would add, his descendants] were considered, in fact if not in law, to be the kings of the area in question or of the former kingdom.

60 This court does not sit as a court of appeal. The question to be considered is, as I have already said, not whether the Commission was correct or incorrect in its findings but whether the Commission took irrelevant considerations were taken into account or did not consider relevant considerations, whether the Commission's decision is not rationally connected to the information before the Commission; and whether the decision was so unreasonable that no reasonable person could have come to the same conclusion. So the enquiry is not so much concerned with the merits of the decision as whether it was arrived at in an acceptable fashion.

61 In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 4 SA 490 CC paras 46-48, the Constitutional Court approved the characterisation of the judicial duty, in appropriate cases, of deference to the findings of administrative decision makers as follows:[7]

> ... (a) judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinise administrative action, but by a careful weighing up of the need for - and the consequences of - judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal.
>
> ... [J]udicial deference does not imply judicial timidity or an unreadiness to perform the judicial function.
>
> ... The use of the word 'deference' may give rise to misunderstanding as to the true function of a review Court. This can be avoided if it is realised that the need for Courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from

---

7 Footnotes, authorities cited and attributions have been omitted:

the fundamental constitutional principle of the separation of powers itself.

... [A]lthough the word "deference" is now very popular in describing the relationship between the judicial and the other branches of government, I do not think that its overtones of servility, or perhaps gracious concession, are appropriate to describe what is happening. In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the limits of that power are. That is a question of law and must therefore be decided by the Courts.

... This means that the Courts themselves often have to decide the limits of their own decision-making power. That is inevitable. But it does not mean that their allocation of decision-making power to the other branches of government is a matter of courtesy or deference. The principles upon which decision-making powers are allocated are principles of law. The Courts are the independent branch of government and the Legislature and Executive are, directly and indirectly respectively, the elected branches of government. Independence makes the Courts more suited to deciding some kinds of questions and being elected makes the Legislature or executive more suited to deciding others. The allocation of these decision-making responsibilities is based upon recognised principles. ... (W)hen a court decides that a decision is within the proper competence of the Legislature or Executive, it is not showing deference. It is deciding the law.

... In treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of

> government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker. This does not mean, however, that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a Court may not review that decision. A Court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.

62 I think that this is a case in which I should approach the evaluation by the Commission of the material before it with deference. The members of the Commission were appointed because they were experts in the field. Their expertise and impartiality is not in issue. There is a further factor which I think I should mention. The proceedings of the Commission were conducted with great tact and diplomacy and the Commission itself reported its findings in the same

vein. A court, however, is called upon to pronounce its judgment in a more forthright manner.

63 Taken as a whole, I do not think it can be said that the Commission's findings offend against the provisions of PAJA as submitted on behalf of the applicant. There was ample evidence before the Commission, much of which was advanced in support of the applicant's own case, to support its conclusions. I think the essence of the conclusions of the Commission, expressed in more direct language than the Commission permitted itself, is this: The case for the applicant is that his forebears established and sustained the kingdom by conquest, ie by the subjugation of the communities in the region under its control from time to time. In the modern democratic era, the ruler, be he or she kingly, presidential or otherwise, rules by the consent of those over whom he or she would rule. In the present case the applicant has not shown that he enjoys the support of a constituency, the size of which the Commission considered to be adequate, of those whose interests would be affected by the restoration of the kingdom.[8]

---

[8] I find the following, which emerges from the material before the Commission, telling in this regard: the applicant has the support of no more than 18 of the 33 senior traditional leaders of the people affected by the issue.

64 In terms of s 26(3) of the Act, the Commission must consider and apply customary law and the customs of the relevant traditional community as they were when the events which gave rise to the claim occurred and be guided by the criteria in s 9(1)(b), ie the need to establish uniformity in the Republic in respect of the status afforded to a king or a queen, whether a recognised kingship exists and the functions to be performed by the king or queen.

65 It is not suggested that the Commission failed to take these considerations into account. I am unpersuaded that the conduct by the Commission of its administrative duties fell foul of PAJA in the respects suggested by the applicant. The application for review can therefore not succeed.

66 Counsel were agreed that it would not be appropriate in these circumstances to award costs against the applicant. The applicant sought to vindicate constitutional rights and enjoys the support of a section of the community in his efforts to do so. The applicant has conducted the litigation with propriety and respect for the rights of the other parties to the litigation.

67 The order of this court is accordingly that the application is dismissed.

There will be no order as to costs.

NB Tuchten
Judge of the High Court
12 November 2012

NxumeloPresident3829.11

"LA3"

CASE NO: 3829/11

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

REGISTRAR OF THE NORTH GAUTENG HIGH COURT PRETORIA
PRIVATE BAG/PRIVAATSAK X67
2013 -02- 22
T. M. LEGODI
PRETORIA 0001
GRIFFIER VAN DIE NOORD GAUTENG HOË HOF PRETORIA

PRETORIA 20 NOVEMBER 2012

BEFORE THE HONOURABLE MR JUSTICE TUCHTEN

In the matter between:

MPISANE ERIC NXUMALO — APPLICANT

AND

REGISTRAR OF THE NORTH GAUTENG HIGH COURT, PRETORIA
PRIVATE BAG/PRIVAATSAK X67
2013 -02- 22
M B O CHAI
PRETORIA 0001
GRIFFIER VAN DIE NOORD GAUTENG HOË HOF, PRETORIA

| | |
|---|---|
| PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA | 1ST RESPONDENT |
| CHAIRPERSON OF THE COMMISSION ON TRADITIONAL LEADERSHIP AND CLAIMS | 2ND RESPONDENT |
| MINISTER OF COOPERATE GOVERNMENT AND TRADITIONAL AFFAIRS | 3RD RESPONDENT |
| NATIONAL HOUSE OF TRADITIONAL LEADERS | 4TH RESPONDENT |
| LIMPOPO HOUSE OF TRADITIONAL LEADERS | 5TH RESPONDENT |
| PREMIER OF LIMPOPO PROVINCE | 6TH RESPONDENT |

HAVING HEARD counsel(s) for the parties and having read the documents filed the court reserved its judgment.

THEREAFTER ON THIS DAY THE COURT ORDERS

**JUDGMENT**

THAT the application is dismissed, and there will be no order as to costs.

BY THE COURT

REGISTRAR
MA

☐ Att: FHSN