IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 68510/2010

(1) REPORTABLE: YES /~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

12/12/19

In the matter between:

WEZIZWE FEZIWE SIGCAU First Applicant

LOMBEKISO MAKHOTSINI SIGCAU Second Applicant

and

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA First Respondent

THE COMMISSION ON TRADITIONAL LEADERSHIP DISPUTES AND CLAIMS	Second Respondent
CHAIRPERSON OF THE COMMISSION ON TRADITIONAL LEADERSHIP DISPUTES AND CLAIMS	Third Respondent
ZANOZUKO TYELOVUYO SIGCAU	Fourth Respondent
MINISTER OF LOCAL GOVERNMENT AND TRADITIONAL AFFAIRS	Fifth Respondent
PREMIER: EASTERN CAPE PROVINCE	Sixth Respondent
NATIONAL HOUSE OF TRADITIONAL LEADERS	Seventh Respondent
EASTERN CAPE HOUSE OF TRADITIONAL LEADERS	Eighth Respondent
IKUMKANI AMAMPONDO ASENYANDENI	Ninth Respondent

JUDGMENT

MOTHLE J

Introduction

[1] In January 2010 the Commission on Traditional Leadership Disputes and Claims ('the Commission') made a determination, in the course of resolving a dispute over the throne of amaMpondo. The Commission decided that the fourth respondent Zanozuko Tyelovuyo Sigcau ('Zanozuko') is the rightful heir to the throne of amaMpondo. The decision was conveyed on 21 January 2010 to the first respondent, the then President of the Republic of South Africa, Mr JG Zuma, to recognise Zanozuko as the king of amaMpondo. On 5 November 2010, President Zuma published the recognition of Zanozuko as King of amaMpondo. Three days later on 8 November 2010, the incumbent Paramount Chief ('uKumkani') Justice Mpondombini Sigcau ('Mpondombini'), launched an application in this Court, seeking relief to have the decisions of the Commission and that of the President reviewed and set aside.

[2] Mpondombini's review application was dismissed by this Court. The dismissal resulted in two rounds of appeal in the period between 2012 and 2018, from this Court through the Supreme Court of Appeal and to the Constitutional Court. The Constitutional Court in the first round of appeals had set aside the initial judgment of this Court on

procedural grounds, but left 'alive' the re-adjudication of the merits of this review application on substantive grounds. This Court was thus once more seized with the adjudication of the review application on the substantive grounds. Mpondombini died on 27 March 2013, before the judgment of the Constitutional Court in the first round of appeals could be delivered. At the end of the second round of appeals in 2018, he was substituted by his daughter and first applicant, Wesizwe Feziwe Sigcau ('Wesizwe') and wife Lombekiso Makhosatsini Sigcau ('Lombekiso') as the second applicant, who re-instated the review application in an amended form in this Court for adjudication on the merits.

[3] In this judgment, in identifying the parties from the royal family who share the surname 'Sigcau', I will follow the approach of the Constitutional Court in referring to the members of the royal family by their names and not titles. No disrespect is intended. The first and second applicants are jointly referred to as 'the applicants.' The primary respondents in this case were the Commission and its chairperson, whose decision was being challenged, and the President of the Republic of South Africa ('the President'), who, on the basis of the impugned decision, had recognised Zanozuko as King of amaMpondo. The Commission, the chairperson of the Commission, and the President were represented by the same counsel and are collectively referred to as 'the respondents'.

[4] In essence, the applicants seek relief to have the determination or decision of the Commission that Zanozuko is the rightful successor to the throne of the amaMpondo; and the decision of the President to recognise

Zanozuko as King of amaMpondo, reviewed and set aside. The applicants further sought leave to introduce the expert affidavit of Dr Anika Claassens, as well as the award of the costs of the application against the respondents. The respondents sought the dismissal of the application.

Background Facts

The period before uKumkani Mandlonke

[5] The background facts in this case have been repeatedly stated in the preceding judgments arising from this review case. I will have to repeat them in greater detail as a result of the substantive grounds of review that have been raised herein. Central to the debate in this Court during the hearing, was the question as to when did the dispute between the applicants and the respondents arise. This question had a bearing on the applicants' ground of review concerning the alleged failure by the Commission to apply the 'living law'. The applicants contended that the dispute that gave rise to this review application started in 2006 when Zanozuko filed a claim with the Commission for entitlement to ascend the throne of amaMpondo. The respondents' view is that the dispute commenced in 1937 after the death of uKumkani Mandlonke when he died without leaving a male issue to succeed him. His two surviving brothers, Botha and Nelson Sigcau became involved in a dispute for the leadership succession. Wesizwe and Zanozuko are the grand-children of Botha and Nelson respectively.

[6] For the sake of completion, I will start as far back as the reign of King Faku, in 1824. The background would best be understood in three phases. The first phase will be from the reign of King Faku leading to the death of uKumkani Mandlonke. The second phase starts from the restoration of the kingship/queenship by the Commission, and the third phase will cover the litigation history arising out of this review.

[7] King Faku of the amaMpondo ruled from 1824 to 1867, with his Great Place at Qaukeni. He is credited as the founder of the Kingdom of amaMpondo by successfully defending attacks by Shaka, the King of amaZulu. It was during this period that he crossed to the west of Mzimvubu river and established his new Great Place near Mngazi river. He later returned to Qaukeni, leaving Ndamase, his eldest son, to rule on his behalf on the west of Mzimvubu river. That was the beginning of the separation between amaMpondo aseQaukeni (Eastern Pondoland) in the east of Mzimvubu river and amaMpondo aseNyandeni (Western Pondoland) in the west of the river. It needs to be recorded that there appears to be different versions as to how Ndamase came to settle in Western Pondoland. However, the fact is that at the end, both east and west Pondoland were subjugated by the Apartheid Government which abolished the title of king and each territory separately accorded the status of paramount chief, *uKumkani*.

[8] King Faku in Qaukeni was succeeded by his son Mqikela, who in turn was succeeded by his son Sigcau. Sigcau was succeeded by his son Marhelane. Marhelane died in 1921 and was to be succeeded by

Mandlonke. Between 1921 and 1935, Mandlonke's uncle, Mswakeli served as regent as the former was still a minor. It was during the reign of Regent Mswakeli that the apartheid government enacted the Black Administration Act 38 of 1927[1]. It was on the basis of that Act that the government of the day referred to the kings and queens of African communities as 'paramount chief'. Mandlonke became uKumkani in 1935 when he ascended the throne. He died in 1937, living no male issue to succeed him. He had a daughter who was born after his death, who, as custom dictated at that time, could not succeed him.[2] As there was no male issue succeeding him, this task fell to his half-brothers Nelson and Botha.

[9] The contest for succession to the position of uKumkani ensued between Nelson and Botha. Nelson is alleged to have been popular and was expected to succeed on the basis of his popularity. Botha, who according to Mpondombini's evidence, was the first to be approached by the elders to raise a seed in his deceased brother's house, but declined to do so. This request was in accordance with the customary practice of *ukungena*. The elders then approached Nelson who was the younger of the two, to raise a seed in the house of his deceased brother. Nelson agreed and that resulted in his brother's widow, Magqinqi, giving birth to

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[1] Initially called the Bantu Administration Act, 1927.

[2] As in many African Traditional Communities which practiced the doctrine of primogeniture, the custom of amaMpondo dictated that only males qualified to succeed in leadership positions. Females were discriminated against.

Zwelidumile in 1947, who in turn is the father to Zanozuko. Nelson's son with Magqinqi never assented the throne.

[10] The dispute between Nelson and Botha ended when the Governor in 1939 chose Botha as the rightful successor. Author Govan Mbeki[3] writes that the people at that time felt that Botha had enlisted the assistance of the apartheid authorities who, after setting up a Commission, concluded that Botha should succeed. According to the author, this enraged the community and they, amongst others demanded the removal of Botha.

[11] Botha stayed on and in 1979 was succeeded by his son, Mpondombini as uKumkani of amaMpondo aseQaukeni.[4] The dispute over kingship between Nelson and Botha cascaded down to their sons when Zwelidumile mounted a challenge against Mpondombini. In an attempt to resolve the dispute, the assistance uKumkani Matanzima of the neighbour community of amaXhosa was sought, when he ordering a vote on the matter and Mpondombini who was more popular, prevailed. Zwelidumile launched a court challenge, but according to the respondents' version, died in 1984 before the court challenge was prosecuted to finality.

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[3] Mbeki, G. (1964) South Africa: *The Peasants' Revolt* p 116.

[4] Mpondombini was nominated by Nelson, to succeed his brother Botha. Nelson is the biological father of Zwelidumile.

The restoration of the amaMpondo Kingship/Queenship

[12] It was during the reign of uKumkani Mpondombini in 2008 that the Commission investigated the status of the paramountcy of amaMpondo. As Zanozuko had lodged a claim in 2006, contesting the incumbency of the envisaged kingship/queenship, the Commission had two issues to consider. The first being the question of the restoration of the kingship/queenship of amaMpondo and followed by the second, being the question of incumbency of that throne.

[13] The Commission determined and restored the kingship/queenship in 2008. This determination was delivered in a report, concluding as it did, that there was only one kingship/queenship uniting the amaMpondo aseQaukeni and amaMpondo aseNyandeni, as the kingdom of amaMpondo existed before King Faku separated the communities.[5] The method and procedure of that investigation, the narrative as well as the findings of that report were never legally challenged and remained extant.

[14] It was after the determination of the kingship/queenship that the Commission turned to address the claim lodged by Zanozuko for the dispute over incumbency, which claim was opposed by Mpondombini. The Commission held hearings where each party presented witnesses which were cross-examined by the other and made its finding in January

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[5] I return to deal with this aspect in detail later in the judgment under the role and mandate of the Commission.

2010, informing the President that Zanozuko is entitled to be heir to the throne of amaMpondo. It was while Mpondombini was in hospital in August 2010, that he learned of a public announcement that was made, to the effect that the President had accepted the decision of the Commission and that he recognised Zanozuko as King of amaMpondo. In November 2010, Mpondombini instituted the current review proceedings.

The litigation history that spawned from the review application

[15] Mpondombini's review application was heard in this Court and on 19 March 2012, De Klerk AJ dismissed the review application and refused leave to appeal[6]. The Supreme Court of Appeal also refused leave to appeal. Mpondombini was granted leave to appeal by the Constitutional Court. He died in March 2013, before the Constitutional Court delivered its judgment on 13 June 2013. In a judgment that came to be known as *Sigcau v President of the Republic of South Africa and others*[7] ('*Sigcau I*'), the Constitutional Court set aside the judgment and orders of De Klerk AJ on a procedural ground of review, and ruled that the recognition of Zanozuko was invalid in that the then President Zuma, relied on the provisions of the amended Traditional Leadership and Governance Framework Act 23 of 2009 ('new Act') instead of the first Traditional Leadership and Governance Framework Act 41 of 2003 ('old

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[6] Sigcau v President of the Republic of South Africa and others [2012] ZAGPPHC 84.

[7] Sigcau v President of the Republic of South Africa and others [2013] ZACC 18.

Act`). The Court left the consideration of the merits of the review application open for re-adjudication.

[16] The parties could not reach an agreement over the interpretation of the Constitutional Court order in *Sigcau I.* Lombekiso contended that their appeal before the Constitutional Court was successful and therefore she was entitled to be appointed as queen regent. The Commission and the Presidency were of the view that all that was needed was for the former President to follow the provisions of the old Act in recognising Zanozuko again. This legal impasse led to the second application by the Minister of Cooperative Governance to seek a proper interpretation of the order in *Sigcau I.* The application came before Murphy J in this Court[8].

[17] The High Court judgment was delivered on 20 November 2015, in which Murphy J agreed with the Minister`s interpretation of the Constitutional Court order in *Sigcau I.* With leave of the High Court granted on 3 June 2016, Lombekiso launched an appeal to the Supreme Court of Appeal, which delivered its judgment on 7 June 2017, dismissing the appeal[9]. The Lombekiso turned to the Constitutional Court which delivered its judgment on 11 September 2018. In *Sigcau and Another v Minister of Cooperative Governance and Traditional Affairs*

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[8] Judgment of Murphy J in the Minister of Cooperative Governance and others v Sigcau and others [2016] 3 All SA 588 (GP).

[9] Judgement of Dambuza JA in Sigcau v Minister of Cooperative Governance and Traditional Affairs [2017] ZASCA 80.

and Others[10] *(Sigcau II)*, the Constitutional Court upheld the Supreme Court of Appeal and High Court judgments that on a proper construction of the *Sigcau I* judgment, the President is authorised to recognise Zanozuko in terms of the old Act. Again the Constitutional Court left "*alive*" the question of the merits of the review application.

[18] The following month on 5 October 2018, Wesizwe and Lombekiso applied for substitution as applicants in the review application. In the same year on 30 November 2018, President Ramaphosa published in a Presidential Minute, the recognition of Zanozuko as King of amaMpondo. On 10 December 2018, within a month after the publication of the Presidential Minute recognising Zanozuko as King of amaMpondo, the applicants requested the High Court to place the review application on the roll for the adjudication of the merits. A directive was issued with 20 August 2019 stated as the date of hearing of the review application.

[19] Consequent to *Sigcau I* and *Sigcau II*, the applicants accepted that since some of the original grounds of review lodged by Mpondombini had been addressed in the course of the two rounds of appeal, it would be necessary to amend the notice of motion and submit a supplementary affidavit, to re-focus the case on the remaining grounds of review. The amendment to the notice of motion and supplementary affidavit was

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[10] Judgment of Zondo DCJ in Wezizwe Feziwe Sigcau and Another v Minister of Cooperative Governance and Traditional Affairs and others [2018] ZACC 28.

delivered on 30 January 2019 and the respondents delivered a supplementary answering affidavit dated 19 March 2019.

[20] Prior to the hearing, the parties produced a joint practice note and a joint chronology of events, limiting the issues to be addressed at the hearing. The application for review was heard in the High Court on 20 August 2019.

The amendment

[21] In amending the initial notice of motion delivered by Mpondombini, the applicants deleted prayers 1 to 9 and inserted new prayers 1 and 2. The applicants further re-numbered prayers 10 and 11 as new prayers 3 and 4. The prayers in the amended notice of motion read thus:

'1. The determination or decision of the Commission on Traditional Leadership Disputes and Claims (the Second Respondent) dated 21 January 2010, alternatively July 2010, that Zanozuko Tyelovuyo Sigcau (the Fourth Respondent) is the rightful successor to the throne of amaMpondo is reviewed and set aside.

2. The decision of the President (the First Respondent) to appoint Zanozuko Tyelovulo Sigcau as King of the amaMpondo in terms of section 9(2)(a) and (b) of the Traditional Leadership and Governance Framework Act 41 of 2003, and the notice of the President which published this decision in the Government Gazette (Notice 13 15 of GG 42068 dated 30 November 2018), is reviewed and set aside.

3. Costs of the application against the respondents who oppose the relief sought.

4. Further and alternative relief.'

Issues to be determined

The amended notice of motion had narrowed the issues that require determination. In a Joint Practice Note between the Applicants and the Respondents filed on 13 August 2019, the parties agreed as follows in regard to the issues to be determined by this Court, namely:

'6.1 Whether the Applicants must seek condonation for any delay in prosecuting this review application, and if so, whether condonation should be granted.

6.2 Whether the Court should allow the expert evidence by Dr Claassen to be admitted.

6.3 Whether the impugned decisions should be reviewed on any of the following grounds:

6.3.1 Whether the Commission, in investigating and deciding the above disputes, correctly fulfilled its statutory role in the relevant provisions of amaMpondo customary law;

6.3.2 Whether the Commission erred in concluding that Nelson Sigcau, and not Botha Sigcau, was the rightful successor to Mandlonke in terms of the customary law of amaMpondo;

6.3.3 Whether Nelson's heir had a legitimate claim to the throne through the custom of Ukungena:

(a) Whether Ukungena was practiced by royalty in amaMpondo custom;

(b) Whether Magqinqi was a great wife in the royal house;

(c) Whether an Ukungena Union in fact occurred between Nelson and Magqinqi.

6.3.4 Whether the Commission had a duty to consider the views of amaMpondo on whether Zanozuko Sigcau ought to be appointed. If so, whether this duty was satisfied.

6.4 If the review is successful, what the remedy should be.'

The role and the mandate of the Commission

[22] Before dealing with the issues identified for determination by this Court, it is necessary to examine the role and mandate of the Commission and the events leading to the impugned decision.

[23] The Commission was established on the basis of section 212(1) of the Constitution of the Republic of South Africa, 1996 ('the Constitution'). Section 211(3) of the Constitution obligates the courts to apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law. In 2009, the old Act was enacted. Section 22 of the old Act established the Commission with a mandate to address the Traditional Leadership Dispute and Claims. Under the old Act the Commission's term of office was limited to five years. Toward the end of the fifth year, an amendment was effected and the new Act came into being, establishing a new and successor in title to the Commission, though with reduced powers, also for a new period of five years. The term of office of the new Commission was extended until 2017, to enable it to finalise the outstanding matters. Therefore, as at the time this application was heard on 20 August 2019, both Commissions' terms of office had come to an end. Throughout the text in this judgment, reference to the Commission shall mean the Commission of the old Act.

[24] It is apposite to record that the mandate of the Commission was two-fold[11]. First, the Commission had to determine the status of the paramountcy established under the Black Administration Act 38 of 1927, which came into operation on 5 July 1927. The Commission had to determine which of these paramountcy could be recognised as kingship or queenship. The mandate was expressed in s 25(2)(a)(i) of the old Act. Secondly, the old Act also mandated the Commission in terms of s 25(2)(a)(ii) to resolve disputes where a claim had been lodged, contesting the incumbency of that kingship or queenship.

[25] In particular, in respect of the first mandate, and relevant to this case, the Commission, exercising its powers in terms of section 25(20(a)(i) of the old Act, recognised and recommended the establishment of a single kingship/queenship for amaMpondo, uniting the amaMpondo aseQaukeni and amaMpondo aseNyandeni under that kingship/queenship. The decision was communicated in the 2008 Commission's report.

[26] The next mandate was that of resolving the dispute over the incumbency, lodged by Zanozuko in 2006. The Commission was able to complete its work on the question of the kingship/queenship of amaMpondo and the dispute over the incumbency, within the prescribed five years' period ending on 31 January 2010.

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[11] *Supra* at para 12.

The decision of the Commission

[27] The decision of the Commission was delivered on 21 January 2010 in the Commission's second report. The report provides a brief overview of the Commission's powers to investigate and resolve disputes relating to the incumbency of the kingship/queenship upon receipt of a claim contesting such.

[28] The report further deals with the procedure that was followed when adjudicating the dispute. Apart from the research that was conducted by the Commission, a public hearing was held where both Zanozuko and Mpondombini were permitted to present oral evidence and call witnesses to testify.

[29] Zanozuko appeared at the hearing without legal representation. He testified and called two witnesses. Mpondombini, who had legal representation, also testified and presented seven witnesses, including the two who testified after he was allowed, on application, to lead further evidence. Before and at the end of presentation of evidence, the parties were invited to address the Commission, before the proceedings were adjourned.

[30] The Commission contends that its decision was based on an analysis of the evidence of the customary laws and customs of the traditional leadership succession of amaMpondo. That analysis was explained in the 2008 Commission's report. The respondents' answering affidavit states thus:

'As explained in the Commission's findings, a king has several wives, divided into houses. His first wife formed the "*right-hand house*" *(or ikumene).* But a custom had arisen (adopted from amaXhosa community) that the sons of the right-hand house could never succeed. The reason for this was that the king would marry his first wife relatively young, and his eldest sons from this union would reach adulthood while their father was still in power. To avoid power-struggles between the king and his older sons, these sons were barred them from succession. They could establish semi-autonomous communities, but could not succeed to the role of *ikumkani.*

Later in his life, the king would take a "great wife" (*or undlunkulu*) who would head the "great house" (*or indlunkulu).* The entire community would pay the lobola for this wife, and the purpose of this union would be to bear a successor to the king.
In addition, each house would have *amaqadi* (sing. *Iqadi*) wives. They were consorts, who supported the main wives, particularly in relation to bearing male offspring…
Following these principles, Zanozuko pointed out that Mandlonke had no sons with his great wife or *amaqadi* of the great house. The next in line was then Nelson, who was the eldest surviving son of *amaqadi* of the right hand house. Botha, as the eldest surviving son of the right-hand wife, had to be skipped over.'

[65] The Commission made a determination by concluding that Zanozuko was genealogically entitled to succeed as King in the house of his customary grandfather, Mandlonke. It needs to be mentioned that the Commission comprised of experts and eminent scholars knowledgeable in customary laws, customs and processes. The decision reached was a collective effort by this group of experts. In *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims and Others*[12] the Constitutional Court stated:

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[12] Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims and Others [2014] ZACC 36 par 80.

'. . . The Commission is a specialist body constituted by experts "who are knowledgeable regarding customs and the institution of traditional leadership". As this Court held in *Nxumalo*, it is appropriate to treat its decisions with some deference.'

[31] I now turn to deal with the issues requiring determination by this Court, including the grounds of review.

Have the applicants delayed in prosecuting this review and was it necessary for them to apply for condonation?

[32] The respondents, contending that the Commission's decision in January 2010 was an administrative action in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), allege firstly that Mpondombini delayed in launching the review application on 24 November 2010, well after the 180 days prescribed by section 7(1) of PAJA, which period had expired in July 2010.

[33] The second line of attack is the respondents' further contention that after both *Sigcau I* and *Sigcau II*, there was a delay on the part of the applicants to prosecute the merits of the application even after it was made clear by the Constitutional Court that it is open for them to do so.

[34] It is further submitted for the respondents, with reference to a line of several court decisions such as in *SANRAL v City of Cape Town* [13]

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[13] SANRAL v City of Cape Town [2016] ZASCA 122 para 79.

(SANRAL), *Opposition to Urban Tolling Alliance v The South African National Roads Agency Limited*[14], *ABM Motors v Minister of Minerals and Energy and others*[15], *Cassimjee v Minister of Finance* [16] and *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited*[17], that a court may dismiss an application due to delay in launching same, after the impugned decision was taken. The respondents further contend that the same principle applies in regard to the delay in prosecuting an application.

[35] It is common cause that the applicants did not file any condonation application. It is also common cause that during the nine-year period, November 2010 to August 2019, there were two rounds of litigation arising from this application, one after the other, which led to *Sigcau I* and *Sigcau II*. Both these matters in turn started in this Court, and subsequently escalated to the Supreme Court of Appeal and the Constitutional Court. In *Sigcau I*, this court had, in 2012 adjudicated the application on the merits as lodged by Mpondombini in November 2010.

[36] After the decision in *Sigcau II*, the applicants did not immediately approach the High Court to prosecute the merits, it was only when the President in November 2018, recognised Zanozuko as King of amaMpondo in accordance with the ruling by the Constitutional Court,

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[14] Opposition to Urban Tolling Alliance v The South African National Roads Agency Limited [2013] ZASCA 148 para 26.

[15] ABM Motors v Minister of Minerals and Energy and others 2018 (5) SA 540 (KZP) par 27.

[16] Cassimere v Minister of Finance [2012] ZASCA 101 par 10.

[17] State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited [2017] ZACC 40 para 27.

that the applicants approached this Court on 10 December 2018, to request this Court for a date to prosecute the merits and to seek substitution as applicants.

[37] In *Sigcau I* and *Sigcau II* the courts did not deal with or pronounce on the delay by Mpondombini in launching this application for review. In his affidavit, he states that he became aware of the decision of the Commission in August 2010, after it was publicised on 29 July 2010 by the then President Zuma, formally recognising Zanozuko as King of amaMpondo. At that stage, he was bedridden in hospital. Mpondombini succumbed from his illness after the Constitutional court had heard his appeal but had not delivered its judgment in *Sigcau I*.

[38] In my view the delay by Mpondombini is not fatal, considering his ill health at that time and the fact that President Zuma took the decision to recognise Zanozuko as King on 29 July 2010. Until then, the decision of the Commission had not been implemented by the President. I am of the view that the Courts would have condoned the delay under those circumstances.

[39] In regard to the allegation concerning the delay in the prosecution of the merits, the applicants contend that the President only recognised Zanozuko as King in November 2018 and consequently, the December 2018 request for a date to prosecute the review application was not delayed. It is contended further that there was therefore no need to apply for condonation.

[40] The applicants had the period between 13 June 2013 after the judgment of the Constitutional Court in *Sigcau I* and the delivery of the Constitutional Court judgment in *Sigcau II* on 11 September 2018, more than 4 years to re-instate the review proceedings. They failed to do so and also failed to explain what caused the delay. In *SANRAL*[18], the Court explained the rationale behind the need to avoid a delay in instituting proceedings thus:

'[U]ndue and unreasonable delay on the part of an aggrieved party in initiating review proceedings might cause prejudice to other parties to the proceedings and that, therefore, in such cases the court should have the power to refuse to entertain the review. An associated rationale for what became known as the "delay rule" was public-interest element in the finality of decisions by repositories of state power, whatever their nature'

[41] This matter is not only confined to the interests of the litigants, but affects the people of amaMpondo. There is no doubt that this issue is of public interest as it concerns the entire communities of amaMpondo. The public interest factor alluded to in the quoted text from *SANRAL* above, supports the view that it will be in the interest of the parties and the people of amaMpondo that the merits of this case be finally adjudicated in the Courts.

[42] In spite of the failure by the applicants to prosecute the review application without delay and failure to apply for condonation, which ordinarily would be fatal to their case, I am of the view that any prejudice

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[18] SANRAL v City of Cape Town supra, para 79

suffered by the respondents as a result the delay is outweighed by the need to bring this matter to finality. It is essential that after *Sigcau I* and *Sigcau II*, the litigation between the parties regarding this dispute should be adjudicated to finality. This Court is further of the view that it will also be in the interest of both parties not to have another round of appeals solely on the issue of delay.

Should the expert evidence of Dr Claassen be admitted?

[43] Dr Claassens' opinion has already served before the Constitutional Court in *Sigcau I and Sigcau II*. In Sigcau II it found support in the dissenting judgment of Froneman J.

[44] The applicants' contention is that the Commission, in considering the disputed claim on incumbency, failed to apply the 'living law'. According to Dr Claassens's opinion, the living law in that context involved a process of consultation with the people of amaMpondo on their preferred leader. This issue was raised as the main ground of review after the amendments, and in my view is relevant to the proceedings.

[45] The chairperson of the Commission agreed that there would be instances where a person's popularity emerged as a factor in a traditional leadership contest. Ordinarily that would arise within the context of politics within the royal family, which is a common factor in all traditional communities. However, it would serve as a deviation to the customary law leadership succession through the bloodline. He further disagrees that it was or would have been a criterion necessary for the

Commission to consider in determining the question as to who would be entitled to succeed.

[46] The parties have joined issue on this ground of review and this Court is seized with it. The applicants should thus not be denied the right to present expert evidence. The expert opinion of Dr Classsens is therefore admitted as evidence. Its probative value, however remains to be considered. I will return to this aspect later in this judgment.

Whether the impugned decisions should be reviewed on any of the four grounds listed.

Did the Commission fulfil its statutory role in considering the amaMpondo customary law?

[47] Section 25(1) of the old Act authorised the Commission to decide on any traditional leadership dispute and claim. The Commission further had authority, in terms of section 25(2)(a) to investigate, either on request or of its own accord, amongst others and relevant to this case:

'(i) a case where there is doubt as to whether a kingship, senior traditional leadership or headmanship was established in accordance with customary law and custom;
(ii) a traditional leadership position where the title or right of the incumbent is contested.'

[48] It is common cause that the Commission in 2008, first investigated the question of the kingship/queenship of amaMpondo in terms of section 25(2)(b)(i). The Commission found and concluded that there was only one kingship/queenship for amaMpondo, located at Qaukeni.

[49] It is further common cause that Zanozuko lodged a claim, raising a dispute in regard to the incumbency of the kingship of amaMpondo, in terms of section 25(2)(a)(ii) of the old Act. After establishing the kingship/queenship, the Commission turned to the investigation of Zanozuko's claim.

[50] The Commission contends that its investigation included conducting research, interviews and consultation with the elders of both communities. Further that it applied the following procedure in dealing with the dispute on incumbency: that upon receipt of that claim from Zanozuko, it referred it to Mpondombini for his comment, which he provided. Thereafter the Commission referred Mpondombini's response to Zanozuko and then summoned the parties to a public hearing regarding the claim and the opposition thereto. Each party was invited to present oral and or documentary evidence and could summon any number of witnesses, all of whom were subjected to cross-examination by the opposing party and questions from the panel of the Commission's experts.

[51] Apart from the contention that the Commission did not consult the people of amaMpondo, the legality of the process followed in conducting the investigation was not disputed, nor were there any allegations that it was procedurally unfair or unreasonable. In answer to the question raised for determination by this Court, I conclude that the Commission followed an investigative procedure that was conducted within the spirit and purport of section 33 of the Constitution, read with the provisions of

PAJA. Therefore, apart from the allegation that the Commission failed to apply the living law, an issue that is dealt with later in this judgment, in my view the Commission had fulfilled its statutory role in considering the amaMpondo customary law.

Did the Commission err in concluding that Nelson and not Botha was the rightful successor to Mandlonke in terms of the customary law of amaMpondo?

[52] The Commission's findings in terms of the contestation between Nelson and Botha was determined on the basis of the rules of customary laws and custom of amaMpondo on traditional leadership succession. That finding on the rules was made in the 2008 Commission's report during the first phase of determining the question of the kingship/queenship.

[53] Botha, Nelson and Mandlonke were the sons of Marhelane. The Commission found that in the absence of any male issue from the Great House and the Right-Hand House of Mandlonke to succeed him, the rules pointed to his brothers Botha and Nelson. According to the customary law succession of amaMpondo with reference to the Great House and the Right-Hand House as indicated earlier in this judgment[19], a male born of the incumbent traditional leader and Iqadi of the Right-Hand wife, ranks before the male offspring of the traditional leader and the Right-Hand

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[19] *Supra* at para 29.

Wife. Nelson as the eldest son of iqadi in the Right-Hand House ranked ahead of Botha, the eldest son of the Right-Hand Wife.

[54] Mpondombini testified before the Commission with reference to the statement by ukumkani Victor Poto[20] ('Poto'), that a son of the Right-Hand Wife succeeds ahead of any son of *iqadi*. Poto was an author who, when presenting evidence before the courts in the 1940s in regard to the dispute between Botha and Nelson, recanted the view he expressed in his book published in 1927, prior to the eruption of the dispute between Botha and Nelson. In his book, Poto[21] wrote that sometimes the chief dies without an issue. Under those circumstances the men choose a great wife from the king's wives. The son of that chosen great wife is then installed as the chief. The successor is never chosen from the right-hand house. Sometimes the chief dies without a great wife, the men choose a successor.

[55] Poto recanted this statement when he was called to assist in resolving the dispute. He changed his view in favour of Botha that a son from the right-hand house can succeed. Of importance to note, when in 1944 Poto was recanting what he wrote back in 1927, he had ascended the position of ukumkani of amaMpondo of Nyandeni as the son of a Right-Hand Wife. He was thus conflicted and had a vested interest in

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[20] Victor Poto at that time of contestation between Botha and Nelson, was ukumkani of the amaMpondo aseNyandeni.

[21] Ndamase, VP. (1927) Lovedale: *Ama-Mpondo: Ibali neNtlalo* p50.

asserting this view. The Commission accepted the view Poto had expressed in the book, because he expressed such view in 1927, at the time he was free of influence and vested interests.

[56] The Commission applied the customary law and custom of the traditional leadership succession of amaMpondo, that the son of the right hand wife does not succeed. I am unable to find any evidence that the decision of the Commission in this regard is either irrational, unlawful, unreasonable or procedurally unfair and that on any of these grounds it should be set aside.

Whether Nelson's heir had a legitimate claim to the throne through the custom of ukungena, in particular

Whether ukungena was practiced by royalty in Mpondo custom;

[57] The answer to this question is found in the affidavit deposed to by Mpondombini, filed in court in opposition to Magingqi's application to return to the Great House. The affidavit was submitted to the Commission during the hearing. Mpondombini stated the following:

'if a deceased Paramount Chief is succeeded by two brothers, and leaves no issue of his own, then Ingena union can only be entered into between the widow and the elder of the two such brothers.'

[58] Mpondombini went on to state in the affidavit that his father Botha being older than Nelson, was the first to be requested to enter into the *ukungena* union with Magingqi and he refused. The point being made is

that Mpondombini's affidavit corroborated the finding by the Commission that the ukungena custom was indeed practised by the royalty of amaMpondo. The Commission had reported on the custom in their first 2008 report on the restoration of the kingship/queenship.

Whether Magingqi was a Great Wife in the royal house?

[59] Mandlonke had married two wives, Magingqi and Mampofane. Both did not have a male issue who could qualify as successor. During its investigation of the question of the kingship/ queenship for amaMpondo, the Commission concluded that in accordance with the custom of the amaMpondo, the successor had to come from the Great House and by the Great Wife.

[60] The Commission found, on the basis of the evidence placed by witnesses before it, that at the time Nelson performed the custom of *ukungena*, Magingqi was still the occupant of the Great House at Mzindlovu. The elders intended that the *ukungena* union be held with the occupant of the Great House, who at that time was Magingqi and not Mampofane. Poto at that time, also warned that any *ukungena* union with Magingqi would spell trouble in future. He did not refer to Mampofane.

[61] The Commission therefore concluded, mainly from the direct and indirect evidence of the witnesses that Magingqi was the Great Wife, who had resided with Mandlonke at the Great House before the latter's death. The evidence also supports the allegation that she continued to stay there after the death of Mandlonke, until she was pressured to leave the Great

House, hence her application to the Supreme Court of Transkei in 1983 in an attempt to return to the Great House.

Whether an ukungena union in fact occurred between Nelson and Magingqi.

[62] The Commission in this regard was presented with conflicting evidence. Mrs Madikizela, one of Mpondombini's witnesses, testified that people were expecting Nelson to enter into an *ukungena* union with Magingqi. She further testified that she heard rumours of *ukungena* in the house of Mandlonke, but that she had not witnessed it. The point she was making was that while she heard of the *ukungena* union between Nelson and Magingqi, in her view, he had married her and the marriage took place at eKhubeni, the marital home of Magingqi. According to the custom of amaMpondo, the *ukungena* union must take place at the house the widow occupied with the deceased leader.

[63] The view that Nelson married Magingqi was firstly contradicted by Magingqi's uncle, the younger brother to her father, Mr Ncoyeni, testifying at the Commission that Nelson was introduced to them as the person who entered into an *ukungena* union with Magingqi and had not married her. Secondly, it is an established amaMpondo custom that men from the same family can never pay *lobola* twice for the same woman.

[64] The Commission accepted the version that the elders turned to Nelson to enter into a union of *ukungena* with Magingqi. Nelson agreed and had a male child with Magingqi. The male child, Zwelidumile, who

became Zanozuko's father, was born of that custom of *ukungena* and was regarded sociologically as the child of the deceased Mandlonke. He was, according to custom, intended to succeed him. The intervention of the Apartheid authorities resulted in Botha succeeding instead.

[65] Further, the Commission accepted that is was Magingqi, and not Mampofane, who shared the Great House with Mandlonke. Even though Magingqi had testified before the Supreme Court of Transkei that she was the Right-Hand Wife, she later corrected that evidence by stating that the ranking of the wives was a function of the men of the amaMpondo and that she was not familiar with that custom.

Whether the Commission had a duty to consider the views of amaMpondo on whether Zanozuko ought to have been appointed, if so, whether this duty was satisfied.

[66] The applicants predicate their case on the opinion of Dr Claassens in regard to the evolution of populism or the 'living law' as a factor in determining traditional leadership succession in customary law. The opinion further paints a picture of the dynamic and often unpredictable nature of politics in customary succession, but concludes that the Commission should have had regard *'to internal processes of the community'* in order to be consistent with section 211 of the Constitution. The contention is that the Commission in arriving at their decision, failed to consult the amaMpondo.

[67] The courts' approach to the living law as stated by the Constitutional Court in *Shilubana v Nwamitwa*[22] and *Bhe v Khayelitsha Magistrate*[23], recognises the need for the courts in interpreting customary law, customs and processes to accept the developmental aspects thereof, so as to reflect the practices dictated to by the modern trends. The applicants' case, inspired by Dr Claassens's opinion, in essence was that in adjudicating on the dispute over incumbency, the Commission failed to consult the people of amaMpondo.

[68] In reply, the respondents contend that by interviewing the members of the amaMpondo community during the first investigation to determine the kingship/queenship and thereafter conducting public hearings where oral evidence was presented during the second investigation on incumbency, the Commission's approach was consultative.

[69] What then was the 'living law' within the context of this case? By way of illustration and in answer to this question, I refer to quotes from the applicants' affidavit deposed to by Wesizwe, where she refers to the submissions made by counsel in the Constitutional Court in *Sigcau II*[24].

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[22] Shilubana v Nwamitwa [2008] ZACC 9.

[23] Bhe v Khayelitsha Magistrate and Others [2004] ZACC 17.

[24] Wezizwe Feziwe Sigcau and Another v Minister of Cooperative Governance and Traditional Affairs *supra*, note 8.

Wesizwe in her founding affidavit[25] in support of the contention that the evidence of Dr Claassens should be admitted, quotes from the submissions made by counsel[26] for the Centre for Law and Society, the Centre having been admitted as *amicus curiae*.

[70] In essence, and based on Dr Claassens's opinion, counsel for the Centre argued that the Commission had a legal obligation to consult the public in the determination of leadership succession. He submitted further that:

'It is intrinsic to the customary mechanisms that the public should participate in decisions about their leadership. Once a leader is imposed from above by the Commission or the President, the leader becomes a state functionary leader and that it is a fundamental distortion of a requirement of customary law. Then it must follow that the Commission was duty bound to investigate what the views were of the public.'

[71] The notion of 'consulting the public' for the traditional leadership succession in this case was certainly fraught with inconsistencies and obvious practical difficulties. Firstly, during the hearing before the Commission in 2009, Mpondombini contended that the Commission should consider his popularity with the 'Chiefs' (senior traditional leaders). In support of that contention he submitted the Chiefs' confirmatory affidavits. As it will appear later in this judgment, that

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[25] Volume titled: Application for Leave to amend the Notice of Motion and leave to introduce expert's affidavits: Founding affidavit of Wesizwe Sigcau page 11para 24 et seq.

[26] P11 of the same Volume as in footnote 25 above. Founding affidavit, para 24.

popularity was not an event as at the time the dispute arose, which would require consideration in terms of section 25(3)(a) of the old Act.

[72] Similarly, the applicants in *Sigcau II* relied on the notion that the Commission had to consult the royal family in terms of section 9 of the old Act, before taking the impugned decision. The Constitutional Court in the main judgment of *Sigcau II* rejected the applicants' argument that the decision of the Commission taken in terms of section 25(2)(b)(ii) of the old Act had to be referred to the royal family in terms of section 9 of the same Act. The Court found that on a proper reading of the Act, that form of consultation with the royal family would be inconsistent with the purpose of section 25 of the old Act.

[73] In this Court, the applicants now rely on the notion of public consultation as the living law. In the first instance, this Court could not find any evidence of the sources and content of customary law rules on public consultation for the determination of traditional leadership succession in the customary laws and custom of amaMpondo. Further, there was no evidence presented to this Court as to what form that consultation would take, in terms of customary law. In particular, and as observed by Froneman J in the dissenting judgment in *Sigcau II*[27], in instances where the royal family, alternatively the entire amaMpondo nation evidence prevalence of division or factionalism in regard to views on the choice of leadership, it seems that eventually traditional leadership

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[27] Wezizwe Feziwe Sigcau and Another v Minister of Cooperative Governance and Traditional Affairs par 83 and 84.

may have to be determined through a democratic process of casting of votes.

[74] This practical difficulty is demonstrated with reference to the questions raised by Chief Justice Mogoeng and Deputy Chief Justice Moseneke to Advocate Ngcukaitobi for the Centre, again quoted from Wezizwe's founding affidavit[28] as follows:

'Chief Justice Mogoeng: I am sorry to interrupt you. All I want to know is, are we advocating for the development of a new law, or is it a recognised component of customary law that there should be public participation before a leader of a traditional community can be recognised as either the senior traditional leader or the king, that is all I (need) to know, as a matter of established customary law. Not the one we are aspiring towards.

Advocate Ngcukaitobi: Chief Justice, it is the latter. Our submission, primarily, is that it is recognised, intrinsic part of customary law, and these authors that we cite suggest that it is intrinsic that the leaders must emanate from below, and not from above....

Deputy Chief Justice Moseneke: And it (the Commission) ignored it by not consulting the community?

Advocate Ngcukaitobi: Well (a) by not consulting the community, but also if one examines the facts in this case, there are two contending ideas. The first is whether a leader of this community should emanate only from the first born son of the Great Wife, or whether there are other alternatives. Because ultimately the argument that is made on behalf of the First Respondent is that there is a straight line of geneology that ultimately is legitimated by the fact that he emanates from the Great Wife or the Great House. And there is a contending view that says there are other alternatives to that decision.

Deputy Chief Justice Moseneke: And which of those two would be the living one?

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[28] Bottom of page 12 to page 13, paras 27 and 28.

Advocate Ngcukaitobi: Well, this is the point Deputy Chief Justice. *It is that it is very difficult, if one traces the histories of these two ideas, to work out precisely which of these two could considered to be the living or present customary law.* The only mechanism is what we suggest in relation to the first point- the only mechanism is popular participation and popular political support.' Emphasis added.

[75] The difficulty alluded to by counsel was considered by the Commission when applying the customary rules of succession between the male children in the Great House and those in the Right-Hand House. The starting point was the children of the Great House, born by the Great Wife or *amaqadi* to the Great Wife. Where there were no children from the Great House as was the case in this instance, the Right-Hand House comes into contention. In this regard, Botha was a son of the Right-Hand Wife while Nelson was a son of *iqadi* of the Right –Hand Wife. The customary law rules determined that in that instance, Nelson had to succeed ahead of Botha. Consequently, the dispute erupted when Botha refused to accept that a son of *iqadi* to his mother should rank before him. Botha contended for a deviation from the rule. Neither counsel nor Dr Claasens in her opinion attempts to demonstrate, with reference to this case, how the living law should have been applied by the Commission to resolve the dispute, against the customary rules of leadership succession as the found them.

[76] Secondly, and in consideration of the fact that the living law is the continuing evolution of customary law and customs, then the question that arise is at which stage of the historical events in this case would be the applicable living law? Zanozuko's claim was based on two grounds. The first was that in terms of customary law principles, his grandfather

Nelson, had the true claim to succeed Mandlonke. The second claim referred to an *ukungena* union between Nelson and the widow of the deceased Mandlonke, being Magingqi. Both claims refer to events in the period just after the death of Mandlonke and the contestation between Nelson and Botha. In this regard, Section 25(3)(a) of the old Act provides:

'(3) (a)When considering a dispute or claim, the Commission must consider and apply customary law and the customs of the relevant traditional community as they were when the events occurred that gave rise to the dispute or claim.' (emphasis added)

[77] It seems to me that the Commission was thus enjoined by section 25(3)(a) to go back in time, to the events of 1937 to 1939, to unravel what appeared from the evidence submitted by both parties and their witnesses, to be the root of the dispute, namely, the events relating to the leadership contestation between Nelson and Botha. The living law applicable was therefore that of the period from 1937, after Mandlonke's death to 1939 when the then Apartheid government installed Botha as ukumkani. The living law during the period between 2008 to 2009, when the Commission heard evidence leading to the impugned decision, would not have assisted the Commission to resolve the dispute within the prescribed terms of section 25(3)(a).

[78] The evidence also points to the applicable living law at the time of the dispute. The Commission's 2010 report records that in regard to the

question of popularity, Nelson was more popular and acceptable to the community than Botha. Mbeki[29] in his publication wrote:

'The then Nationalist government moved to invade the area with its new policies, and from the very start it went wrong, making the serious mistake of choosing as the arch-champion of Bantu Authorities Chief Botha Sigcau, a man already discredited in the eyes of his people. As far back as 1939, when the choice had had to be made of a successor to the Paramount chief of East Pondoland the government of the day had picked on Chief Botha in preference to his half-brother Nelson, who had been regarded by many as the rightful heir. The use of Chief Botha by the Nationalists to introduce Bantu Authorities, in the face of popular opposition to his chieftainship, was bound to provoke widespread resentment.'

[79] Having regard to Mbeki's views expressed above, had the Apartheid Government then, consulted the public in resolving the dispute between Nelson and Botha in compliance with the popularity factor as the living law, it seems Botha would not have been appointed ukumkani. Consequently, Mpondombini would not have being entitled to succeed him either. However, the popularity factor as advocated by the applicants to be considered post 2008, is not the basis on which the Commission took the impugned decision.

[78] The Commission was constrained by section 25(3)(a) of the old Act to consider the events as they were at the time the dispute arose. In that regard, the content of the evidence presented by both parties and their witnesses pointed to the events as they were when the dispute started in 1937. The Commission's decision was thus informed by that evidence,

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[29] Mbeki, G. *The Peasants' Revolt* p118.

which came from some witnesses who lived during that period; witnessed and experienced the events as they unfolded then; and lived long enough to narrate them in 2009. It seems to me that the Commission's public hearings and the evidence obtained therein between 2008 and 2009, were a form of public consultation within the notion of the living law on the customary law and custom of amaMpondo, relevant to this case.

CONCLUSION

[80] The task of formulating the rules of consultation to determine traditional leadership succession as the living law of amaMpondo, has to be determined by the people of amaMpondo. There was no evidence placed before the Commission that, in spite of s25(3)(a), it had to consult the people of amaMpondo. The witnesses testified about the events that took place from 1937 to 1939. Therefore, apart from making the allegation that the Commission failed to consult the people of amaMpondo, the applicants could not point to the customary law rules of succession as to how and with whom, in view of the provisions of s25(3)(a), the Commission should have conducted the consultation. The applicants' attack of the impugned decision was not premised on any review grounds of irrationality or illegality or unreasonableness or procedural unfairness. The application must thus fail. In view of the decision I intend to take on this matter, the question of a remedy does not arise.

COSTS

[81] The costs normally follow the result. However, in this instance, on the basis of the principle set out in *Biowatch Trust v Registrar, Genetic Resources*[30], which the Respondents conceded, the applicant will not be mulcted with costs.

ORDER

[82] In the premises I make the following order:

1. The application is dismissed.

2. There is no order as to costs.

JUDGE SP MOTHLE
Judge of the High Court
Gauteng Division
Pretoria

APPEARANCES

For the Applicant:	Adv. Geoff Budlender SC Instructed by Webber Wentzel Attorneys, Johannesburg.
For the Respondents:	Adv. Norman Arendse SC Adv. David Borgström Instructed by Bhadrish Daya Attorneys, Pretoria.

[30] *Biowatch Trust v Registrar, Genetic Resources 2009 (6) SA 232 (CC).*