CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 162/13

In the matter between:

MPISANE ERIC NXUMALO	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
CHAIRPERSON OF THE COMMISSION ON TRADITIONAL LEADERSHIP DISPUTES AND CLAIMS	Second Respondent
MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Third Respondent
NATIONAL HOUSE OF TRADITIONAL LEADERS	Fourth Respondent
LIMPOPO HOUSE OF TRADITIONAL LEADERS	Fifth Respondent
PREMIER, LIMPOPO PROVINCE	Sixth Respondent

Neutral citation:	*Nxumalo v President of the Republic of South Africa and Others* [2014] ZACC 27
Coram:	Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, Nkabinde J, Van der Westhuizen J and Zondo J
Decided on:	2 October 2014

ORDER

On appeal from the North Gauteng High Court, Pretoria:

1. Leave to appeal is granted.
2. The appeal against the order of the High Court concerning the President's decision is upheld and that order is set aside and replaced with the following order:

   "The first respondent's decision or notice is set aside."
3. The appeal against the order of the High Court concerning the decision of the Commission on Traditional Leadership Disputes and Claims is dismissed.
4. There is no order as to costs.

JUDGMENT

ZONDO J (Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, and Van der Westhuizen J concurring):

Introduction

[1] The Traditional Leadership and Governance Framework Act[1] (Framework Act) established the Commission on Traditional Leadership Disputes and Claims (Commission). The Commission had power, either upon request or of its own accord,

[1] 41 of 2003.

to investigate and decide disputes or claims concerning, among others, kingships in accordance with customary law and customs.[2]

[2] The disputes or claims that the Commission could investigate and decide were limited to those "dating from 1 September 1927".[3] However, the Commission had authority to investigate, "where good grounds exist, any other matters relevant to the matters listed in section [25(2)(a)(i)-(vi)], including the consideration of events that may have arisen before 1 September 1927."[4]

[3] Once the Commission had made its decision concerning a claim or dispute, it was required to forward its report to the President who was then obliged to implement

---

[2] Section 25(2)(a)(i)-(vi) reads:

> "The Commission has authority to investigate, either on request or of its own accord—
>
> (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 customs;
>
> (ii) a traditional leadership position where the title or right of the incumbent is contested;
>
> (iii) claims by communities to be recognised as traditional communities;
>
> (iv) the legitimacy of the establishment or disestablishment of 'tribes';
>
> (v) disputes resulting from the determination of traditional authority boundaries and the merging or division of 'tribes'; and
>
> (vi) where good grounds exist, any other matters relevant to the matters listed in this paragraph, including the consideration of events that may have arisen before 1 September 1927."

Section 25(3)(a) reads:

> "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."

[3] Section 25(4) reads:

> "The Commission has authority to investigate all traditional leadership claims and disputes dating from 1 September 1927, subject to subsection 2(a)(vi)."

[4] Section 25(2)(a)(vi) reads:

> "The Commission has authority to investigate, either on request or of its own accord where good grounds exist, any other matters relevant to the matters listed in this paragraph, including the consideration of events that may have arisen before 1 September 1927."

its decision.[5] Where, for example, the Commission's decision was that a certain kingship should be restored or recognised and a certain person was entitled to be the king, the President would give effect to those decisions by issuing the necessary certificates.[6]

Background

[4] The applicant lodged a claim with the Commission for the restoration of the kingship of the traditional community of amaShangana and for him to be recognised as its king. The Commission conducted an investigation into this claim. The investigation included public hearings at which the applicant and members of amaShangana community testified. The Commission also heard evidence of how the kingship of amaShangana had been formed around 1828, how it had grown into what was called an "empire" and how it later disintegrated around 1894 or 1897. Its disintegration or destruction entailed the movement of its subjects to different parts of Southern Africa with the result that some settled in Bushbuckridge (in South Africa) and others in Zimbabwe and Mozambique.

[5] Section 26(2)(a) reads:

> "A decision of the Commission must, within two weeks of the decision being taken, be conveyed to—
>
> (a) the President for immediate implementation in accordance with section 9 or 10 where the position of a king or queen is affected by such a decision".

[6] Section 9(2) reads:

> "The recognition of a person as a king or a queen in terms of subsection (1)(b) must be done by way of—
>
> (a) a notice in the *Gazette* recognising the person identified as king or queen; and
>
> (b) the issuing of a certificate of recognition to the identified person."

[5] The Framework Act was amended by way of the Traditional Leadership and Governance Framework Amendment Act[7] (Amendment Act). In terms of the Amendment Act the Commission ceased to exist with effect from 31 January 2010. A new Commission was established by the Amendment Act. The Framework Act was amended with effect from 25 January 2010. In this judgment any reference to the new Act is a reference to the Traditional Leadership and Governance Framework Act as amended by the Traditional Leadership and Governance Framework Amendment Act.

[6] The Commission completed its report on the applicant's claim on 21 January 2010. It in effect dismissed the applicant's claim on, mainly, the basis that the kingdom or kingship of amaShangana had been destroyed around 1894 or 1897, before 1 September 1927 and the applicant had not shown good cause for the restoration of the kingdom. The Commission found that the kingship of amaShangana was never restored after it had disintegrated around 1895. It further decided that the applicant "could not have inherited the position of kingship from his predecessors, Buyisonto and Mafemani Heavyman Nxumalo, as the kingship was long lost."

[7] The report was delivered to the President. According to the applicant, this was on 9 February 2010 after the Commission had ceased to exist. However, according to Professor M A Moleleki, who was the acting chairperson of the old Commission at the time that it ceased to exist, the old Commission delivered the report to the President

[7] 23 of 2009.

on 21 January 2010. It seems to me that, in the light of the *Plascon-Evans* rule,[8] we must accept the date of 21 January 2010 as the Commission was a respondent in the High Court.

[8] In July 2010 the President publicly communicated his acceptance of the Commission's report. By way of Presidential Minute 407 of 3 November 2010, the President recognised certain kingships but the kingship of amaShangana was not one of them.

Litigation history

[9] The applicant brought an application in the North Gauteng High Court to have the President's decision as well as the Commission's decision reviewed and set aside. Tuchten J dismissed the application. The applicant unsuccessfully applied to the High Court for leave to appeal. He then petitioned the Supreme Court of Appeal for leave to appeal. His petition was lodged out of time. Accordingly, he lodged an application for condonation. The Supreme Court of Appeal dismissed the application for condonation on the basis that there were no reasonable prospects of success for an appeal.

In this Court

[10] After his set back in the Supreme Court of Appeal, the applicant brought an application for leave to appeal to this Court. In effect he sought to appeal against the

[8] *Plascon-Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 SCA at 634E-635C.

judgment and order of the High Court.[9] Directions were issued for the parties to deliver written submissions on whether our decision in *Sigcau*[10] was applicable to this case. The parties delivered their written submissions. It is, therefore, necessary that we must first decide whether *Sigcau* is applicable because, if it is, we are bound by it and may not depart from it unless we think it is clearly wrong.

[11] The applicant submitted that *Sigcau* is applicable whereas the first, second and third respondents submitted that it is not. Under the Framework Act the Commission was required to make a decision on a claim or dispute and the President was required to implement that decision. Under the new Act the Commission's power is to make a recommendation to the President and the power to make a decision on the claim or dispute vests in the President.

[12] The first, second and third respondents' contention that *Sigcau* does not apply in this case is based on the submission that in *Sigcau* there was a kingdom for which a king needed to be recognised whereas in this case there is no kingdom and, therefore, no king to recognise. They also submitted that in *Sigcau* the President's notice was set aside because there was a decision to implement, being the recognition of a king, whereas in the present case there is nothing for the President to implement since, without a kingdom, there can be no king to recognise.

[9] This is correct in light of the decision of this Court in *Mabaso v Law Society of the Northern Provinces* [2004] ZACC 8; 2005 (2) SA 117 (CC); 2005 (2) BCLR 129 (CC).

[10] *Sigcau v President of the Republic of South Africa and Others* [2013] ZACC 18; 2013 (9) BCLR 1091 (CC).

[13] In *Sigcau*'s case the applicant had lodged a claim with the same Commission that dealt with the applicant's claim in this case. Mr Sigcau claimed to be the person entitled to be the king of amaMpondo aseQaukeni just as the applicant in this matter claims to be entitled to be the king of amaShangana. Both in *Sigcau* and in this case the Commission took its decision on 21 January 2010. The Commission's term of office ended on 31 January 2010. In *Sigcau* the President issued notices later in the year purporting to implement the decision of the Commission under the new Act. In the present case the President did the same.

[14] In my view the bases upon which the respondents attempt to distinguish the present case from *Sigcau* are without merit. The principle upon which *Sigcau* is based is that, if a functionary purports to exercise under one Act a power that that Act does not confer upon him or her, that exercise of power is unlawful even if there is another Act that confers such power on the functionary.[11] Here the President believed that he had power to decide the applicant's claim and he purported to do so in terms of the new Act. In this regard he misconstrued the position. The new Act was not applicable. The Framework Act was applicable. Under the Framework Act the President had no power to decide claims such as the applicant's claim. It was the Commission that had the power. The President's obligation under the Framework Act was to implement the decision of the Commission. In the present case he did not do so but sought to make his own decision under the new Act.

[11] *Minister of Education v Harris* [2001] ZACC 25; 2001 (4) SA 1297 (CC); 2001 (11) BCLR 1157 (CC).

[15] This Court held in *Sigcau* that the President should have acted in terms of the Framework Act and not the new Act. That meant that the President had acted outside his powers. The notice containing his decision was set aside. We also set aside the decision of the High Court dismissing the review application that had been brought by Mr Sigcau in respect of both the decision of the Commission as well as the President's notices.

[16] In *Sigcau* the President's notices were set aside on the basis that he had acted under a wrong Act. There is no reason why this matter should not be decided on the same principle. It is, therefore, proper that we should set aside the President's notice in this case as well. It is in the interests of justice to grant the applicant leave to appeal against the High Court's decision concerning the President's notice. An order will be made setting aside that decision. The reason for setting aside that part of the High Court's order is that the High Court erred in not upholding the applicant's contention that the President should have acted in terms of the Framework Act as opposed to the new Act.

[17] What should this Court do about the Commission's decision? In his application in the High Court the applicant also sought to have the Commission's decision reviewed and set aside. Before us he also seeks leave to appeal against that part of the decision of the High Court that related to the Commission's decision. In *Sigcau,* where the applicant had sought to have not only the President's notice set aside but also the Commission's decision, we did not set aside the Commission's

decision. The order of the High Court dismissing the applicant's review application was set aside.

[18] It seems to me that the result was not only that in *Sigcau* the Commission's decision still stood but also that the applicant's review application in respect of the Commission's decision remained undecided and, therefore, pending before the High Court. However, during oral argument in *Sigcau*, counsel for the applicant informed us that the applicant would be content with an order merely setting aside the President's notices. The reasons we gave related to the President's decision only. Our judgment gave no reasons for setting aside the High Court's order in so far as it dismissed the applicant's application in *Sigcau* to have the Commission's decision reviewed and set aside.

[19] What should this Court do with the application for leave to appeal against the High Court's order dismissing the applicant's application to have the decision of the Commission reviewed and set aside? It appears to me that we should deal with it. Since leave to appeal against the High Court's order concerning the President's decision is to be granted, leave to appeal against the High Court's decision concerning the Commission's decision is also to be granted. It is in the interests of justice that the matters be dealt with in this way.

[20] Broadly speaking, there are two bases upon which the applicant attacks the judgment of the High Court concerning the Commission's dismissal of his claim. The

one is that the High Court was wrong to show deference to the decision of the Commission. The other is that the High Court should have found that the Commission had erred in its conclusion that the kingdom of amaShangana had disintegrated or had been destroyed around 1894 or 1897 and, certainly, long before the date of 1 September 1927.

[21] There is no merit in the applicant's criticism of the High Court's approach in showing deference to the Commission. The Commission was a specialist body established by an Act of Parliament to deal with a special category of disputes affecting a large section of society.[12] It was required to apply customary law in adjudicating those disputes.[13] Members of the Commission were required to have

[12] See section 25(2)(a)(i)-(vi) above n 2.

[13] Section 21 provides:

"(1)

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

(b) Where a dispute envisaged in paragraph (a) relates to a case that must be investigated by the Commission in terms of section 25(2), the dispute must be referred to the Commission, and paragraph (a) does not apply.

(2)

(a) A dispute referred to in subsection (1)(a) that cannot be resolved as provided for in that subsection must be referred to the relevant provincial house of traditional leaders, which house must seek to resolve the dispute in accordance with its internal rules and procedures.

(b) If a provincial house of traditional leaders is unable to resolve a dispute as provided for in paragraph (a), the dispute must be referred to the Premier of the province concerned, who must resolve the dispute after having consulted—

(i) the parties to the dispute; and

(ii) the provincial house of traditional leaders concerned."

expertise in traditions and customs.[14] The High Court cannot be criticised for its approach.

[22] A reading of the Commission's report seems to support sufficiently its finding that the kingship of amaShangana crumbled around the end of the 19th century. The applicant's reliance upon the "triumphant return" of Buyisonto to Bushbuckridge in or about 1922 does not necessarily mean that the kingship of amaShangana rose from the ashes then – just in time for the crucial date of 1 September 1927. The High Court explained that Buyisonto was accorded a status no higher than that of a senior traditional leader of amaShangana at that time.

[23] There is no justification for criticising this reasoning by the High Court. The disintegration of the kingship of amaShangana in the decades before 1922 had seen some settling in Bushbuckridge (South Africa), others in Zimbabwe and yet others in Mozambique. In these circumstances, the applicant has failed to show that the Commission's factual findings were unreasonable or irrational.

[24] In the light of all the above, the applicant's appeal is partly successful and partly unsuccessful. It is successful in regard to the High Court's order concerning the President's decision and unsuccessful in regard to the High Court's order relating to the Commission's decision. In regard to the order concerning the President's

[14] Section 23(1).

decision, the appeal must be upheld. The appeal against the High Court's order concerning the Commission's decision is dismissed.

[25] It seems to me that, although the applicant has been partly successful, that success is of no consequential value to him. The real decision that he wanted to have overturned, namely, that of the Commission, remains intact. I do not think that he can be said to have achieved substantial success. It is appropriate to make no order as to costs.

[26] The following order is made:

1. Leave to appeal is granted.
2. The appeal against the order of the High Court concerning the President's decision is upheld and that order is set aside and replaced with the following order:

   "The first respondent's decision or notice is set aside."
3. The appeal against the order of the High Court concerning the decision of the Commission on Traditional Leadership Disputes and Claims is dismissed.
4. There is no order as to costs.

For the Applicant:	D B Ntsebeza SC and G Shakoane instructed by Knowles Husain Lyndsay Inc.
For the First, Second and Third Respondents:	N Arendse SC and D Borgström instructed by Bhadrish Daya Attorneys.