



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case No: 949/2018

In the matter between:

MHLANGABEZI RAYMOND MGIJIMA

APPELLANT

and

**THE PREMIER OF THE EASTERN CAPE
PROVINCE**

FIRST RESPONDENT

**THE MEMBER OF THE EXECUTIVE
COUNCIL FOR LOCAL GOVERNMENT
AND TRADITIONAL AFFAIRS, EASTERN
CAPE PROVINCE**

SECOND RESPONDENT

**THE CHAIRPERSON, EASTERN CAPE
PROVINCIAL COMMITTEE OF THE
COMMISSION ON TRADITIONAL LEADERSHIP
DISPUTES AND CLAIMS**

THIRD RESPONDENT

XABISO ZULU

FOURTH RESPONDENT

Neutral citation: *Mgijima v The Premier of the Eastern Cape Province & others*
(949/2018) [2020] ZASCA 139 (30 October 2020)

Coram: MAYA P, DAMBUZA and PLASKET JJA and LEDWABA and EKSTEEN AJJA

Heard: 12 May 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAAFLII. The date and time for hand-down is deemed to be 14h00 on 30 October 2020.

Ukuwiswa: Esi sigwebo sawiswa ngeintanethi, ngokusiwa kubameli-mthethweni bamacala onke ngeimeyili, nangokupapashwa kwisiza sonxibelelwano seNkundla ePhakamileyo yeziBheni nangokufakwa kuSAAFLII. Umhla nexesha lokuwiswa kwaso uthathwa njengokuba ngulo: 14h00 nge 30 kuCanzibe 2020.

Summary: Traditional Leadership and Governance Framework Act 4 of 2005 – review of decision declaring fourth respondent had a hereditary claim to chieftainship and recognising him as chief of the Zulu Traditional Council, Sheshegu – no ground of review established by appellant in terms of the Promotion of Administrative Justice Act 3 of 2000 – appeal dismissed.

Isishawankathelo: UMthetho-Sikhokelo wobuNkokheli beMveli noLawulo 4 ka2005 – uphononongo lwesigqibo esabhengeza umphenduli wesine njengonebango lobundlalifa ebukhosini, sisamkela njengenkosi yeBhunga leMveli kaZulu, Sheshegu – umbheni akabonisanga mhlaba wakuphonononga ngokoMthetho wokuKhuthaza ubuLungisa kuLawulo wesi3 ka2000 – isibheni siyachithwa.

ORDER/UMYALELO

On appeal from: Eastern Cape Division of the High Court, Bhisho (Mageza AJ sitting as court of first instance):

The appeal is dismissed.

Kwisibheni esivela: kwiSahlulo seNkundla ePhakamileyo yaseMpuma Koloni, eBhisho (uMageza AJ ehleli njengenkundla yesiqalo setyala):

Isibheni siyachithwa.

JUDGMENT/ISIGWEBO

Maya P: (Dambuza and Plasket JJA and Ledwaba and Eksteen AJJA concurring/bevuma):

[1] This appeal concerns the Esi sibheni singobukhosi beBhunga chieftainship of the Zulu Traditional leMveli kaZulu laseSheshegu eDikeni, Council of Sheshegu, Alice in the kwiPhondo leMpuma Koloni. Sisukela Eastern Cape Province. It arises from kwityala elaqala kwiSahlulo seNkundla review proceedings launched in the ePhakamileyo yaseMpuma Koloni, Eastern Cape Division of the High Court, eBhisho, ngongasekhoyo uMnu Bhisho, by the late Mr Mhlangabezi Mhlangabezi Raymond Mgijima Raymond Mgijima, cited herein as the okhankanywe apha njengombheni, appellant. The appellant, however, died kodwa ebhubhe phambi kokuba isicelo before the application was finalised. He siphunyezwe. Endaweni yakhe kule

was then substituted in the proceedings, in terms of Uniform Rule 15(2), by his son, Mr Dumalisile Mgijima.

mbambano kwangena unyana wakhe, uMnu Dumalisile Mgijima, ngokoMgaqo olawula inkqubo yeenkundla eziPhakamileyo zoMzantsi Afrika we 15(2).

[2] The orders which were sought in the review proceedings were (a) the review and setting aside of the decision of the first respondent, the Premier of the Eastern Cape, which declared that the fourth respondent, Mr Xabiso Zulu, has a hereditary claim to the chieftainship of the Zulu Traditional Council at Sheshegu and dismissing the appellant's claim thereto; (b) the review and setting aside of the decision of the Eastern Cape Provincial Committee of the Commission on Traditional Leadership and Claims (the Committee) chaired by the third respondent, Dr Nokuzola Mndende, which recommended the dismissal of the appellant's claim to the chieftainship; and (c) a declarator that the appellant is recognised as chief of the Zulu Traditional Council at Sheshegu.

Imiyalelo eyacelwa kwityala lophononongo yayiyile: (a) ukuba kuchithwe kwesigqibo somphenduli wokuqala, iNkulumbuso yePhondo leMpuma Koloni, esasibhengeza ukuba umphenduli wesine uMnu Xabiso Zulu, unebango lobundlalifa ebukhosini beBhunga leMveli kaZulu, sigqibo eso satsho salichitha ibango lombheni kwelobango; (b) ukuba kuchithwe isigqibo seKomiti yePhondo leMpuma Koloni yeKomishoni yamaBango ngobuNkokheli beMveli esihlalo wayo ingumphenduli wesithathu, uGqirha Nokuzola Mndende, apho kwandululwa ukuba lichithwe ibango lombheni kubukhosi obu; kunye (c) nesibhengezo sokuba umbheni avunywe njengenkosi yeBhunga

The application came before Mageza AJ, who dismissed it, but subsequently granted the appellant leave to appeal to this Court. Only the first and third respondents oppose the appeal. No relief was sought against the fourth respondent and the second respondent, the Member of the Executive Council for Local Government and Traditional Affairs, Eastern Cape (the MEC), who was cited in the proceedings merely as the functionary responsible for local government and traditional affairs in the Eastern Cape Province.

leMveli kaZulu laseSheshegu. Ityala lachotshelwa nguMageza AJ, owalichithayo, waze wanika umbheni imvume yokubhenela kuleNkundla. Ngabaphenduli owokuqala nowesithathu kuphela abasichasayo esi sibheni. Akukho sigwebo sicelelwayo ngakumphenduli wesine nowesibini, uMphathiswa woRhulumente weNgingqi neMicimbi yeMveli, kwiMpuma Koloni, okhankanywe kule mbambano njengonoxanduva lokujongana nolawulo lwengingqi nemicimbi yemveli kwiPhondo leMpuma Koloni (uMphathiswa).

[3] The background facts may be summarized as follows. The appellant, during his lifetime, and the fourth respondent are members of the amaHlubi community at Sheshegu. The dispute arose when the appellant laid claim to the chieftainship of the Zulu Traditional Council against the fourth respondent's father, the late Mzwandile Zulu. The

Isishwankathelo seenkcukacha ngemvelaphi: Umbheni, ngoko wayesaphila, kunye nomphenduli wesine bangabemi abangamaHlubi baseSheshegu. Imbambano yavela mhla umbheni wabanga ubukhosi beBhunga leMveli kaZulu, ebubanga kuyise womphenduli wesine ongasekhoyo, uMnu Mzwandile Zulu, yena

latter occupied the position from 1992 until 2011, whereupon the fourth respondent succeeded him. The appellant contended that he was the rightful incumbent of the chieftainship as the son of Elijah Mgijima.

obechophe kwesisihlalo ukusukela ngo 1992 ukuya ku2011, waze walandelwa ngumphenduli wesine. Umbheni wabanga ukuba nguye onelungelo lobukhosi njengonyana kaElijah Mgijima.

[4] The claim was determined in a public hearing convened by the Committee.¹ In those proceedings, the appellant's witness, Terence Mgijima, traced the chieftainship of Mgijima at Sheshegu back to 1835, upon the arrival in Peddie, of a group of amaHlubi that had escaped the iMfecane wars in Natal. According to the witness, the group was led by Chief Mgijima, who was one of the abaMbo chiefs that convened a meeting and took vows of loyalty to the colonial British government at Mqwashwini, named after the uMqwashu tree around which the meeting gathered. Thereafter the chiefs

Ibango eli lashukuxwa kwimbizo yesidlangalala eyayibizwe yiKomiti yeKomishoni yeeMbambano namaBango ngobuNkokheli beMveli. Kulo mbizo, ingqina lombheni, uMnu Terence Mgijima, wabulanda emva ukusukela ngo1835 ubukhosi bakwaMgijima eSheshegu, ekufikeni kweqela lamaHlubi eNgqushwa, ebhace kwiimfazwe zeMfecane eNatala. Ngokwelingqina, eliqela lalikhokelwe yiNkosi uMgijima owayeyenye yeenkosi zabaMbo ezabiza intlanganiso zaze zenza izibhambathiso norhulumente wamaNgesi angamakolonyali eMqwashwini,

¹ Established under Chapter 6 of the Traditional Leadership and Governance Framework Act 41 of 2003, in particular s 22, which provides for the establishment of the Commission, s 25 which empowers the Commission to investigate and make recommendations on, inter alia, whether any traditional leadership dispute contemplated in subsection (2) and s 26A, which provides for the establishment of provincial committees to deal with disputes and claims relating to traditional leadership.

and their followers dispersed to settle in various areas. Chief Mgijima's group settled in Ngxwengxwe, also known as Kat River Basin. They later moved to Sheshegu, which zoned, and the residents, who were the first people to settle there, were awarded title deeds for their land. The fourth respondent's family was not among these early settlers. And as proof thereof, the appellant furnished an official title deeds register, which did not reflect any Zulu names.

isivivane esathiywa ngomthi onguMqwashu ekwakudityenwe phantsi kwawo. Emva koko iinkosi nabalandeli bazo zemka zayakuma kwiindawo ezahlukeneyo. ElikaNkosi Mgijima iqela laya kuma eNgxwengxwe, ekwabizwa ngokuba yiKat River Basin. Kuthe emva koko baya kuma eSheshegu, ekwathi babelwa yona, baze abahlali ababengabokuqala ukuma apho banikwa iitayitile zemihlaba yabo. Usapho lomphenduli wesine lwalungekho kwabo bemi bokuqala. Ukungqina oku, umphenduli wesine uthe rhuthu irejista yeetayitile esesikweni, apho kungekho magama ooZulu.

[5] The evidence continued that in 1880, Chief Mgijima became the senior traditional leader of amaHlubi at Sheshegu. Upon his death, his son, Kapoko, succeeded him. Kapoko was succeeded by his son, Bhalincwadi. Bhalincwadi was, in turn, succeeded by his own son, the appellant's father,

Ubungqina buqhuba buthi ngo 1880, uNkosi Mgijima waba yinkokheli yemveli eyongameleyo yamaHlubi aseSheshegu. Ukubhubha kwakhe unyana wakhe uKapoko wathatha iintambo endaweni yakhe, waza uKapoko walandelwa ngowakhe unyana uBhalincwadi. UBhalincwadi

Elijah. The appellant was still a minor when Elijah died hence Elijah's younger brother, Mongameli, was appointed as a regent for him. However, in 1964 Mongameli was removed from the regency after a spat with the local magistrate and was replaced by Whittaker Mgijima, who ruled until 1974. In 1975, the Mgijima family brought the appellant back from Port Elizabeth, where he lived, to assume the chieftainship. However, political upheavals and new political party affiliations arising from the establishment of the Ciskei homeland interfered with the institution of traditional leadership and the appellant's appointment. As a result, the fourth respondent's father was appointed as the chief of the Zwelonke Tribal Authority, as it was then called, until its name was changed to Zulu Traditional Council in 1978. The appellant was given a position of a mere headman, which he spurned, although he did not challenge what he

naye walandelwa ngowakhe unyana, uElijah onguyise wombheni. Wayeselula kakhulu umbheni ukubhubha kukaElijah, kwaze konyulwa umninawa kaElijah onguMongameli ukuba abambele umbheni. Nangona kunjalo, uMongameli wasuswa ekubambeni akungavisisani nomantyi owayekho, kwabekwa uWhittaker Mgijima endaweni yakhe, owaphatha de yangu1974. Ngo1975 usapho lwakwaMgijima lwamlanda umbheni owayesele engumhlali waseBhayi, ukuba athabathe ubukhosi. Iintshukumo zopolitiko, namaqela amatsha awavela ngokusekwa korhulumente wephandle laseCiskei, zaphazamisana nokumiselwa kolawulo lwemveli, kunye nobeko lombheni. Ngenxa yoko, uyise womphenduli wesine wabekwa wayinkosi yeGunya leSizwe uZwelonke, njengoko yayibizwa ngelo xesha, gama elo lathi lajikwa laba liBhunga leMveli kaZulu ngo1978. Umbheni wanikwa isikhundlana nje

considered a usurpation of his birth right out of fear of victimisation.

sokuba sisibonda, awasicekisayo njengokwebiwa kwelifa lakhe, nangona engazange afake simangalo kuba esoyika ukuba lixhoba lentshutshiso.

[6] Mr Xolile Zulu made representations on the fourth respondent's behalf and advanced a different version of the genealogy and chieftainship of amaHlubi of Sheshegu. On his account, abaMbo arrived in Peddie in 1835 led by Chief Msuthu, who had two sons, Tyhefu and Zulu. Zulu later moved to Sheshegu whilst Tyhefu remained in Peddie. At some stage, Chief Msuthu deployed a Mfengu regiment led by Zulu, to assist the British army in the war of Mlanjeni. Zulu left behind a son, Thalanyana, but had a fellow clansman, Mvunga, act as the traditional leader of Sheshegu during his absence because Thalanyana was still very young. After the war, Zulu was rewarded with a parcel of land in Butterworth, where he settled and established the Hlubi chieftainship in the late 1800's. Because the institution of

UMnu Xolile Zulu, engqinela umphenduli wesine, wayibeka ngendlela eyohluka mpela imbali yomnombo nobukhosi bamaHlubi aseSheshegu. Ngokokutsho kwakhe, abaMbo bafika eNgqushwa ngo1835 bekhokelwe nguNkosi Msuthu, owayenoonyana ababini, uTyhefu noZulu. UZulu waye wafudukela eSheshegu, waze yena uTyhefu wahlala kwaseNgqushwa. Kuthe ethubeni, uNkosi Msuthu wakhupha ibutho elalikhokelwe nguZulu ukuya kuncedisa umkhosi wamaNgesi kwimfazwe kaMlanjeni. UZulu washiya ngemva unyana wakhe uThalanyana, kodwa wabanjelwa kwalelinye iHlubi, uMvunga, kuba wayeselula kakhulu uThalanyana. Ukuphela kwemfazwe, uZulu wawongwa ngomhlaba owawuseGcuwa, apho wema khona

chieftainship was suppressed by the British colonial government, Thalanyana and his descendants were not recognised as chiefs and Sheshegu was ruled by a series of headmen for the next century.

wamilisela ubukhosi bamaHlubi ekupheleni kwenkulungwane yoo1800. Kwathi kuba ubukhosi babungafunwa ngurhulumente wamaNgesi, uThalanyana nesizukulwana sakhe abazange babonelwe ntweni njengeenkosi, yaze yabe ke iSheshegu ilawulwa zizibonda ngezibonda inkulungwane yonke elandelayo.

[7] Mvunga had followed Chief Zulu to Butterworth and left another Hlubi, Luzipho, in charge of Sheshegu. Luzipho was succeeded by Ntuntwana, from whom Mgijima, Kapoko's father, took the reins, as a headman. The line of succession was not in dispute from this point. The respective versions diverged only in respect of the events which unfolded in 1975, after Whittaker's rule. According to Xolile, the resident magistrate advised the Sheshegu community to choose a chief. Counsel was then sought from Chief Msuthu's surviving descendant in Peddie, Tyhefu's son, Nkebeza. He advised that

UMvunga walandela uNkosi Zulu waya eGcuwa eshiya elinye iHlubi elinguLuzipho liphethe eSheshegu. ULuzipho wanikezela kuNtuntwana, owanikezela yena kuMgijima uyise kaKapoko ukuba abesisibonda. Ukuza kufika kwesi sithuba bekungekho mbambano ngomnombo wokulawula. Impikiswano iqale ngeziganeko ezenzeke ngo1975 emva kokuphatha kukaWhittaker. NgokukaXolile, umantyi welooxesha wandulula ukuba abemi baseSheshegu bazikhethela inkosi. Kwayiwa eNgqushwa kwisizukulwana esisaphilayo sikaNkosi Msuthu esasinguNkebeza unyana

the chieftainship of amaHlubi at kaTyhefu. Wathi yena ubukhosi Sheshegu resided in the house of Zulu. bamaHlubi eSheshegu bobendlu An identification process led to Mahlubi kaZulu. Iphulo lokutyumba lakhokelela Zulu, who ruled from 1978 and was kuMahlubi Zulu, owalawula ukusukela succeeded by his son, Mzwandile. ngo1978 waze walandelwa ngunyana Mzwandile's son, the fourth respondent, wakhe uMzwandile. Unyana assumed the chieftainship in 2011. Xolile kaMzwandile, ongumphenduli wesine, was corroborated by a further witness for wathatha iintambo ngo2011. UXolile the fourth respondent, Zimasile Zulu, ungqinelwe lelinye ingqina who disputed that the change in lomphenduli wesine, uMnu Zimasile government had anything to do with the Zulu, okhanyeleyo ukuba inguqu resuscitation of the amaHlubi eyenzeka kurhulumente yaba nefuthe chieftainship at Sheshegu. He recounted ekuvuseni ubukhosi bamaHlubi a number of meetings convened by the eSheshegu. Ulande uthotho lweembizo amaHlubi themselves to identify their ezabizwa ngamaHlubi ngokwawo chief, which culminated in a voting ukuze azityumbele inkosi yawo, process conducted by the magistrate in a umsebenzi owaqukunjelwa ngevoti meeting held on 8 March 1973, in which eyaqhutywa ngumantyi ngeye8 Zulu got 44 votes and Mgijima only 22 yoKwindla ngo1973 apho uZulu votes. wazuza iivoti ezingama-44, waza uMgijima wanama-22 kuphela.

[8] The Committee evaluated the IKomiti izivavanyile ezi nkcazelo representations made to it and relied on yakugqiba ukuziva, yaqamela the works of two historians, Ngqangweni ngababhali bezeembali uNgqangweni and Ncwana, who supported the fourth noNcwana, abathi bangqinelana

respondent's version. The historical writings confirm Chief Msuthu's royal lineage (from Mthinkulu I - Radebe - Ngwane - Maqhubela - Mjoli - and Msuthu's father, Zide) and that he was one of the abaMbo chiefs that trekked to Peddie and subsequently congregated at Mqwashwini. The writings make no mention of Mgijima at that stage. In the Committee's view, this omission supported the assertion that 'Mgijima only surfaced in the leadership of Sheshegu when he was succeeding Ntuntwana as a headman'. It dismissed the appellant's reliance on the title deeds register on the basis that the document, which was very old, had a lot of missing names that were obliterated by old age.

nenkcazelo yomphenduli wesine. Ezembali ziyawuvuma umnombo wobukhosi bukaMsuthu (ukusukela kuMthinkulu I - Radebe - Ngwane - Maqhubela - Mjoli – noyise kaMsuthu uZide), zikwangqina nokuba wayeyenye yeenkosi zabaMbo ezaya eNgqushwa zaze zahlangana eMqwashwini. Kwezimbali akuthethwa kwaphela ngoMgijima ngelaxesha. Ngokokubona kweKomiti, ukungaveli kwegama lakhe kuxhasa imbono yokuba uMgijima ungene ebunkokhelini baseSheshegu ekuthatheni kwakhe ububonda kuNtuntwana. IKomiti kwakhona ikuchithile ukuxhathisa kombheni ngerejista yeetayitile zemihlaba kuba olu xwebhu ludala, nto leyo eyenza ukuba ngenxa yobudala abe amagama amaninzi sewacimeka.

[9] The Committee accepted the fourth respondent's version that the Mgijimas were all headmen and not chiefs. It relied on the repealed Bantu

IKomiti yakwamkela okuthethwe ngumphenduli wesine ukuba ooMgijima babezizibonda, bengezizo iinkosi. Yaye yaqamela kuMthetho

Authorities Act 68 of 1951, which distinguished between chiefs and headmen, and official correspondence that referred to Whittaker as a headman. It concluded that the Zulu chieftainship, which was lost when Thalanyana missed his turn to ascend to the throne, ‘was resuscitated on the basis of its hereditary claim to chieftainship which stretches through a number of generations as most of its forebears were ... of royal blood’ and rightly belonged to the fourth respondent’s father. In a ruling dated 11 April 2013, the Committee unanimously recommended that the appellant’s claim be dismissed.² Thereafter, it conveyed its decision to the Premier for final decision in terms of s 26 of the Traditional Leadership and Governance Framework Act 41 of 2003 (the Framework Act).³

woGunyaziwe baBantu 68 ka1952 osewayekwayo, owawusahlula phakathi kweenkosi nezibonda, kunye nembalelwano yasebuRhulumenteni eyayisithi uWhittaker usisibonda. Yagqiba yathi ubukhosi booZulu, abaphulukana nabo ngokuthi uThalanyana aphose ukuthabatha isikhundla sobukhosi ngesakhe isihlandlo, bavuseleleka ngenxa yebango lobundlalifa bobukhosi bezizukulwana ngezizukulwana kuba ooyisemkhulu babengabantwana begazi, nto leyo etsho mhlophe ukuba uyise womphenduli wesine nguye onelungelo lobukhosi. Kwisigqibo somhla we 11 kuTshazimpuzi 2013, iKomiti yavumelana ngesindululo sokuba ibango lombheni lichithwe. Emva koko, yasidlulisela kwiNkulumbuso ukuze yenze isigqibo

² In terms of s 26(1) of the Traditional Leadership and Governance Framework Act 41 of 2003, a ‘recommendation of the Commission is taken with the support of at least two thirds of the members of the Commission’.

³ As the provincial State functionary vested with the executive authority to make final decisions on traditional leadership disputes. The power derives from s 127(1) of the Constitution of the Republic of South Africa, 1996, in terms of which the Premier of a province has the powers and functions entrusted to that office by the Constitution and any legislation. In this case that legislation is the Framework Act, in particular, ss 26(2)(b) and (3) thereof in terms of which the Commission’s recommendations are to be conveyed to the Premier within two weeks of being made and thereafter decided upon within 60 days.

sokwenene ngokweCandelo 26 loMthetho 41 ka 2003, wobuNkokheli beMveli nesiKhokelo soLawulo (uMthetho Sikhokelo).

[10] On 10 October 2013, the Premier (then Ms Noxolo Kiviet) issued a decision couched as follows:

‘Pursuant to an investigation and recommendations of the Committee of the Commission on Traditional Leadership Claims and Disputes in terms of Sections 25 and 26 of the Traditional Leadership and Governance Framework Act, Act No. 41 of 2003) as amended, the claim of Mhlangabezi Raymond Mgijima against the late Mzwandile Zulu is hereby dismissed on the following grounds:

(a) The evidence at hand suggests that both Mgiima and Zulu claim to be the chiefs of amaHlubi and they trace Peddie to be their point of departure to Sheshegu. Mgijima specifically alleges to have left Peddie subsequent to the making of the vows by amaMfengu at Mqwashwini. According to Ngqangweni (2005:08) “Iinkosi ezazikhokela abaMbo ukusuka eNatal kwezamaHlubi yayinguZulu kaMafa, uMlambiso, uZibi ka

[10] Ngomhla we10 kweyeDwarha ngo2013, iNkulumbuso (eyayingu Nkosh Noxolo Kiviet ngelo xesha) yakhupha isigqibo esibhalwe ngolu hlobo:

‘Emva kophando nezindululo zeKomiti yeKomishoni yeeMbambano namaBango ngobuNkokheli beMveli ngokwamaCandelo 25 kunye no 26 oMthetho Sikhokelo, uMthetho 41 ka 2003) ohlonyelelweyo, ibango likaMhlangabezi Raymond Mgijima ngakuMzwandile Zulu ongasekhoyo liyachithwa ukwenjenje oku ngezizizathu zilandelayo:

(a) Ubungqina obukhoyo kaloku nje bukhomba ukuba uMgijima noZulu bobabini babanga ngelithi baziinkosi zamaHlubi, belanda iNgqushwa njengendawo abasuka kuyo ukuya eSheshegu. UMgijima ude athi yena wemka eNgqushwa emva kokwenziwa kwezibhambathiso ngamaMfengu eMqwashwini. Ngokokutsho kukaNgqangweni (2005:08) “Iinkosi ezazikhokela abaMbo ukusuka eNatala

Matomela, uZimema, uMsuthu noMbilase”. In this list there is no mention of Mgijima.

kwezamaHlubi yayinguZulu kaMafa, uMlambiso, uZibi ka Matomela, uZimema, uMsuthu noMbilase”. Kolu luhlu alikho igama likaMgijima.

(b) It cannot be denied that the chieftainship in the house of Zulu got lost when Thalanyana, Zulu’s son, did not ascend to the throne, after Zulu’s departure for Butterworth, and the leadership at Sheshegu was left at the mercy of various Hlubi headmen for about a century of which the greater number of headmen were from the Mgijima family.

(b) Ayinakuphikwa mntu into yokuba ubukhosi bendlu kaZulu baphuncuka ngokuthi uThalanyana unyana kaZulu angasithathi isihlalo sobukhosi emva kokufuduka kukaZulu esiya eGcuwa. Ngaphezu koko, iSheshegu yalawulwa zizibonda ezingamaHlubi inkulungwane yonke yeminyaka – ezininzi kwezo zibonda yayizezakwaMgijima.

(c) It needs to be acknowledged that chieftainship in the house of Zulu was resuscitated on the basis of its hereditary claim to chieftainship which stretches through a number of generations. If then the incumbent traces his lineage from the above background, then he is of royal blood and is correctly appointed as a chief of Zulu Traditional Council.

(c) Kumele kwamkelwe ukuba ubukhosi bendlu kaZulu bavuseleleka ngenxa yebango lobundlalifa kumnombo omde wezizukulwana ngezizukulwana. Ukuba ke lo uphetheyo ngoku uwulanda umnombo wakhe kule mvelaphi ingentla, ngenene unegazi lobukhosi kwaye ubekwe ngokufanelekileyo ukuba abe yinkosi yeBhunga leMveli kaZulu.

(d) According to Ncwana (1953:04) “UMthimkhulu wokuqala kwindlu yakhe yasekunene wazala uRadebe, waza ke uRadebe kobakhe ubukhosi kwindlu enkulu wazala uNgwane, ozele uMaqhubela ozele

(d) UNcwana (1953:04) ubhala athi “UMthimkhulu wokuqala kwindlu yakhe yasekunene wazala uRadebe, waza ke uRadebe kobakhe ubukhosi kwindlu enkulu wazala uNgwane, ozele uMaqhubela, ozele

uMjoli, ozele uZide, ozele uMsuthu, ozele uZulu noTyhefu”.

uMjoli, ozele uZide, azele uMsuthu, ozele uZulu noTyhefu”.

(e) The above extract confirms the fact that Zulu had royal background even though at some stage it disappeared and was resuscitated in 1978.

(e) Isicatshulwa esingentla siyangqina ukuba uZulu ngowomnombo wobukhosi, nangona bebukhe balahleka isigaba esithile baza babuya bavuseleleka ngonyaka ka1978.

(f) The respondent thus has a hereditary claim to the chieftainship of Zulu.’

(f) Umphenduli ngoko unalo ibango lobundlalifa kubukhosi bukaZulu.’

[11] These decisions prompted the appellant to launch the review proceedings. He raised a number of review grounds. However, some of them, for example that the Committee’s unanimous decision did not have the support of at least two thirds of its members and was not conveyed to the Premier within two weeks after it was made, in breach of s 26(1) and (2), were patently disproved by the record itself.

Ezi zigqibo zikhokelele ekubeni umbheni andulule olu phononongo. Ubale izizathu eziliqela zokuba enjenjalo. Nangona kunjalo, amanye amanqaku ame ngawo akhatywe ngokuphandle yingxelo ngokwayo, umzekelo leli lokuba isigqibo ekuvunyelwene ngaso yiKomiti iphela ayifumananga nkxaso yesibini kwisithathu samalungu ayo, yaze ayadluliselwa kwiNkulumbuso phambi kokuba kudlule iiveki ezimbini senziwe isigqibo, nto leyo enxamnye neCandelo 26(1) kunye no (2).

[12] The grounds which were vigorously pursued were that (a) the

Izizathu ekuthe kwagxilwa ngamandla kuzo zezi (a) isigqibo seNkulumbuso

Premier's written decision was esibhaliweyo sadinga ukuvavanywa reviewable because it was not counter- kuba singasayinwanga signed by the MEC, in breach of s 140(2) nanguMphathiswa, nto leyo inxamnye of the Constitution; (b) the Premier's neCandelo 140(2) loMgaqo Siseko; (b) affidavits fell to be struck out because the amaxwebhu obungqina eNkulumbuso answering affidavit deposed to by achithwa kuba amaxwebhu Premier Phumulo Masualle constituted aphenzulayo avela kuNkulumbuso hearsay and opinion evidence as he did Phumulo Masualle ayengundiva, not make the impugned decision and the ekwabubungqina obuziimbono zakhe confirmatory affidavit of his kuba zange senziwe nguye isigqibo predecessor, former Premier Noxolo kwaye kwanoxwebhu oluxhasayo Kiviet, who actually made the decision, olwenziwa ngowayesakumandulela failed to answer material allegations in esihlalweni sakhe, owayesakuba the appellant's founding affidavit; and yiNkulumbuso uNoxolo Kiviet, onguye (c) the merits favoured the appellant owenza isigqibo, wasilela because the Hlubi genealogy and ekuphenduleni izityholo eziqulethwe credible historical records proved the kuxwebhu lokuseka lombheni; nokuba Mgijima chieftainship and the (c) kuninzi okungecala lombheni kuba Committee failed to discharge its umlibo wamaHlubi, kunye noovimba investigative and inquisitorial functions bezembali abanokuthenjwa and to conduct a full and proper research ziyabungqina ubukhosi booMgijima into his claim. The appellant also sought yaye neKomiti yasilela ekwenzeni condonation for the late filing of the umsebenzi wayo wokuphanda nzulu review application, which he brought ngebango lakhe. Umbheni waphinda under s 7(1) of the Promotion of wangxengxeza ngokungenisa isicelo Administrative Justice Act 3 of 2000 (the sakhe sovavanyo seleshiyiwe lixesha,

PAJA), and his late replying affidavit, in which he introduced additional historical evidence that he claimed to have since found in the national archives, to bolster his claim.

awasifaka eqamele ngeCandelo 7(1) loMthetho wokuKhuthazwa kobuLungisa kuLawulo 3 ka2000 (PAJA), nangokuphinda ashiywe lixesha ekungeniseni uxwebhu lwakhe oluphendulayo, apho wangenisa obunye ubungqina bezembali aawayesithi ubufumene koovimba besizwe, ukuxhasa ibango lakhe.

[13] The Premier, Dr Mndende, and the fourth respondent strenuously opposed the application and averred that the appellant's claim was properly and fully investigated and adjudicated by the Committee and thereafter, the former Premier. The Premier fully aligned himself with the Committee's findings and recommendations and the allegations in Dr Mndende's affidavit and disputed that his predecessor committed any misdirection in making her decision.

INkulumbuso, uGqirha Mndende kunye nomphenduli wesine basicase ngamandla isicelo, besithi ibango lombheni laphandwa ngokwaneleyo, laza lagwetywa yiKomiti, kwakunye neNkulumbuso emva koko. INkulumbuso yazayamanisa ngokupheleleyo neziphumo nezindululo nezityholo ezazikuxwebhu bungqina lukaGqirha Mndende, ekuphikisa ukuba owayesesihlalweni ngaphambi kwakhe wenza imposiso ukwenza kwakhe isigqibo sakhe.

[14] Dr Mndende supported the fourth respondent's version of the amaHlubi

UGqirha Mndende wayixhasa imbali yomphenduli wesine elanda umlibo

genealogy and history that established the chieftainship of Zulu at Sheshegu and robustly challenged the appellant's account. According to her, amaHlubi were part of a larger group of amaMfengu that escaped the iMfecane wars in Natal. A faction of that group settled in Butterworth and the others moved further and settled in Peddie. It is the Radebe faction of the amaMfengu, led by Mpahla, Msuthu's regent, that gathered at Mqwashwini. She refuted the allegation that the group that escaped iMfecane and the one that later settled at Sheshegu after the vows at Mqwaswhini were led by a Chief Mgijima. On her version, the first chief at Sheshegu was Zulu, the fourth respondent's great, great grandfather and all the Mgijimas that subsequently held traditional leadership positions there were merely headmen.

nemvelaphi yamaHlubi ekwasekelwa ubukhosi bukaZulu eSheshegu, eyihlaba qatha eyombheni yona imbali. Ngokokwakhe, amaHlubi ayeyinxenye yeqela elikhulu lamaMfengu awabhaca ebaleka iimfazwe zeMfecane eNatala. Abaqhezuka kwelo qela bayakuma eGcuwa, abanye bahamba umganyana baya kuma eNgqushwa. NgamaMfengu angooRadebe, ekhokelwe nguMpahla owayebambele uMsuthu, awathi ahlanganela eMqwashwini. Wasikhaba isityholo sokuba iqela elabaleka iMfecane nelayakuma eSheshegu emva kwezibhambathiso zaseMqwashwini lalikhokelwe nguNkosi Mgijima. Ngokokwakhe inkosi yokuqala eSheshegu yayinguZulu, ukhokho womphenduli wesine, kwaye bonke ooMgijima abagqibela bekulawulo lwemveli babezizibonda kuphela.

[15] Dr Mndende dismissed the defective title deed relied upon by the appellant to prove that there were no Zulus among the early Sheshegu settlers.

UGqirha Mndende wayikhaba itayitile yomhlaba eneziphene awayeqamele ngayo umbheni ukungqina ukuba kwakungekho Zulu kubemi

She produced documentation retrieved from the national archives dating back to 1940, which listed Zulu, Ntuntwana and Msuthu families among Sheshegu's original residents. She then pointed out that Victoria East, alias Sheshegu, came into existence and would have been occupied by amaMfengu only after the British defeated amaXhosa in war and annexed their land in 1847. On the basis of the appellant's own records showing Kapoko to have been the first Mgijima headman at Sheshegu in 1880, she surmised that Zulu ruled Sheshegu between 1847 and when he went off to the War of Mlanjeni, to command amaMfengu assisting the British. She also pointed out Zulu's depiction in the appellant's own genealogy as the right-hand house of Mthimkhulu I, and Mgijima as the right-hand house of Radebe, who was on the same line as Zulu. This placed Zulu far senior to Mgijima and Dr Mndende contended that this ruled out any possibility that

baseSheshegu bokuqala. Wathi thaca amaxwebhu onyaka ka1940 atsalwe koovimba besizwe anoluhlu leentsapho zooZulu, zooNtuntwana nooMsuthu phakathi kwabemi bokuqala eSheshegu. Wandula ukwaleka ukuba iVictoria East, ekwayiSheshegu, yasekwa emva kokoyiswa kwamaXhosa ngamaNgesi ngo1847 aze awuhlutha umhlaba wawo, kwaze kwema amaMfengu kuyo. Ezombheni iingxelo zibonisa uKapoko inguye isibonda sokuqala sakwaMgijima eSheshegu ngo1880, watsho uGqirha wathekelela ukuba uZulu walawula eSheshegu phakathi kuka1847 nexesha awemka ngalo ukuya emfazweni kaMlanjeni, esiya kukhokela amaMfengu kuncediswa amaNgesi. Waphinda wabalula ukuba ingxelo yombheni ikhomba umnombo wakhe kwindlu yasekunene kaMthimkhulu 1, noMgijima njengowendlu yasekunene kaRadebe owayekumlibo omnye noZulu. Le ngxelo yamenza wangaphezulu kanobom ngokwezindlu uZulu

Mgijima would be a chief over Zulu in the same community.

kunoMgijima, watsho wathi uGqirha Mndende kwakungekho ndlela yokuba uMgijima angayinkosi ekhona uZulu kuloongingqi.

[16] The court a quo condoned the appellant's delay in launching the review application. But it refused to admit the new evidence raised in reply. The court took the view that the appellant, who had been legally represented and had 'his own advisors and interlocutors', was afforded ample opportunity to research and present his case before the Committee. Granting the indulgence would prejudice the respondents, who had no chance to deal with the new material, so it held. The court further found no reason to strike out the Premier's affidavit in which he aligned himself with and defended former Premier Kiviet's decision. The court also refused to decide whether the Premier's decision required the MEC's counter-signature in terms of s 140(1) and (2) of the Constitution on the basis

Inkundla yamxolela umbheni ngokulibazisa ukufaka isicelo sakhe sovavanyo. Kodwa zange ivume ukubamkela ubungqina obutsha abuveze kwimpendulo yakhe. Ngokoluvo lwenkundla umbheni, owayemelwe ligqwetha, ekwanabakhe abacebisi, nabanxibelelanisi bakhe, walinikwa ixesha elaneleyo lokuphanda aze abeke bonke ubungqina bakhe phambi kweKomiti. Ukumvulela lo mtyhi kwakunokubadlela indlala abaphenduli, abangafumananga thuba bona lokugocagoca la maxwebhu matsha, yatsho inkundla. Ngapha koko ayifumananga sizathu sakuluchitha uxwebhu lweNkulumbuso apho yayizayamanisa ikwakhusela isigqibo seNkulumbuso yangaphambili uKiviet. Iphinde inkundla yala ukugqiba ukuba isigqibo seNkulumbuso kunyanzelekile

that the point was raised for the first time in the appellant's supplementary heads of argument and was not substantively argued. The court also referred to a decision involving a similar issue, which was the subject of a pending appeal.

ukuba sisayinwe nanguMphathiswa na, ngokweCandelo 140 (1) kunye no (2) loMgaqo Siseko kuba isithi oku kwaqala ukuvela kumaxwebhu ombheni wezihloko zengxoxo, kwaza akwaxoxwa ngokwaneleyo. Inkundla yaphinda yabalula nesinye isigqibo senkundla kumba okumila kunje, umba olinde isibheni esingxangileyo.

[17] Regarding the merits of the claim, the court a quo noted a concession made by the appellant's counsel that the evidence led before the Committee properly included 'research in all the relevant libraries and institutional archives on British occupation in Cape Town and Pretoria in order to properly investigate the issues pertaining to the dispute'. The court observed that the appellant's real complaint was that the Committee did not consult certain historians, in particular a Professor Jeff Peires, who allegedly held a different view to those to which the Committee had recourse. The court dismissed this

Malunga nesihlahla sebango, inkundla igqale isivumo esenziwe ngummeli wombheni sokuba ubungqina obondlelwe phambi kweKomiti badandalazisa ngokwaneleyo uphando olwenziwa kumathala eencwadi nakoovimba ngobukoloni yali bamaNgesi, busenziwa eKapa nasePitoli ekuphicotheni yonke imiba engale mbambano. Inkundla yaphawula ukuba esona sikhhalazo sombheni yayikukuba iKomiti ayizange iqondisise kwezinye iingcaphephe zezembali, ngakumbi uNjingalwazi Jeff Peires, yena obona ngokwahlukileyo kwiingcaphephe ezajongwa yiKomiti.

criticism on the ground that it was the appellant's responsibility to properly collate and present his evidence, including the historical information, which was readily accessible from the National History Libraries, in his founding affidavit. The court concluded that the Committee clearly conducted its own investigation and could hardly be expected to consult 'each and every expert available in the country'.

Inkundla yasichitha esisikhalazo ngelithi uxanduva lolombheni lokuqokelela zonke iinkcukacha zobungqina aze abondlale kuxwebhu lwakhe lwesiseko, kuquka nezeembali ezifumaneka lula kumaThala eSizwe ezeMbali. Inkundla yagqibela ngelithi iKomiti yazenzela olwayo uphando, kwaye kungalindelekanga ukuba iphande kuzo zonke iingcaphephe ezikhoyo kweli.

[18] The appellant persisted with his main review grounds in the court a quo on appeal before us. First, it was contended that the Premier's answering affidavit was inadmissible as it impermissibly commented on former Premier Kiviet's state of mind when she was available and able to do so and contained 'opinions and conclusions on issues that the court was competently able to decide on its own'. Former Premier Kiviet's confirmatory affidavit 'could not be allowed to stand because she could not confirm something that is,

Umbheni waxhathisa engagungqi ngezizathu zakhe ezisentloko kwisibheni esiphambi kwethu. Okokuqala, kwabangwa ukuba uxwebhu lukaNkulumbuso oluphendulayo alunakwamkelwa kuba lwaphawula ngokungafanelekanga ngeengcingane zeNkulumbuso yangaphambili uKiviet ekubeni ekhona enokuzithethela, yaye iqulethe iimbono nezigqibo ngemiba inkundla eyayinokuzigqibela ngokwayo. Uxwebhu oluxhasayo lweNkulumbuso yangaphambili uKiviet

as a matter of law, inadmissible'. Thus, it was contended, the appellant's factual allegations stood uncontested.

malungavunywa kuba akanakuxhasa into engavumelekanga emthethweni. Kungoko ke kwabangwa ukuba izityholo zombheni aziphikiseki.

[19] The argument proceeded that former Premier Kiviet acted irrationally and in a procedurally unfair manner when she took the final decision because she failed to invite the appellant to make representations, had no recourse to the evidence presented to the Committee and merely upheld its recommendations without enquiring further into the matter. It was further contended that s 140(2) of the Constitution required the Premier's decision to be counter-signed by the MEC 'if that decision concerns a function assigned to' him, which was not done here. As indicated, the court a quo found no merit in all these contentions and dismissed the application. The parties were each ordered to bear their own costs in light of the nature of the issues raised in the matter.

Yaqhuba ingxoxo yathi owayesakuba yiNkulumbuso uKiviet wenza ngokungaqiqanga nangokungekho mgaqweni ukuthatha kwakhe isigqibo sokugqibela kuba wasilela ukumema umbheni ukuza kuzithethela, engabubonanga ubungqina obathiwa thaca phambi kweKomiti, wasuka wamkela izindululo zayo engawugocagocanga nzulu umba. Kwathiwa kwakhona iCandelo 140 (2) loMgaqo Siseko liyanyanzelisa ukuba isigqibo seNkulumbuso sisayinwe nanguMphathiswa xa eso sigqibo siqulethe izinto ezingumsebenzi wakhe – nto leyo ingenzekanga apha. Njengoko sekutshiwo, inkundla ayifumananga sihlahla kuwo onke la mabango, yasichitha isicelo. Icala ngalinye layalelwa ukuba lizihlawulele

iindleko zetyala ngenxa yemo yemiba
ekubanjwenwe ngayo.

[20] I deal first with the application to strike out the Premier's affidavits, which may be given short shrift. It is not clear to me why it would have been incompetent for Premier Masualle to defend the proceedings. The application was brought, not against former Premier Kiviet personally, but against the Premier of the Eastern Cape, which he was at the material time. He was therefore obliged to respond to it. He indicated information in respect of which he had no personal knowledge. Thus, former Premier Kiviet's affidavit, in which she confirmed Premier Masualle's allegations and categorically denied any irrationality or impropriety in her decision-making, was filed in that regard.

Mandiqale ngokuqwalasela isicelo sokukhuphela ngaphandle amaxwebhu kaNkulumbuso, sona sinokukhawuleziseka. Andicacelwa kakuhle kukuba kutheni uNkulumbuso Masualle wayengenakuliphikisa elityala. Isicelo asenziwanga ngakuNkulumbuso weMpuma Koloni wangaphambili uKiviet, senziwa ngakwiNkulumbuso yePhondo laseMpuma Koloni awayeyiyo ngelo xesha. Wayenyanzelekile ukuba aliphendule ityala. Wazixela iinkcukacha awayengenalwazi ngazo yena buqu. Kungoko wafaka uxwebhu lwakhe uNkulumbuso wangaphambili uKiviet, apho wavumelana namabango kaNkulumbuso Masualle, ekhanyela ngokuphandle ukuba isigqibo sakhe sasingaqiqiswanga kwaye singafanelekanga.

[21] The confirmatory affidavit reads, in relevant part:

‘I have read the affidavit deposed to by my successor, the current Premier of the Eastern Cape Province, Mr Phumulo Masualle, and I confirm his affidavit whenever reference is made to me therein.

I wish to particularly confirm that in arriving at my decision that forms the subject matter of the present application I properly and carefully applied my mind to the matter and to all relevant information and material before I took such decision. I accordingly deny any suggestion that my decision was irrational, improper or unjustified in any way whatsoever. The decision was properly taken after due and proper consideration of all relevant material and any challenge to such decision is without basis. In the premises I join in the prayer that it should please this Honourable Court to dismiss this application with costs.’

Inxenye echaphazelekayo yoxwebhu lwesiqinisekiso ifundeka ngolu hlobo:

‘Ndilufundile uxwebhu olwabhalwa yinkulumbuso eyangena ukumka kwam, uNkulumbuso weMpuma Koloni uMnu Phumulo Masualle osesihlalweni ngoku, kwaye ndiyavumelana noxwebhu lwakhe kuzo zonke iindawo apho athetha ngokubhekiselele kum. Ndinga ndingavuma ngakumbi ukuba ndazikisa ukucinga ngazo zonke iinkcukacha ukuze ndifikelele kwisigqibo sam ekuxoxwa ngaso ngoku kulomba. Kungoko ndikhanyela nayiphi na ingcingane yokuba isigqibo sam sasingaqiqwanga, singafanelekanga, singenasizathu kwaphela. Isigqibo ndasithatha emva kokuphonononga nzulu zonke izinto ezingundoqo, ngoko ke konke okuchasana neenjongo zam akunasihlahla. Ndiyangenelela kwesi sicelo, ndibongoza ukuba lenkundla ibekhekileyo isichithe esi sicelo neendleko zaso.’

[22] In my view, these assertions adequately address the appellant's factual allegations. His reliance on the judgment in *Zuma v DA*,⁴ for the criticism of the affidavit is misguided. That decision is distinguished by its own facts. There, the court took umbrage at the fact that the decision-maker merely filed a supplementary confirmatory affidavit only after the applicant had filed its replying affidavit. This was necessitated by the atrocious nature and substance of the affidavit of the main deponent, which made damning statements, with no factual basis, about people and spoke of unsubstantiated investigations and rumours. That is not what happened in this case. I am satisfied in all the circumstances that the striking out application was properly refused.

Ngokokwam ukubona, ezi ntetho ziwaphendula ngokwaneleyo amabango ombheni. Waphazama ngokuxhathisa kwisigwebo sikaZuma emelene neDA. Eso sigwebo sohlukile ngeenkukacha. Kuso, inkundla yacatshukiswa kukuba umenzi wesigqibo afake uxwebhu oluxhasayo kade, emva kokuba umfaki sicelo selelufakile uxwebhu oluphendulayo. Noku kwanyanzeliswa yimeko eyayimaxongo, nasisqulatho soxwebhu lombhali, esenza iintetho ezenyelisayo engenazizathu zakuzenza, ethetha ngabantu ekuphandwa ngabo ngenkohlakalo nangondiva. Akwenzekanga oko kwelityala. Ndonelisekile ukuba isicelo sokuchitha amaxwebhu eNkulumbuso saliwa ngokufanelekileyo.

[23] Similarly, I find no merit in the procedural fairness argument. The appellant's complaint that he was not

Kwananjalo, andifumani sihlahla kwingxoxo ethi ayilandelwanga kakuhle imigaqo. Uyaphazama

⁴ *Zuma v Democratic Alliance and Others; Acting National Director of Public Prosecution and Another v Democratic Alliance and Another* [2017] ZASCA 146; [2017] 4 ALL SA 726 (SCA); 2018 (1) SACR 123 (SCA); 2018 (1) SA 200 (SCA) para 64.

given a chance to make representations to the Premier before her final decision is misconceived. It is so that in terms of s 35(2) of the Eastern Cape Traditional Leadership and Governance Act 1 of 2017 (the provincial Act), the Premier ‘may request the affected parties to make written representations’ before taking a decision on the recommendations of the Provincial Committee. The permissive language of this section, which uses the word ‘may’, however indicates that a disputant may not be given a further hearing after the Committee’s recommendation as a matter of course.

umbheni kwisikhalazo sakhe sokuba akazange anikwe thuba lakuzithethela kwiNkulumbuso ngaphambi kokuba yenze isigqibo. NgokweCandelo 35 (2) loMthetho 1 ka2017 (uMthetho wasePhondweni) iNkulumbuso ‘ingawacela amaqela achaphazelekayo ukuba azithethele ngokubhaliweyo’ ngaphambi kokuba kwenziwe isigqibo ngezindululo zeKomiti yePhondo. Ulwimi olungemandla lwelicandelo, olusebenzisa igama “anga...”, lukhomba ukuba oxoxa enkundleni usenokunganikwa elinye ithuba lokumanyelwa emva kokuba iKomiti indulule, xa kungekho sidingo sakwenjenjalo.

[24] The appellant’s claim was thoroughly investigated and ventilated in an open hearing conducted by the Committee. That Committee comprised customary law experts statutorily tasked to investigate disputes of this very nature and then make recommendations to the Premier, as was done here. As Dr

Ibango lombheni lacokiswa ukuphandwa, lashukuxwa kwingxoxo esesidlangalaleni eyayibhexeshwa yiKomiti. KulooKomiti kwakukho iingcaphephe zomthetho wemveli, ezigunyaziswe ukuba ziphande iimbambano ezilolu hlobo, zize zenze izindululo zizidlulisele

Mndende stated in her answering affidavit, the appellant was given an ample chance, which he fully exploited, to state his case, and his evidence was on record when the matter was sent to the Premier for her decision. Therefore, there was no need to obtain further representations from him. The failure by the Premier to hear the appellant before taking a decision did not amount to procedurally unfair administrative action. After all, the enquiry into the competing claims to the chieftainship was a factual one and the appellant was given a fair hearing by the Committee at the fact-finding stage of the process.

kwiNkulumbuso, njengoko kwenziwayo apha. Njengokuba watsho uGqirha Mndende kuxwebhu lwakhe lokuphendula, umbheni wanikwa ithuba elaneleyo, awalisebenzisayo futhi ekwandlalani ibango lakhe, nobungqina bakhe bukhona kumaxwebhu engxelo xa umba wathunyelwa kwiNkulumbuso ukuba yenze isigqibo sayo. Ngoko ke, kwakungekho sizathu sakufuna bungqina bungaphezulu kuye. Ukusilela kukaNkulumbuso ukuphulaphula umbheni ngaphambi kokuthatha isigqibo akuthethi kuthi akalandelanga migaqo, okanye wenze impazamo yolawulo. Ngapha koko, uphando lwamabango akhuphisanayo ngobukhosi lwalulolwee nkcukacha, yaye umbheni waxhamla ukumanyelwa komba wakhe yiKomiti ngexesha kwakusaqokelelwa iinkcukacha zeli bango.

[25] As regards the alleged breach of s 140(2) of the Constitution, the first observation to make is that it being a Ngokwesityholo sokuba iCandelo 140 (2) loMgaqo Siseko zange lilandelwe, eyokuqala impawulo kukuba

point of law, and contrary to the court a quo's view in this regard, it was permissible for the appellant to raise it for the first time in his heads of argument. The fact upon which it depends – that the Premiers' written decision was not countersigned by the MEC – was undisputed and its consideration would, therefore, involve no unfairness to the respondents.⁵

njengokuba eli ilinqaku lomthetho, ndingavumelani futhi nokubona kwenkundla malunga nalomba, kwakuvumelekile ukuba umbheni aliveze okokuqala kuxwebhu lwezihloko zengxoxo zakhe. Lomba elinqaku lixhomekeke kuwo – ukuba isigqibo seNkulumbuso zange sisayinwe nanguMphathiswa – kwakungaphikiswana ngawo, ngoko ke uphononongo lwawo kwakungekhe lubadlele indlala abaphenduli.

[26] Section 140(1) requires a decision by the Premier of a province to be in writing if it is taken in terms of legislation or has legal consequences. In terms of s 140(2) 'a written decision by the Premier must be countersigned by another Executive Council member if that decision concerns a function assigned to that other member'. It is evident from the plain language of these provisions that the MEC's

Icandelo 140(1) linyazelisa ukuba isigqibo seNkulumbuso yePhondo sibe sesibhaliweyo ukuba sithathwe ngokusemthethweni, okanye sineziphumo ezinobuzaza ngokomthetho. NgokweCandelo 140(2) 'isigqibo esibhaliweyo seNkulumbuso kufuneka sisayinwe nalelinye ilungu lesigqeba esilawulayo ukuba isigqibo eso siqulethe umsebenzi welungu elo'. Kucace gca kwakulwimi olu lulula

⁵ *Cole v Government of the Union of South Africa* 1910 AD 263 at 272-3; *Barkhuizen v Napier* [2007] ZACC 5; 2007 (7) BCLR 691 (CC); 2007 (5) SA 323 (CC) para 39; *Mtokonya v Minister of Police* [2017] ZACC 33; 2017 BCLR 1443 (CC); 2018 (5) SA 22 (CC) para 70.

countersignature is necessary only if the relevant decision concerns a function assigned to her or him.

lusetyenziswe kwezi zindululo ukuba ukusayina koMphathiswa kufuneka kuphela xa isigqibo eso sinxulumene nomsebenzi abelwe wona.

[27] Furthermore, ss 26, 26A(2)(a) and (3) of the Framework Act and the provisions and general scheme of the provincial Act make clear that provincial powers and functions relating to the institution of traditional leadership, including the power to recognize or appoint the appellant as a traditional leader, vest in the Premier. And, in terms of s 88(1) of the provincial Act '[t]he Premier may, subject to such conditions as he or she may determine in writing, delegate any powers conferred upon him or her by this Act to the [Member of the Executive Council responsible for Traditional Affairs in the Province], excluding powers to make Regulations'. But, under subsection (2) such 'delegation does not preclude the Premier from exercising any such delegated powers'.

Ngaphezulu, amaCandelo 26, 26A (2)(a) kunye no (3) oMthetho-Sikhokelo, nezindululo jikelele zoMthetho wePhondo acacisa mhlophe ukuba amagunya nemisebenzi yePhondo ngokobulawuli bemveli, negunya lokonyula umbheni njengenkokheli yemveli likwiNkulumbuso. Kwicandelo 88(1) loMthetho wePhondo kuthiwa 'iNkulumbuso, ngaphantsi kweemigomo eya kuyibeka ngokubhaliweyo, ingadlulisela naliphi igunya kumagunya ewanikwe ngulo Mthetho [kuMphathiswa], ngaphandle kwamagunya okuwisa imigaqo'. Kodwa, phantsi kweCandelwana (2) oko 'kudlulisela amagunya akuthethi kuba iNkulumbuso ayinakuphinda iwasebenzise ngokwayo loomagunya'.

[28] Here, as properly conceded by the appellant's counsel during argument, the Premier personally exercised the power vested in her by the Framework Act and the provincial Act, to appoint a traditional leader, and did not delegate the task to the MEC. There was, therefore, no need for the MEC to countersign her decision. The provisions of s 140(2) of the Constitution do not apply and the MEC's failure to countersign the Premier's decision does not render that decision invalid.

Apha, njengoko evumile ngokufanelekileyo ummeli wombheni ngexesha leengxoxo, iNkulumbuso isebenzise igunya elilelayo elinikwe nguMthetho-Sikhokelo noMthetho wePhondo, ukuba onyule inkokheli, yaze ayalidlulisela eli gunya kuMphathiswa. Kungoko kungazange kubekho mfuneko yokuba uMphathiswa naye asayine kwisigqibo sakhe. Okuqulethwe kwicandelo 140(2) loMgaqo Siseko akungeni ndawo apha, ukungasayini koMphathiswa akunafuthe lokusichitha esi sigqibo.

[29] The principal basis of the appellant's review is that the recommendation of the Commission and the decision of the Premier based on that recommendation, were factually wrong. In general terms, review is concerned with whether a decision was regular or irregular, not with whether it was 'right' or 'wrong'. That is the province of appeals – and no provision is made in the

Isizathu esingundoqo sovavanyo-sigwebo sombheni sesokuba isindululo seKomishoni, kwanesigqibo seNkulumbuso esixhomekeke kwisindululo eso, bezigwenxa. Ngokuphangaleleyo, uvavanyo luphonononga ukuba isigqibo sithathwe ngokusemthethweni na okanye akunjalo, hayi ukukhangela ukuba 'silungile' okanye 'sigwenxa'. Leyo

legislation in this case for an appeal.⁶ In other words, whether the decision is a correct decision is not open for determination on review. The appellant's counsel properly conceded that his attack on the decision was based on it being wrong. He conceded too that in a review, a party may not revisit the correctness of the factual findings of the administrative decision-maker.

yindima yezibheni, kwaye akukho nakroba lomthetho kweli bango lokubhena. Ngamanye amazwi, umcimbi wokuba isigqibo silungile na awujongwa kuvavanyo. Ummeli wombheni uvume ngokufanelekileyo ukuba usihlasele isigqibo kuba esithi asichanekanga. Uvumile kanjalo ukuba kuvavanyo, icala elithile alikwazi kuphindela kwiinkcukacha zeziphumo zogocagoco lomntu owenza izigqibo ngokolawulo.

[30] Except in a narrow band of cases,⁷ of which this case is not one, error of fact is not a ground of review.⁸ The result is that even if it could be said that the Commission's factual conclusions were wrong, that is not a ground of review.

Ngaphandle kweembambano ezimbalwa kakhulu, ube ke lo umba ungenguwo omnye wazo, ukuphosa inkcukacha akusosizathu sokuvavanya. Isiphumo kukuba nokuba kungathiwa izigqibo zeKomishoni beziwuphosile umhlola, ayisosizathu sovavanyo eso.

⁶ See C Hoexter *Administrative Law in South Africa* 2 ed (2012) at 65; L Baxter *Administrative Law* (1984) at 305. See too *Mbina-Mthembu v Public Protector* [2019] ZAECHC 4; 2019 3 ALL SA 241 (ECB); 2019 (6) SA 534 (ECB) paras 10-11; *Bo-Kaap Civic and Ratepayers Association & Others v City of Cape Town and Others* [2020] ZASCA 15; 2020 2 ALL SA 330 (SCA) paras 70-72.

⁷ See *Dumani v Nair and Another* [2012] ZASCA 196; 2013 (2) SA 274 (SCA); 2013 2 ALL SA 125 (SCA) para 30.

⁸ *De Freitas v Somerset West Municipality* 1997 (3) SA 1080 (C) at 1084E-H.

[31] The only other basis upon which wrong factual conclusions may afford a ground of review is if the Commission's factual findings were so out of kilter with the evidence that they were irrational.⁹ The Committee's report shows that it took evidence from both Mgijima and Zulu, and that it considered other sources such as historical records and literature. It concluded that when everything was considered, the weight of the evidence was that the Mgijima line had always been headmen, and not chiefs, and that the Zulu line had always been chiefs. There is thus a rational connection between the evidence before the Premier and the decision that she took. There is also a rational connection between her decision and the reasons that she gave for taking it.

Esinye isizathu sokuvavanya ekukuphela kwaso xa isigqibo singachanekanga kuxa izigqibo zeKomishoni zingahambelani kwaphela nobungqina obandlaliweyo, zaze zangathi azicingiswanga. Ingxelo yeKomiti iyabonisa ukuba buthathiwe ubungqina kuMgijima nakuZulu, kwaphandwa nakwabanye oovimba abanjengoncwadi lwezembali. Yagqiba ukuba ekuhloleni konke, ubunzima bobungqina bakhomba ukuba ooMgijima okoko baba zizibonda, bengezizo iinkosi, ukanti ooZulu bona baba ziinkosi kwasekuqaleni. Ngoko ke kukhona ukuhlangana okwanezisayo phakathi kobungqina obudandalaziswe phambi kweNkulumbuso kunye nesigqibo awasithathayo; naphakathi kwesigqibo sakhe kunye nezizathu awazinikayo zokwenza isigqibo sakhe.

[32] In the premises, I am satisfied that the Committee conducted a thorough Kule migomo ndanele ukuba iKomiti yaqhuba uphando ngokucokisisa, yaze

⁹ See, for example, *W C Greyling & Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board and others* 1982 (4) SA 427 (A) at 448G-449A; *Kotze v Minister of Health & another* 1996 (3) BCLR 417 (T) at 425H-426A.

investigation and properly made its yenza isigqibo ngokuvumelana unanimous decision. There is no reason nangokufanelekileyo. Akukho sizathu to believe from the Premier's written sokucinga ukuba kwisigqibo sayo, decision and confirmatory affidavit that kunye noxwebhu lwesivumo she committed any misdirection in esibhaliweyo, iNkulumbuso yenza endorsing the Committee's mpazamo ithile ekuhambisaneni recommendation. The court a quo nesindululo seKomiti. Inkundla correctly dismissed the review yasichitha ngokufanelekileyo isicelo application and the appeal must, sokuavanya, kungoko kufuneka therefore, fail. isibheni singaphumeleli.

[33] The respondents did not seek Abaphenduli abafunanga zindleko costs in the event that their opposition of ukuba bayaphumelela kwisibheni. the appeal succeeded. Accordingly, no Ngoko ke akukho myalelo uza costs order will be made. kwenziwa ngokweendleko.

[34] The appeal is dismissed. Isibheni siyachithwa.

MML Maya

President of the Supreme Court of Appeal

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