

SOUTH AFRICA / JUDGMENT

Maile and Another v Premier of Limpopo and Others (1743/2018) [2020] ZALMPPHC 54 (25 June 2020)

[2020] ZALMPPHC 54**COURT**

Limpopo High Court, Polokwane

BEFORE

GC Muller

CASE / FILE NUMBER

1743/2018

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Source record**REPUBLIC OF SOUTH AFRICA****IN THE HIGH COURT OF SOUTH AFRICA****LIMPOPO DIVISION, POLOKWANE****(1)REPORTABLE:****YES/NO****REPORTABLE:**

YES/

(2)OF

INTEREST TO OTHER JUDGES:YES/NO

OF

**INTEREST TO OTHER
JUDGES:**

(3)REVISED

REVISED

Case no: 1713/2018

In the matter

between:

MMANKWANA

ANIEKIE MAILE

FIRST APPLICANT

BALEPYE ROYAL

FAMILY

SECOND APPLICANT

PREMIER

OF LIMPOPO

FIRST RESPONDENT

MEC-DEPARTMENT

OF CO-OPERATIVE

GOVERNANCE,

HUMAN SETTLEMENT

AND
TRADITIONAL AFFAIRS, LIMPOPO
SECOND RESPONDENT
BA-PHALABORWA
LOCAL MUNICIPALITY
THIRD RESPONDENT

JUDGMENT

MULLER J:

[1]This application has two parts. It is the main application in term whereof the applicants claim that the Premier of Limpopo (the first respondent) make a decision in the application by the Balepye community to be recognised as a traditional community in terms of section 3 of the Limpopo Traditional Leadership and Institutions Act.[1]

This application has two parts. It is the main application in term whereof the applicants claim that the Premier of Limpopo (the first respondent) make a decision in the application by the Balepye community to be recognised as a traditional community in terms of section 3 of the Limpopo Traditional Leadership and Institutions Act.

[2]The second part of the application is, what counsel for the first and second respondent[2]termed, the "interlocutory application" in terms whereof the respondents claim from the applicants the costs in the main

application and that the applicants be declared vexatious litigants in terms of section 2(b) of the Vexatious Proceedings Act[3]as well as an interdict. The respondents also claim the costs of the interlocutory application and, in the alternative, that the attorneys of the applicants be ordered to pay the costs "from their own pockets" in the event of opposition.

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as well as an interdict. The respondents also claim the costs of the interlocutory application and, in the alternative, that the attorneys of the applicants be ordered to pay the costs "from their own pockets" in the event of opposition.

[3]The issue of the costs can best be decided at the end of the proceedings and not before the main application is determined. The same considerations apply to the prayer that the applicants be declared vexatious litigants. The applicants can hardly be regarded as vexatious litigants, should the main application succeed.

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[4]It is for this reason that I will now turn to the main application. During 2013, and as a result of a successful land claim, the late chief John Masetle Maenetja of Balebye was invited by the Regional Land Claims Commission; Limpopo to attend a handing over ceremony where the title deed to the land to the Balepye community was handed to the chief.

It is for this reason that I will now turn to the main application. During 2013, and as a result of a successful land claim, the late chief John Masetle Maenetja of Balebye was invited by the Regional Land Claims Commission; Limpopo to attend a handing over ceremony where the title deed to the land to the Balepye community was handed to the chief.

[5]The late chief was replaced by his son Metro Maenetja who was the sole heir to the position of Kgosi of the Balepye community. A letter dated 4 July 2015 in which Metro Maenetja was identified as the successor of the late chief was forwarded to the respondents for recognition. No reaction was received from the respondents.

The late chief was replaced by his son Metro Maenetja who was the sole heir to the position of Kgosi of the Balepye community. A letter dated 4 July 2015 in which Metro Maenetja was identified as the successor of the late chief was forwarded to the respondents for recognition. No reaction was received from the respondents.

[6]After enquiries it was established that there is no record of the application. The applicants decided to apply afresh. A fresh application for recognition of the community as a traditional community and an application for recognition of their identified senior traditional leader were prepared.

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[7]The application for recognition of the Balepye community as a traditional community in terms of section 3(2) of the Limpopo Act was forwarded to the first respondent under cover of a letter from Leshilo Attorneys Incorporated, on 19 June 2017. The office of the first respondent acknowledged receipt of the application on 30 June 2017 and also confirmed that the documents had been forwarded to the second respondent for attention.

The application for recognition of the Balepye community as a traditional community in terms of section 3(2) of the Limpopo Act was forwarded to the first respondent under cover of a letter from Leshilo Attorneys Incorporated, on 19 June 2017. The office of the first respondent acknowledged receipt of the application on 30 June 2017 and also confirmed that the documents had been forwarded to the second respondent for attention.

[8]Leshilo Attorneys addressed a letter dated 3 August 2017 (which was hand delivered on 25 August 2017) to the office of the first responderit in terms whereof they stated that they are awaiting the decision of the first respondent. The first respondent did not reply to the letter.

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[9]On 24 October 2017 a letter was also addressed to the second respondent in terms whereof reference was made to the letter dated 3 August 2017 and the fact that no reply was received. The second respondent was warned that if no reply is forthcoming within a period of five days, the court will be approached to compel the first respondent to announce his decision in respect of the application for recognition as a traditional community.

On 24 October 2017 a letter was also addressed to the second respondent in terms whereof reference was made to the letter dated 3 August 2017 and the fact that no reply was received. The second respondent was warned that if no reply is forthcoming within a period of five days, the court will be approached to compel the first respondent to announce his decision in respect of the application for recognition as a traditional community.

[10] The second respondent also failed to reply. On 8 March 2018 the notice of motion was issued and served on the first respondent on 18 April 2018 and on the second respondent on 24 April 2018.

[11]The respondents served an answering affidavit only on 27 June 2018. At the very outset the point was taken that the application is premature as the Premier must first recognise their traditional leader. Once the traditional leader is recognised, the community may apply to be recognised as a traditional community. The respondents further stated that the commission (and I will assume that it is a reference to the Kgatle commission) only finished its work on 31 December 2017 and that the result of the investigation of the commission was published in May 2018. This application is, therefore, premature as it was instituted before a proper application for recognition as a traditional community had been made in terms of section 3(2) of the Limpopo Act.

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that the result of the investigation of the commission was published in May 2018. This application is, therefore, premature as it was instituted before a proper application for recognition as a traditional community had been made in terms of section 3(2) of the Limpopo Act.

[12]The respondents also raised certain points in limine. The first point is that the affidavit of the deponent and confirmatory affidavits were not properly commissioned by the commissioners of oaths. During argument senior counsel for the respondents abandoned further reliance on the first point. She, however, persisted with the second point that the papers lack the necessary averments for a mandatory interdict as no proper basis had been laid and the third point that the applicants must stand or fall by the averments in their founding affidavit. I do not propose to deal in detail with each of the points save to say that they have no merit.

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The first point is that the affidavit of the deponent and confirmatory affidavits were not properly commissioned by the commissioners of oaths. During argument senior counsel for the respondents abandoned further reliance on the first point. She, however, persisted with the second point that the papers lack the necessary averments for a mandatory interdict as no proper basis had been laid and the third point that the applicants must stand or fall by the averments in their founding affidavit. I do not propose to deal in detail with each of the points save to say that they have no merit.

[13]The case of the applicants is simple and straightforward. I will endeavour to explain.

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[14]In terms of Chapter 2 of the Limpopo Act, a community, envisaged by section 2(1) of the Traditional Leadership and Governance Framework Act,[4]may apply in writing[5]to the Premier for recognition as a traditional community.[6]As stated before, it is not disputed that such a written application had been submitted to the first respondent who in turn forwarded the same application to the second respondent for attention and processing.

In terms of Chapter 2 of the Limpopo Act, a community, envisaged by section 2(1) of the Traditional Leadership and Governance Framework Act,

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to the Premier for recognition as a traditional community.

As stated before, it is not disputed that such a written application had been submitted to the first respondent who in turn forwarded the same application to the second respondent for attention and processing.

[15]The applicants pinned their colours to the mast of section 3(3) and 3(4) of the Limpopo Act, after having submitted their written application, as envisaged by section 3(2), for recognition as a traditional community, to the first respondent. Section 3(3), 3(4) and 3(5) reads:

The applicants pinned their colours to the mast of section 3(3) and 3(4) of the Limpopo Act, after having submitted their written application, as envisaged by section 3(2), for recognition as a traditional community, to the first respondent. Section 3(3), 3(4) and 3(5) reads:

" 3(3) The Premier must, upon receipt of the application referred to subsection (1), if satisfied that the community concerned complied with the provisions of subsection (2), refer the matter to the provincial house of traditional leaders, the relevant local house of traditional leaders, and any senior traditional leader whose traditional community is, in the opinion of the Premier, likely to have an interest in the matter and if applicable, the king or queen under whose jurisdiction the group would fall, for their comments, which comments must be submitted within 30 days of the referral.

(4)The Premier must, within three months of receipt of the application referred to in subsection (1), subject to subsection (3) take a decision on whether to recognise the community concerned as a traditional community and inform the community concerned of the said decision.

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(5)Before taking a decision not to recognise the community concerned as a traditional community, the Premier must invite the community to furnish reasons why the application should not be turned down on the basis of the reasons stated by the Premier."

Before taking a decision not to recognise the community concerned as a traditional community, the Premier must invite the community to furnish reasons why the application should not be turned down on the basis of the reasons stated by the Premier."

[16]Section 3(4) is very clear and admits of no ambiguity. The Premier must within three months of receipt of the application make a decision on whether to recognise the community as a traditional community and must communicate the decision to the community concerned. If the Premier makes a decision to recognise a community as a traditional community he/she must simultaneously determine the territorial area of such a community; issue a prescribed certificate of recognition and within thirty days of the decision, publish details of such recognition in the Gazette.[7]

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Gazette.

[17]Section 211 and 212 of the Constitution gives recognition to traditional communities. Section 212 makes provision for the enactment of national legislation to provide for the role of traditional leadership as an institution, in matters effecting local communities. The courts, in disputes emanating from traditional leadership, must apply customary law in terms of section 211(3) which provides:

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"(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."

[18]Both the Framework Act and the Limpopo Act provide for the restoration of the legitimacy of traditional communities and leaders in accordance with customary law and practices.[8]

Both the Framework Act and the Limpopo Act provide for the restoration of the legitimacy of traditional communities and leaders in accordance with customary law and practices.

[19]In terms of the provisions of section 3(1) of the Limpopo Act, the first respondent is empowered to recognise a community as a traditional community.[9]For the premier to recognise a traditional community he/she must make a decision.[10]The Premier in terms of the empowering provision, is a functionary exercising a public power as an organ of State.[11]All exercise of public power, be it legislative, executive or administrative, is subject to judicial review. [12]

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[20]In terms of section 6(2)(g) of The Promotion of Administrative Justice Act[13]a court has the power to review an administrative action, if the action concerned consists of a failure to take a decision. Section

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6(3) provides:

"If any person relies on the ground of review referred to in subsection (2) (g), he or she may in respect of a failure to take a decision, where-

(a)....

(b)(i) an administrator has a duty to take a decision;

(ii) a law prescribes a period within which the administrator is required to take that decision; and

(i) the administrator has failed to take that decision before the expiration of that period, institute proceedings in a court or tribunal for judicial review of the failure to take the decision within the period on the ground that the administrator has a duty to take the decision notwithstanding the expiration of that period.

[21]The applicants in my view has made a clear case for relief under section 6(3)(b) of PAJA. The declaratory order prayed for in prayer 2 is unnecessary as the section 3(4) of the Limpopo Act, which is the applicable law, placed a duty to make a decision within three months of receipt of the application, squarely on the shoulders of the Premier.

The applicants in my view has made a clear case for relief under section 6(3)(b) of PAJA. The declaratory order prayed for in prayer 2 is unnecessary as the section 3(4) of the Limpopo Act, which is the applicable law, placed a duty to make a decision within three months of receipt of the application, squarely on the shoulders of the Premier.

[22]The three months period in which the first respondent was required to make a decision expired on 1 October

2017. The first respondent has failed to make a decision within the stipulated time period. The applicants have a statutory right, in terms of the provisions of section 3(4) of the Limpopo Act, to enforce that right by means of amandamus.

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2017. The first respondent has failed to make a decision within the stipulated time period. The applicants have a statutory right, in terms of the provisions of section 3(4) of the Limpopo Act, to enforce that right by means of a

mandamus.

[23]The defences raised by the first respondent are untenable. The outcome of the Kgatle commission is irrelevant with regard to the right of the applicants in terms of section 3(4) of the Limpopo Act to demand a decision from the first respondent. The Premier is obliged to make a decision once an application in terms of section 3(2) is received by him/her. Whatever the decision is, the premier is obliged to communicate it to the applicants. The first respondent is required to simply make a decision.

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[24]This application could have been avoided by the respondents. All that was needed was a letter addressed to the attorneys of the applicants to explain that the first respondent awaited the outcome of the investigation by the commission or the applicants could have been informed that they must first apply for the recognition of the traditional leader that had been identified, before a decision can be made. But, instead, the respondents chose to ignore the application by the applicants. It is certainly the duty of the second respondent to assist the applicants to realise their rights. But, that is not all. After this application had been

instituted, the first respondent should have realised that he is obliged to make a decision. He could have made the decision in the interim and thereby could have averted any possible adverse costs order. The respondents nevertheless, despite this obligation to make a decision, persisted with untenable defences and, in addition, instituted an interlocutory application, to which I will now turn my attention.

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[25]The Assistant State Attorney deposed to the facts in the founding affidavit of the interlocutory application. She stated that the interlocutory application was lodged in terms of Rule 41 for payment of the costs in respect of the main application which was set down by the applicants for 18 February 2019. The application was removed from the roll in terms of a notice delivered on 14 February 2019.

The Assistant State Attorney deposed to the facts in the founding affidavit of the interlocutory application. She stated that the interlocutory application was lodged in terms of Rule 41 for payment of the costs in respect of the main application which was set down by the applicants for 18 February 2019. The application was removed from the roll in terms of a notice delivered on 14 February 2019.

[26]On or about 21 May 2019 the applicants delivered another notice of set down for 9 September 2019. The legal team of the respondents attended court on 9 September 2019 but the legal team of the applicants were not in attendance. (the deponent failed or neglected to explain what had happened at court with the application that had been set down.)

On or about 21 May 2019 the applicants delivered another notice of set down for 9 September 2019. The legal team of the respondents attended court on 9 September 2019 but the legal team of the applicants were not in attendance. (the deponent failed or neglected to explain what had happened at court with the application that had been set down.)

[27]Another notice of set down was delivered on 10 October 2019 for hearing of the main application on 17 February

2020. Again the legal team of the applicants failed to be present at court on 17 February 2020 and thereby effectively abandoned their application. (Again nothing was said what had happened with the application at court.)

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[28]Thereafter, on 27 February 2020, yet another notice of set down was delivered in terms whereof the main application was set down for hearing on 15 June 2020. The deponent concluded by stating in paragraph 22:

Thereafter, on 27 February 2020, yet another notice of set down was delivered in terms whereof the main application was set down for hearing on 15 June 2020. The deponent concluded by stating in paragraph 22:

"It has been authoritatively decided that a party that withdraws an action or an application is liable to pay the costs to the other party. In this regard the Applicants are liable to pay the costs to the Respondents."

[29]In respect of the costs order that the respondents seek, the deponent goes on to state that the applicants should pay the costs on a punitive scale on the basis that the case was not properly set down (for 15 February 2020) after the application had been abandoned. (I hasten to interpose that both the applications were fully argued on 17 June 2020 by counsel on both sides.)

In respect of the costs order that the respondents seek, the deponent goes on to state that the applicants should pay the costs on a punitive scale on the basis that the case was not properly set down (for 15 February 2020) after the application had been abandoned. (I hasten to interpose that both the applications were fully argued on 17 June 2020 by counsel on both sides.)

[30]In respect of the prayer to declare the applicants vexatious litigants the deponents stated:

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"30. It is humbly submitted that the Applicants should not be allowed to proceed with their application until such time that the Judge President gives them permission to proceed in which case the Applicants will have to provide security for costs.

31. In addition the Applicants should be interdicted from proceeding with the application unless the Applicants have obtained written

permission from the Judge President".

[31]The deponent continued to state that the respondents seek an interdict prohibiting the applicants from continuously setting the main application down and then abandoning it without any warning to the respondents, and to protect the good name and reputation of the respondents.

The deponent continued to state that the respondents seek an interdict prohibiting the applicants from continuously setting the main application down and then abandoning it without any warning to the respondents, and to protect the good name and reputation of the respondents.

[32]The interlocutory application was set down for hearing on the unopposed roll on 9 June 2020. On the day of hearing counsel for the applicants appeared and handed up a notice to defend, together with an answering affidavit.

The interlocutory application was set down for hearing on the unopposed roll on 9 June 2020. On the day of hearing counsel for the applicants appeared and handed up a notice to defend, together with an answering affidavit.

[33]Counsel for the respondents objected stating that the notice to defend was out of time and therefore also the answering affidavit. Counsel for the applicants agreed that the notice to defend was out of time but stated that it was in time to avert default judgment being granted. The answering affidavit is not out of time. Counsel for the applicants brought to the attention of the court that the main application has been set down for hearing on 15 June 2020. (The papers in the

main application were filed in a different file than the papers in interlocutory application). The court considered that it is in the interests of justice that the application be heard with the main application. The respondents were entitled to file a replying affidavit, if any before that date.

[14]Counsel for the applicants conceded that the wasted costs should be tendered by the applicants. The applicants were ordered to pay the wasted costs.

Counsel for the respondents objected stating that the notice to defend was out of time and therefore also the answering affidavit. Counsel for the applicants agreed that the notice to defend was out of time but stated that it was in time to avert default judgment being granted. The answering affidavit is not out of time. Counsel for the applicants brought to the attention of the court that the main application has been set down for hearing on 15 June 2020. (The papers in the main application were filed in a different file than the papers in interlocutory application). The court considered that it is in the interests of justice that the application be heard with the main application. The respondents were entitled to file a replying affidavit, if any before that date.

Counsel for the applicants conceded that the wasted costs should be tendered by the applicants. The applicants were ordered to pay the wasted costs.

[34]Counsel for the respondents persisted with her objection to allowing the answering affidavit when the interlocutory application was argued on 17 June 2020.[15]Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair hearing before a court. [16]However, a limitation to this right is permissible, provided that such limitation is reasonable. The court has the right to impose

procedural limitations on litigation by persons found to be vexatious. In addition, an inordinate or unreasonable delay in the

prosecution of an action (or motion proceedings) may constitute an abuse of process which may warrant dismissal of the action or motion proceedings. There must be an inexcusable delay which seriously prejudice the respondent.[17]A respondent may under such circumstances apply to have the motion proceedings dismissed.

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prosecution of an action (or motion proceedings) may constitute an abuse of process which may warrant dismissal of the action or motion proceedings. There must be an inexcusable delay which seriously prejudice the respondent.

A respondent may under such circumstances apply to have the motion proceedings dismissed.

[35] The main application to which the interlocutory application has reference was set down for hearing on 15 June 2020. I cannot see what additional prejudice (which was not cured by the costs order) respondents could possibly have suffered if the interlocutory application, which is predicated upon the main application, are heard together with the main application. I am of the view that the answering affidavit should be admitted and equally so, the replying affidavit.[18]

[35] The main application to which the interlocutory application has reference was set down for hearing on 15 June 2020. I cannot see what additional prejudice (which was not cured by the costs order) respondents could possibly have suffered if the interlocutory application, which is predicated upon the main application, are heard together with the main application. I am of the view that the answering affidavit should be admitted and equally so, the replying affidavit.

[36] In the answering affidavit, the applicants, not to be outdone by the respondents, in turn also raised a point in limine that Rule 41 is not the applicable rule to claim costs, against the particular facts of this matter.

in limine

[37] The applicants explained in the answering affidavit that the application was removed from the roll of 18 February 2019 because the file could not be located by the registrar when the roll was closed without the application being placed on the roll.

[38] The case was set down but not enrolled on 9 September 2019. Supplementary heads of argument were served and filed on 5 September 2019. The application was yet again not enrolled by the registrar. On that day the legal representatives of the respondents were not in court. The registrar again informed the attorney of the applicants that the file could not be located.

[39] A further date was obtained for hearing from the registrar on 17 February 2020. The notice of set down was served upon the respondents attorneys on 17 October 2019. The same problem has arisen when the roll was published by the registrar. The application was not enrolled because the notice of set down was not in the court file. The attorneys for the applicants wrote to the respondents attorneys on 17 February 2020 and explained what the problem was.

A further date was obtained for hearing from the registrar on 17 February 2020. The notice of set down was served upon the respondents attorneys on 17 October 2019. The same problem has arisen when the roll was published by the registrar. The application was not enrolled because the notice of set down was not in the court file. The attorneys for the applicants wrote to the respondents attorneys on 17 February 2020 and explained what the problem was.

[40]The respondents in the replying affidavit raised a further point in limine that the applicants have failed to file their heads of argument in time in the interlocutory application. The respondents denied that their legal team did not attend court as stated by the applicants.

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that the applicants have failed to file their heads of argument in time in the interlocutory application. The respondents denied that their legal team did not attend court as stated by the applicants.

[41]It is a sorry state of affairs when parties litigate on a level which has been manifested in this matter. On the one side are the applicants who set the matter down only to discover that the file keeps on disappearing and that the registrar has not enrolled the application. On the other side are the respondents who by means of the interlocutory application wish to put an end to the main application.

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[42]What I do find intriguing, if not perplexing, is that neither the applicants nor the respondents approached the court on the days the matter was set down, with the notice of set down, as proof that the application had been properly set down, to enrol the matter or to argue the costs. It seems that the parties were quite content to take a supine approach, when the application was not enrolled and unable to proceed on each of the occasions that the application had been set down.

What I do find intriguing, if not perplexing, is that neither the applicants nor the respondents approached the court on the days the matter was set down, with the notice of set down, as proof that the application had been properly set down, to enrol the matter or to argue the costs. It seems that the parties were quite content to take a supine approach, when the application was not enrolled and unable to proceed on each of the occasions that the application had been set down.

[43]The mysterious disappearance of the court file just when the file is about to be put on the roll is equally unacceptable. There is no reason whatsoever why a duplicate file could not have been opened, (even with the assistance of the respondents) to be placed before the court on the date the matter was set down. It is not unusual to embark upon that route, especially to avoid wasted costs to be paid by their respective clients. In any event, it must have been within the knowledge of both the legal teams that an application may only be removed by consent between the parties or by order of court after it had been set down. It was, therefore, imperative for the parties to approach the court, if the application did not appear on the court roll, to obtain clarity or at least get guidance from the presiding Judge. I find it equally disconcerting that the legal teams did not engage with each other, at court, on the days the application had been set down which is expected from responsible litigants. I am appalled by the obvious lack of collegiality displayed by the parties. It begs the question why the respondents, who supposedly, were distressed by fruitless expenditure on each occasion when the matter could not proceed, have failed to take steps to set the application down themselves to have it dismissed and to obtain the necessary costs order. The probabilities are strong that the attorneys for the parties were quite willing to allow the application to be dragged out. I find support for my view in the absence of any correspondence from the attorney of the respondents to voice their outrage at the manner the application was handled by the applicants over the whole period. It was only after the notice of set down for the hearing on 15 June 2020 was delivered that the respondents launched the interlocutory application without any prior warning.

The mysterious disappearance of the court file just when the file is about to be put on the roll is equally unacceptable. There is no reason whatsoever why a duplicate file could not have been opened, (even with the assistance of the respondents) to be placed before the court on the date the matter was set down. It is not unusual to embark upon that route, especially to avoid wasted costs to be paid by their respective clients. In any event, it must have been within the knowledge of both the legal teams that an application may only be removed by consent between the parties or by order of court after it had been set down. It

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[44]It is nevertheless clear that the applicants did not abandon their application. After each occasion that the application was not enrolled, they promptly applied for a new date and served the notice of set down. The suggestion by the respondents that the application had been abandoned, in my view, smacks of opportunism.

It is nevertheless clear that the applicants did not abandon their application. After each occasion that the application was not enrolled, they promptly applied for a new date and served the notice of set down. The suggestion by the respondents that the application had been abandoned, in my view, smacks of opportunism.

[45]I will return to the issue of the wasted costs occasioned on each of these instances, when the costs are considered.

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[46]I proceed to determine whether the interlocutory application is indeed interlocutory or if the interlocutory application is not an abuse of the process of court. This court has the inherent power to prevent an abuse and to regulate and protect its own process.[19]In the present matter the purpose of the interlocutory application must be examined by having regard to the orders the respondents seek to be able to discern whether it is truly interlocutory. In *South Cape Corporation (pty) Ltd v Engineering Management Services (Pty) Ltd*[20]it was explained with reference to interlocutory orders:

I proceed to determine whether the interlocutory application is indeed interlocutory or if the interlocutory application is not an abuse of the process of court. This court has the inherent power to prevent an abuse and to regulate and protect its own process.

In the present matter the purpose of the interlocutory application must be examined by having regard to the orders the respondents seek to be able to discern whether it is truly interlocutory. In

South Cape Corporation (pty) Ltd v Engineering Management Services (Pty) Ltd

it was explained with reference to interlocutory orders:

"In a wide and general sense the term "interlocutory refers to all orders pronounced by the Court, upon matters incidental to the main dispute, preparatory to, or during the progress of, the litigation."

[47]Perhaps it is better, at the outset, to acknowledge that at common law a purely interlocutory order, on the one hand, may be corrected, altered, or set aside by the Judge who granted it, at any time before final judgment. An order which has final and definitive effect on the other hand, even if it may be interlocutory, in the wide sense, is *res judicata*. [21]

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res judicata.

[48]The test whether an order is a simple interlocutory order or not was stated inPretoria Garrison Institutes v Danish Variety Products (Pty) Ltd:[22]

The test whether an order is a simple interlocutory order or not was stated in

Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd:

"... that a preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to 'dispose of any issue or any portion of the issue in the main action or suit' or, which amounts, I think, to the same thing, unless it 'irreparably anticipates or precludes some of the relief which would or might be given at the hearing'."

[49]If the test is applied to the purpose of the interlocutory application and relief claimed in terms thereof, it is clear that the orders are final orders which if granted, will be susceptible to appeal. The costs order as well as the order in terms whereof the applicants are declared vexatious litigants together with the interdict, are most assuredly, not interlocutory in the main application. Once the order declaring that the applicants are vexatious litigants and the interdict had been granted, the orders

would have precluded the court from pronouncing on the merits of the main application. In addition, the respondents, in my view have failed to make out a case in their founding affidavit to declare the applicants vexatious litigants. The respondents rely on the provisions of section 2(1)(b) of Act 3 of 1956 which is a complement to the common law. In terms of the common law the court has the inherent power to strike out claims that are vexatious. Vexatious must be understood to refer to proceedings that are instituted

without sufficient ground to serve as an annoyance to the respondents, and include proceedings that are frivolous, and improper.[23]The purpose of Act 3 of 1956 was held by the Constitutional Court inBeinash and another v Ernest&Young and others[24]to be:

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The purpose of Act 3 of 1956 was held by the Constitutional Court in

Beinash and another v Ernest

Young and others

to be:

"This purpose is "to put a stop to persistent and ungrounded institution of legal proceedings". The Act does so by allowing a court to screen (as opposed to absolutely bar) a "person (who) has persistently and without any reasonable ground instituted legal proceedings in any Court or inferior court". This screening mechanism is necessary to protect at least two important interests. These are the interests of the victims of the vexatious litigant who have repeatedly been subjected to the costs, harassment and embarrassment of unmeritorious litigation; and the public interest that the functioning of the courts and the administration of justice proceed unimpeded by the clog of groundless proceedings."

[50]To obtain relief the respondents have to show that the applicants have persistently instituted legal proceedings and that those proceedings have been without reasonable ground.[25]

To obtain relief the respondents have to show that the applicants have persistently instituted legal proceedings and that those proceedings have been without reasonable ground.

[51]With regard to the first requirement it was never the case of the respondents that the applicants "persistently" instituted proceedings. It is common cause that only the main application was instituted by the applicants. True, the application was set down on various occasions, but it is still the same application which was instituted in the first place that is before the court today. In relation to the second ground, this court has held that the main application has been instituted with reasonable cause and that it should succeed.

With regard to the first requirement it was never the case of the respondents that the applicants "persistently" instituted proceedings. It is common cause that only the main application was instituted by the applicants. True, the application was set down on various occasions, but it is still the same application which was instituted in the first place that is before the court today. In relation to the second ground, this court has held that the main application has been instituted with reasonable cause and that it should succeed.

[52]The point was taken that the application was abandoned by the applicants. That too cannot be accepted. The applicants caused a notice of set down to be served after each occasion that the case did not make on to the roll. After the notice of set down for 15 June 2020 was served on the respondents on 21 February 2020, instituted and served the interlocutory application on 3 March 2020. The applicants never abandoned their application. If that was the position, the respondents should have set the application down and asked that it be dismissed for that reason with costs, to obtain finality. In the result the interlocutory application falls to be dismissed.

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[53]I now return to the question of costs. The affidavits filed in the interlocutory application shed useful light on the manner the parties treated the litigation.

I now return to the question of costs. The affidavits filed in the interlocutory application shed useful light on the manner the parties treated the litigation.

[54]I have decided to show my disapproval of the manner the parties conducted themselves in this application. I think it is fair that no costs order be made in respect of the main application. Each party must pay its own costs.

I have decided to show my disapproval of the manner the parties conducted themselves in this application. I think it is fair that no costs order be made in respect of the main application. Each party must pay its own costs.

[55]However, I am of the view that the interlocutory application, which is a disguised counter-application, is an abuse of the process of court. It was misconceived and doomed to failure from its conception. The respondents must pay the costs of the interlocutory application.

However, I am of the view that the interlocutory application, which is a disguised counter-application, is an abuse of the process of court. It was misconceived and doomed to failure from its conception. The respondents must pay the costs of the interlocutory application.

1.THE MAIN APPLICATION

THE MAIN APPLICATION

(a)The first respondent is ordered to make a decision envisaged by section 3(4) of the Limpopo Traditional Leadership and Institutions Act, Act 6 of 2005 in respect of the application for recognition by the BALEPYE community dated 16 June 2017, within a period of one (1) month from the date of service of this order on the State Attorney Polokwane.

The first respondent is ordered to make a decision envisaged by section 3(4) of the Limpopo Traditional Leadership and Institutions Act, Act 6 of 2005 in respect of the application for recognition by the BALEPYE community dated 16 June 2017, within a period of one (1) month from the date of service of this order on the State Attorney Polokwane.

(b) Each party to pay its own costs in respect of the main application.

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2. THE INTERLOCUTORY APPLICATION

THE INTERLOCUTORY APPLICATION

(a) The interlocutory application is dismissed.

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(b) The respondents are ordered to pay the costs of the interlocutory application jointly and severally, the one paying the other to be absolved.

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GC MULLER

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION: POLOKWANE

APPEARANCES

1. For the Applicant (main application)

: K Maleka

For the Applicant (main application)

: K Maleka

2. For the Respondents

: EK Tsatsi SC

For the Respondents

: EK Tsatsi SC

3. For Applicants (Interlocutory application) : EK Tsatsi SC

For Applicants (Interlocutory application) : EK Tsatsi SC

4. For Respondents

: PS Hopane

For Respondents

: PS Hopane

5.Date of hearing

: 17 June 2020

Date of hearing

: 17 June 2020

6.Date judgment delivered

: 25 June 2020

Date judgment delivered

: 25 June 2020

[1]Act 6 of 2005. Hereinafter "the Limpopo Act".

[2]The MEC: Department of Cooperative Governance human Resources and Traditional Affairs. The third respondent is the Ba-Phalaborwa Local Municipality. No relief was sought against the third respondent. The third respondent did not oppose the application and played no further part in the proceedings.

[3]Act 3 of 1956.

[4]Act 41 of 2003. Hereinafter "the Framework Act". Section 2(1) states: "A community may be recognised as a traditional

community if it-(a)is subject to a system of traditional leadership in terms of that community's customs; and(b)observes a system of customary law."

[4]Act 41 of 2003. Hereinafter "the Framework Act". Section 2(1) states: "A community may be recognised as a traditional

community if it-

(a)is subject to a system of traditional leadership in terms of that community's customs; and

(b)observes a system of customary law."

[5]The application must contain the particulars required and set out in section 3(2)(a) to (g).

[6]Section 3(1) of the Limpopo Act.

[7]Section 3(6) of the Limpopo Act.

[8]Preamble of the Framework Act and the Preamble of the Limpopo Act.

[9]" Empowering provision"means a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken;"

" Empowering provision"

[10]A decision in terms of PAJA means "any decision of an administrative nature made, proposed to be made, or required to be

made, as the case may be, under an empowering provision.

[11]Section 239 of the Constitution.

[12]Democratic Alliance v Ethekwini Municipality2012 (2) SA 151 (SCA

Democratic Alliance v Ethekwini Municipality

[13]Act 3 of 2000. Hereinafter "PAJA." PAJA states"Administrative action"means any decision taken, or any failure to take a decision by-(a) an organ of state, when-(i) exercising a power in terms of the Constitution or a provincial constitution; or(ii) exercising a public power or performing a public function in terms of legislation; or(b) which adversely effects the rights of any person and which has a direct, external legal effect.

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(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of legislation; or

(b) which adversely effects the rights of any person and which has a direct, external legal effect.

[14]The respondents at the hearing on 15 June 2020 handed up a replying affidavitex abundanti cautelaif the answering affidavit is allowed.

ex abundanti cautela

[15]The court was closed on 15 June 2020. Hence the applications were argued on 17 June 2020.

[16]Section 34 of the Constitution.

[17]Cassimjee v Minister of Finance2014 (3) SA 198(SCA) par 10-11. The court dealt with an action. There is no reason why the same principle cannot be applicable to motion proceedings.

Cassimjee v Minister of Finance

2014 (3) SA 198

[18]Pangbourne Properties Ltd v Pulse Moving CC and Another2013

(3) SA 140(GSJ) par 16-18.

Pangbourne Properties Ltd v Pulse Moving CC and Another

2013

(3) SA 140

[19]Section 173 of the Constitution.

[20]1977 (3) SA 534(A) 549F.

1977 (3) SA 534

[21]South Cape Corporation (Pty) v Engineering Management Services (Pty) Ltd supra550H-551A.

South Cape Corporation (Pty) v Engineering Management Services (Pty) Ltd supra

[22]1948 (1) SA 839 (A) 870.

[23]Fisheries Development Corporation ofSALtd v Jorgensen and Another; Fisheries Development Corporation ofSALtd v AWJ Investments (pty) Ltd and Others1979 (3) SA 13310N) 1339E-F,Bisset and Others v Boland Bank Ltd and Others1991

(4) SA 603(D) 6088 -E;Cohen v Cohen and Another2003 (1) SA 103(C) par 15.

Fisheries Development Corporation of

Ltd v Jorgensen and Another; Fisheries Development Corporation of

Ltd v AWJ Investments (pty) Ltd and Others

1979 (3) SA 1331

Bisset and Others v Boland Bank Ltd and Others

1991

(4) SA 603

Cohen v Cohen and Another

2003 (1) SA 103

[24]1999 (2) SA 116(CC) par 15.

1999 (2) SA 116

[25]Cohen v Cohen and Another suprapar 17.

Cohen v Cohen and Another supra

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