

SOUTH AFRICA / JUDGMENT

Mtirara and Others v Premier of the Eastern Cape Province and Others (3132/2021)

[2024] ZAECMHC 2 (23 January 2024)

[2024] ZAECMHC 2

COURT

Eastern Cape High Court, Mthatha

BEFORE

Laing

CASE / FILE NUMBER

3132/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, MTHATHA)

CASE

NO. 3132/2021

In

the matter between:

MNINAWA

MTIRARA

First

applicant

MFANTA

ROYAL FAMILY

Second

applicant

HALA

TRADITIONAL COUNCIL

Third

applicant

And

PREMIER

OF THE EASTERN CAPE PROVINCE

First

respondent

MEC

FOR CO-OPERATIVE GOVERNANCE AND

TRADITIONAL

AFFAIRS, EASTERN CAPE

PROVINCE
Second
respondent
CHAIRPERSON
OF THE HOUSE OF
TRADITIONAL
LEADERS, EASTERN CAPE
PROVINCE
Third
respondent
KING
DALIMVULA MATANZIMA
Fourth
respondent
NONESI
TRADITIONAL COUNCIL
Fifth
respondent
XOLILE
MZINGISI MFANTA
Sixth
respondent

JUDGMENT

LAING J

[1] This is an application pertaining to the leadership of the fifth respondent, i.e. the Nonesi Traditional Council. The applicants seek, inter alia, the review and setting aside of the first and second respondents' failure to decide an application for the removal of the sixth respondent as acting traditional leader of the Nonesi Traditional Council. They also seek recognition of the first applicant as its senior traditional leader, and the review and setting aside of the first and second respondents' refusal to grant such recognition.

[2] The background to the matter is set out below.

BACKGROUND

[3] The parties' respective cases are summarised in accordance with the corresponding sub-headings.

Applicants' case

[4] The first applicant alleges in his founding affidavit that he and his elder brother, the late Khandilizwe Mtirara, were sons from the great house of the late Manzezulu Mtirara, who had been the senior traditional leader for the Hala Traditional Council in the Lady Frere district. In 1967, the Hala Traditional Council was split to create the Nonesi Traditional Council to accommodate those communities situated far from the great place. Khandilizwe

Mtirara assumed the role of senior traditional leader for the Nonesi Traditional Council in 1989.

- [5] The first applicant's father, Manzezulu Mtirara, subsequently married a second wife, Noluntu Mtirara. This led to the creation of a right-hand house (ukunene), situated in the Cofimvaba district.
- [6] In 2002, Manzezulu Mtirara passed away. The Mfanta Royal Family (cited as the second applicant) thereupon decided that Khandilizwe Mtirara should succeed his father and become the senior traditional leader for the Hala Traditional Council. At the same time, the first applicant's half-brother, Bongisizwe Mtirara, from the right-hand house, was recognized as acting senior traditional leader for the Nonesi Traditional Council, despite its having been established, avers the first applicant, for the great house.
- [7] Khandilizwe Mtirara passed away in 2009. This resulted in the recognition of his eldest son, Nkosiphendule Mtirara, as the senior traditional leader for the Hala Traditional Council. Bongisizwe Mtirara passed away a couple of years later.
- [8] On 6 November 2011, the Mtirara Royal Family met to identify the sixth respondent as the acting senior traditional leader for the Nonesi Traditional Council. The first applicant denies, however, that he ever attended such a meeting and further denies that he ever signed a resolution to that effect. He also goes on to deny that the Mtirara Royal Family ever existed. Instead, he alleges that the Mfanta Royal Family met on 18 February 2012 to identify him, as the eldest surviving son of the late Manzezulu Mtirara, to be the senior traditional leader for the Nonesi Traditional Council. The family requested the second respondent ('the MEC') to accord the first applicant the necessary recognition.
- [9] The first applicant contends that it is customary amongst the abaThembu for the heirs of the right-hand house not to be appointed as senior traditional leader while any of the heirs of the great house are still alive. There was no basis for the decision taken by the Mtirara Royal Family.
- [10] This led to the Mfanta Royal Family's requesting the MEC to intervene and to protect the great house from the alleged abuses of the right-hand house. The family subsequently instructed attorneys to assist. To that effect, Smith Tabata Inc requested, on 21 November 2012, that the MEC withdraw recognition of the sixth respondent and recognise the first applicant as the senior traditional leader for the Nonesi Traditional Council. The first respondent ('the Premier') acknowledged the matter and assured the attorneys involved that it would receive attention.
- [11] The requests yielded no result, leading the first applicant to bring an application against the MEC, the Nonesi Traditional Council, and the sixth respondent. This was later withdrawn.

- [12] On 11 March 2021, says the first applicant, the Premier assured his new attorneys that the matter had been referred to the Department of Co-operative Governance and Traditional Affairs ('COGTA') for investigation. Nothing, however, came of this.
- [13] The first applicant attaches the affidavits of various members of the Mfanta Royal Family, confirming that the Nonesi Traditional Council was created for the great house, not the right-hand house.

Respondents' case

- [14] In their answering papers, the Premier and the MEC rely on the affidavit of a senior COGTA official, Zingisa Bokwe. He alleges that he is responsible for investigations into the recognition of traditional leaders in terms of the Traditional and Khoi-San Leadership Act 3 of 2019.
- [15] At the outset, the respondents aver that the first applicant has already brought two separate but identical applications, under case numbers 1730/2013 and 2022/2018, which he later withdrew. The facts and cause of action upon which the current application rests are the same as the earlier applications.
- [16] The respondents assert that, consequent to the passing of the late Khandilizwe Mtirara, the Mfanta Royal Family met on 13 March 2009, immediately after the funeral. The family identified the first applicant as acting senior traditional leader for the Hala Traditional Council, while the late Khandilizwe Mtirara's son, Nkosiphendule Mtirara, remained a minor. The first applicant subsequently refused to surrender his role as regent and laid claim to the position of senior traditional leader.
- [17] On 6 November 2011, the Mfanta Royal Family met at Ezibeleni after the passing of Bongisizwe Mtirara, who had been senior traditional leader for the Nonesi Traditional Council. The respondents state that the first applicant chaired the meeting, and the sixth respondent recorded it. Following heated discussion, the family identified the

sixth respondent as acting senior traditional leader for the Nonesi Traditional Council and regent to the late Bongisizwe Mtirara's

minor son, Sinovuyo Mtirara.

- [18] The Mfanta Royal Family then requested the MEC to recognise the sixth respondent. The resolution to that effect, say the respondents, incorrectly refers to the Mtirara Royal Family. The surnames, i.e. Mfanta and Mtirara, are used interchangeably, but both the Hala Traditional Council and the Nonesi Traditional Council fall under the administrative authority of an institution or structure known as the Mfanta Royal Family. They also point out that the first applicant is in possession of the original attendance register, minutes, and resolution, but has consistently refused to provide them with copies thereof.

[19] The respondents take issue with the first applicant's failure to attach a written resolution of the Mfanta Royal Family for the institution of legal proceedings. A supporting affidavit from Nkosiphendule Mtirara was insufficient. They also contend that the decision allegedly taken at a meeting of the Mfanta Royal Family on 18 February 2012 was attended, in the main, by the first applicant's immediate relations, i.e. his wife and children. It excluded numerous

senior traditional leaders who were members of the Mfanta Royal Family at the time.

Consequently, the decision allegedly taken to appoint the first applicant did not reflect the views of the majority. The respondents argue that it is contrary to the traditions

of the abaThembu for a younger son from the great house to seek to be made a senior traditional leader for the right-hand house. The Mfanta Royal Family has never confirmed the first applicant's allegations or attempted to rectify its earlier resolution to identify the sixth respondent.

[20] Overall, the respondents assert that the late Manzezulu Mtirara practised polygamy, which had led to the creation of a great house and a right-hand house. The latter exercised its authority through the Nonesi Traditional Council, for which the first applicant sought to be recognized as senior traditional leader, notwithstanding the custom that prevented an heir from the great house from attempting to do so. The Mfanta Royal Family could never have identified the first applicant as he has alleged; this would have been contrary to the traditions of the abaThembu.

[21] The respondents state that MM Holi Attorneys wrote to the Premier, on 6 October 2017, requesting the recognition of their client, the first applicant, as the senior traditional leader for the Nonesi Traditional Council. The MEC, on 14 November 2017, refused their request. The same attorneys subsequently demanded, on 9 March 2021, that the MEC reverse the recognition of the sixth respondent as acting senior traditional leader for the Nonesi Traditional Council.[1] To this, the MEC sent a strongly worded response, on 19 April 2021, confirming recognition of the sixth respondent, emphasising the customs involved, highlighting the flaws in the first applicant's reasoning, and pointing out that his various court challenges amounted to frivolous litigation.

[22] The sixth respondent added a supporting affidavit to the answering papers. He confirms that the Mfanta Royal Family met at Ezibeleni on 6 November 2011 after the passing of Bongisizwe Mtirara and identified the sixth respondent as acting senior traditional leader and regent. The acting king at the time, Gwazinamba Matanzima, explained that the first applicant was precluded from being appointed by reason of his being from the great house, not the right-hand house.

In reply

[23] The first applicant is adamant, in reply, that he never attended any meeting of the Mfanta Royal Family at which the sixth respondent was identified for recognition. The signature to the family resolution

was not his and was forged. Any decision in relation to the identification of the sixth respondent, alleges the first applicant,

was taken by a bogus institution or structure calling itself the Mtirara Royal Family. Such meeting as did take place on the date in question was that of the Dlomo clan, on the passing of one of their members.

[24] The primary issues for adjudication, contends the first applicant, are whether the Nonesi Traditional Council was created for the benefit of the right-hand house, and whether he has the right to lead it. This assertion is discussed below.

ISSUES

TO BE DECIDED

[25] Before the court can deal with the issues highlighted by the first applicant, it must address the plethora of points raised in limine by the respondents. Whereas many of the points were only raised in argument, the following emerge from the respondents' papers:

the MEC's decision, 14 November 2017, to refuse the first applicant's request for recognition remains in effect until

reviewed and set aside; the first applicant's reliance on section 6(2)(g) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') is misplaced because the MEC did, in fact, take a decision, both on the above date and on 19 April 2021; [2] the first applicant has delayed in launching his review application, contrary to section 7(1) of PAJA, and has failed to demonstrate why such delay should be condoned; there is no resolution from the Mfanta Royal Family that either identifies the first applicant as a senior traditional leader or that authorises the institution of these proceedings; and the first applicant has failed to exhaust the available internal remedies, as envisaged in terms of section 7(2) of PAJA.

[26] The first applicant later amended his notice of motion to include a prayer for the review and setting aside of the Premier and the MECs' decision to refuse his request for recognition. The amendment, in effect, addresses the first point, above, and forms the subject of the immediate application. Furthermore, it now seems to be common cause, in terms of both the answering and replying papers, that the MEC has, in fact, taken a decision to refuse the first applicant's request. [3] Whether this is the decision that ought to be reviewed and set aside or whether it should be the earlier decision to recognise the sixth respondent is something to be considered further, but it can safely be said that the first applicant no longer appears to depend on section 6(2)(g) of PAJA, as contended by the respondents under the second point, above.

[27] Consequently, the remaining points can conveniently be arranged as follows:

- (a) whether the first applicant is authorised to bring the present application; (b) whether he has exhausted all internal remedies; and (c) whether he has demonstrated a basis upon which to condone the procedural delay envisaged under section 7(1) of PAJA. If

the above hurdles can be cleared, then the merits of the matter can be considered, including the primary issues described by the first applicant. Before proceeding further, it is necessary to consider, briefly, the relevant legal principles involved.

LEGAL FRAMEWORK

- [28] The Traditional Leadership and Governance Framework Act 41 of 2003 ('the TLGFA') applied at the time that the sixth respondent was recognised as acting senior traditional leader. It also applied when the first applicant was so recognised, as he has alleged. The TLGFA provided for the identification and recognition of senior traditional leaders, regents, and persons acting as such. Furthermore, it set out, in terms of section 21, a dispute and claim resolution process whenever a dispute or a claim concerning customary law or tradition arose in relation to the implementation of the legislation in question. This involved several stages of resolution. An attempt had to be made to resolve the dispute or claim internally, failing which it had to be referred to the provincial house of traditional leaders, failing which it had to be referred to the Premier. If, at that stage, the dispute or claim had still not been resolved, then (and only then) it had to be referred to the Commission on Traditional Leadership Disputes and Claims ('the CTLDC'), as contemplated under section 22.
- [29] Similar provisions exist in the Eastern Cape Traditional Leadership and Governance Act 1 of 2017 ('the provincial Act'). Although it had not been enacted at the time that either the sixth respondent or the first applicant was recognised, as alleged, the provincial Act came into effect prior to the MEC's refusal of the first applicant's request and prior to the institution of the present proceedings.[4] A dispute resolution procedure is contained in section 36 thereof.
- [30] The Traditional and Khoi-San Leadership Act 3 of 2019 ('the national Act') was enacted with effect from 1 April 2021, also prior to the institution of the present proceedings. It repealed the

TLGFA but retains, in effect, the mechanisms created in terms thereof for the identification and recognition of senior traditional leaders, regents, and persons acting as such. Similarly, it retains a mechanism for dispute resolution, as apparent from section 59.

- [31] The above legislation comprises the framework for the matter at hand. The legal principles regarding the first applicant's procedural delay are well-known and shall be dealt with separately, below.

DISCUSSION

- [32] The issues to be decided shall be discussed in further detail under their respective sub-headings, as indicated.

Lack of authorisation

[33] The respondents' contention, as the court understands it, is that, firstly, the Mfanta Royal Family has never resolved to retract or withdraw its identification of the sixth respondent as the acting senior traditional leader for the Nonesi Traditional Council and regent to Sinovuyo Mtirara. Its decision of 6 November 2011 still stands. The first applicant has, secondly, failed to provide any evidence of a resolution taken by either the Mfanta Royal Family or the Hala Traditional Council to institute these proceedings.

[34] The absence of a clear resolution by the institutions or structures involved poses a formidable obstacle to the first applicant. Whereas he has attached the confirmatory and supporting affidavits of Sandi

Mtirara and Nkosiphendule Mtirara, respectively, purportedly to demonstrate the necessary authorisation, neither document takes the matter much further. Each begs the question. There is no indication at all that either Sandi Mtirara or Nkosiphendule Mtirara was, in turn, authorised by the family or the council to endorse or support the present application. No record of any meeting or collective decision to that effect has been provided. Interestingly, the first applicant chooses not to deal with the issue at all in reply.

[35] Consequently, there is merit in the respondents' point in limine. The lack of visible authorisation attracts, at the very least, the question of whether the Mfanta Royal Family and the Hala Traditional Council have indeed approved the institution of these proceedings. This may have a bearing on costs, to be addressed in due course.

Exhaustion of internal remedies

[36] The provisions of section 7(2) of PAJA stipulate that no court shall review an administrative action unless an internal remedy provided for in any other law has first been exhausted. If a court is not satisfied that an internal remedy has been exhausted, then it must direct the person concerned to exhaust the remedy in question before instituting review proceedings. The provisions allow a court to exempt such person from exhausting the remedy, in exceptional circumstances and on application by the person concerned, if deemed to be in the interests of justice.

[37] In academic commentary on the above provisions, JAvS d'Oliveira observes as follows:

'The underlying purpose of section 7 is to defer, and not exclude, judicial review of administrative action until an existing internal

(or domestic) remedy provided by "any other law" is utilised and those proceedings concluded. The phrase "any other law" in section 7(2)(a) refers to a law other than PAJA. Section 7(2) transforms the common law and is more stringent in its insistence that internal remedies be exhausted: first, section 7(2)(a) requires the court to direct the party concerned to first exhaust such remedy if he or she has not done so and, second, it empowers the court in its discretion to exempt the party concerned not only if it is in the interests of justice but also if exceptional

circumstances exist.’[5]

[38] As briefly considered previously, the applicable legal framework consists of legislation enacted to regulate traditional leadership within the context of the customary law and traditions of a community. The legislation in question, i.e. the TLGFA, the provincial Act, and (later) the national Act, all contain dispute resolution procedures that constitute internal remedies.

[39] It is apparent from the first applicant’s papers that his erstwhile attorneys, Smith Tabata Inc, referred the dispute to the provincial house of traditional leaders and subsequently the Premier, as contemplated under both the TLGFA and the provincial Act. Nevertheless, the last communication in that regard seems to have been a letter from COGTA to the attorneys in question, 8 February 2013, assuring them that the matter was receiving attention. There is no evidence that further steps were taken to pursue the available remedies prior to the first applicant’s institution of these proceedings on 8 July 2021. Inasmuch as he brought two applications before the High Court during the intervening period, it is not at all apparent whether and to what degree the first applicant made any bona fide effort in the eight years that passed since the last communication between his attorneys and COGTA to re-engage with the dispute

resolution procedures available.

[40] The court is not satisfied that the first applicant has properly explored and used up the internal remedies provided in terms of the applicable legal framework. No exceptional circumstances exist to permit the court to exempt the first applicant from doing so.

[41] It would be open to the court, at this stage, to direct the first applicant to exhaust the dispute resolution procedures indicated in the provincial Act, read with the national Act, before attempting to pursue the immediate proceedings. Before investigating this aspect further, however, it is necessary to consider the consider procedural delay incurred by the first applicant in bringing the present review application.

Procedural delay

[42] There are several aspects to this, to be dealt with separately.

Subject of the review proceedings

[43] The parties have focused on the MEC’s decision to refuse the first applicant’s request for recognition as the senior traditional leader for the Nonesi Traditional Council, as contained in COGTA’s letter to MM Holi Attorneys, 14 November 2017. It seems to be common cause that it is this decision that lies at the heart of the present review proceedings. When considered more closely, however, the basis for this is questionable.

[44] What appears to have been overlooked is the MEC’s earlier decision to recognize the sixth respondent, pursuant to a meeting of the Mfanta Royal Family at Ezibeleni on 6 November 2011. From the record filed by the respondents, it is evident that the MEC’s decision was

made on or about 14 March 2012. The first applicant has never disputed that such a decision was ever made. Instead, he has alleged, inter alia, that the meeting at which the sixth respondent was identified was that of the Dlomo clan, and that he was never present, saying further that the ensuing resolution was of a bogus institution or structure describing itself as the Mtirara Royal Family, and that his signature thereto was forged. Until reviewed and set aside, however, the MEC's earlier decision stands and must be given effect in accordance with the principles enunciated in *Oudekraal Estates (Pty) Ltd v City of Cape Town*.^[6] Any attempt to have the MEC's later decision reviewed and set aside will be meaningless without addressing the earlier decision.

Relevant legal principles

^[45] Irrespective of whether the earlier or the later decision forms the focus of these proceedings, the fact remains that the first applicant has brought the present application well outside the 180-day timeframe prescribed under section 7(1) of PAJA. This attracts the application of the now well-established case law in relation to procedural delay. The relevant principles were discussed in *Associated Institutions Pension Fund and others v Van Zyl and others*,^[7] where Brand JA remarked:

'It is a long-standing rule that courts have the power, as part of their inherent jurisdiction, to regulate their own proceedings, to refuse a review application if the aggrieved party had been guilty of unreasonable delay in initiating the proceedings. The effect is that, in a sense, delay would "validate" the invalid administrative action... The *raison d'être* of the rule is said to be twofold. First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Second, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions...

...The scope and content of the rule has been the subject of investigation in two decisions of this court. They are the *Wolgroei* case...^[8] and *Setsokeane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie en 'n ander*...^[9] As appears from these two cases and the numerous decisions in which they have been followed, application of the rule requires consideration of two questions:

- (a) Was there an unreasonable delay?
- (b) If so, should the delay in all the circumstances be condoned?

...The reasonableness or unreasonableness of a delay is entirely dependent on the facts and circumstances of any particular case.'^[10]

^[46] The above questions must, essentially, inform any enquiry into whether a procedural delay was unreasonable. They are rooted in our jurisprudence and are reflected in the most recent authorities that pertain to review proceedings under PAJA and associated delays.

[47] Regarding, specifically, the 180-day timeframe indicated in terms of section 7(1) of PAJA, the decision in *Opposition to Urban Tolling Alliance v South African National Roads Agency Limited* makes it clear that a delay that exceeds the above period is per se unreasonable.[11] A court cannot deal with any review proceedings unless the interests of justice require the granting of an application made for the extension of the period in question.

[48] The decision of the Constitutional Court in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* set out, expressly, the principles that apply when assessing delay.[12] The unreasonableness of a delay cannot be examined in a vacuum and a court must decide whether the delay ought nevertheless to be

overlooked. To that effect, the court must consider several factors:

(a) the potential prejudice to affected parties as well as the possible consequences of setting aside the impugned decision; (b) the nature of the impugned decision; and (c) the conduct of the applicant. Despite there being no basis upon which to overlook an unreasonable delay, the court may, nevertheless, be constitutionally

compelled to declare state conduct unlawful.[13]

[49] In the end, Asla and recent decisions invoke the two questions identified in *Associated Institutions Pension Fund*:

(a) was there an unreasonable delay; and (b) if so, should the delay in all the circumstances be condoned?[14] These must be applied to the facts of the present matter.

Condonation

[50] Based on the principles contained in *OUTA*, it must be accepted that the first applicant's delay is per se unreasonable. He now seeks condonation.

[51] For the respondents, any attempt to have the MEC's decision(s) set aside will affect a status quo that has already been in place for a period of nine years. The individuals, families, and communities involved have planned, adjusted to, and conducted themselves in accordance with the consequences of the recognition of the sixth respondent after his identification by the Mfanta Royal Family on 6 November 2011. The potential prejudice that will be caused if such recognition were to be reviewed and set aside is obvious. The likelihood that it would attract additional litigation is difficult to refute, resulting in further acrimony and communal instability.

[52] Regarding the nature of the decision itself, the first applicant's papers indicate that the MEC's later decision, 14 November 2017, is the focus of these proceedings. He has failed to deal, decisively and unequivocally, with the consequences of the possible review and setting aside of such decision when the MEC's earlier decision, recognising the sixth respondent, remains intact. The court has been left with the unfavourable impression that the first applicant has skirted the issue to avoid having to explain his refusal or failure to have challenged the earlier decision timeously (and head-on, so to speak), rather than via the

belated and indirect attempt made in terms of the present application.

[53] The respondents have, moreover, furnished a cogent and reasonable set of explanations for why the MEC's later decision was correct and in alignment with the applicable tenets of customary law and tradition. The first applicant, from the great house, cannot be a senior traditional leader for a traditional council that was established for the right-hand house. To the extent that the first applicant's case rests on the assertion that an heir from the right-hand house cannot be identified and recognised as a senior traditional leader while there is a surviving heir from the great house, in circumstances where the Nonesi Traditional Council was allegedly established for the latter, this cannot be resolved in his favour on the papers. The issues for adjudication that the first applicant outlined in reply, viz. whether the Nonesi Traditional Council was created for the benefit of the right-hand house, and whether he has the right to lead it, inevitably give rise to a factual dispute. The general rule must be applied. The court, in accordance with the principles laid down in, inter alia, *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd*,^[15] can only grant a final order on notice of motion if the facts as stated by the respondent, together with the facts alleged by the

applicant that are admitted by the respondent, justify such an order. The exception to this, as explained in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*,^[16] is:

'...where the court is satisfied that the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is so far-fetched or so clearly untenable or so palpably implausible as to warrant its rejection merely on the papers.'

[54] Such an exception does not emerge from the respondents' papers. If anything can be said in this regard, then it is the first applicant's allegations that fall to be rejected. His contention that he never attended the meeting of the Mfanta Royal Family on 6 November 2011 at which the sixth respondent was recognised, that the resultant resolution was produced by a bogus institution or structure, and that the signature thereon was not his, is a fanciful and entirely unconvincing attempt to deal with what seem to be inconvenient truths.

[55] The conduct of the first applicant cannot escape criticism. A fundamental consideration is his failure to have provided a proper explanation for the delay. At best, he has neglected to deal adequately with the period between the date of the MEC's later decision, 14 November 2017, and the date of the institution of these proceedings, 8 July 2021; at worst, he has refused to explain, carefully and transparently, what meaningful steps were taken in the nine years between the date of the MEC's earlier decision and the date of the present application. The first applicant was, at all pertinent times, legally represented; he cannot plead ignorance of what ought to have been done. The full details of any engagement with the respondents to resolve the dispute have not

been supplied. The contents of his earlier applications and reasons for why they were withdrawn have not been disclosed. The first

applicant has simply failed to take the court into his confidence.

[56] The cumulative effect of the above is that the court is far from persuaded that condonation for the first applicant's delay should be granted.

Relief and costs

[57] As already discussed, it is not at all clear that either the Mfanta Royal Family or the Hala Traditional Council authorised these proceedings. There is, moreover, no indication that the first applicant has exhausted the internal remedies available to him in accordance with the applicable legal framework. It is the first applicant's procedural delay, however, that presents an insurmountable hurdle to the granting of the relief that he seeks. That such delay was unreasonable is beyond dispute. For the reasons already provided, the court is not prepared to condone the delay. The application must be rejected.

[58] The only remaining issue is that of costs. In the absence of any unequivocal indication that either the Mfanta Royal Family or the Hala Traditional Council properly authorised the present application, the court is reluctant to impose a costs order against them. In relation to the first applicant, the general rule must be applied, viz. the respondents are entitled to their costs.

[59] In the circumstances, the following order is made:

- (a) the application is dismissed; and
- (b) the first applicant is directed to pay the costs of the first, second, and sixth respondents.

JGA LAING

JUDGE OF THE HIGH COURT

Appearances: For the applicants: Adv KD Qitsi SC Instructed by: MM Holi Attorneys Suite no's 125 & 127 ECDC Building Cnr York Road and Elliott Street Mthatha Ref: Mr MM Holi Email: mmholiattorneys@gmail.com Tel: 047 531 0190 / 081 801 7482 For the respondents: Adv LL Sambudla Instructed by: State Attorney Broadcast House 94 Sisson Street Fort Gale Mthatha Ref: Mr M Nqiwa (1274/21-A6N) Tel: 047 502 9900 Date of hearing: 19 October 2023 Date of judgment: 23 January 2024

[1] From the contents of MM Holi Attorneys' letter, 9 March 2021, it is apparent that they demanded that the MEC 'review and set aside' the decision to recognize the sixth respondent. This was clearly outside the MEC's powers.

[2] The provisions of section 6(2)(g) of PAJA grant a court the power to judicially review an administrative action if this consists of a failure to take a decision.

[3] COGTA clearly communicated the MEC's decision to refuse the first applicant's request to MM Holi Attorneys on 14 November 2017. It subsequently communicated confirmation thereof on 19 April 2021; this did not amount to a fresh decision.

- [4] The provincial Act commenced on 15 June 2017, the MEC refused the first applicant's request on 14 November 2017, and the first applicant launched his application on 8 July 2021.
- [5] JAvS d'Oliveira, 'Administrative Justice', in LAWSA (vol 2, 3ed, 2015), at para 62.
- [6] 2004
- (6) SA 222 (SCA); see, too, *Judicial Service Commission v Cape Bar Council* 2013 (1) SA 170 (SCA); and *Member of the Executive Council for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute* 2014 (3) SA 481 (CC).
- [7] [2004] 4 All SA 133 (SCA).
- [8] *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978
- (1) SA 13 (A).
- [9] 1986
- (2) SA 57 (A).
- [10] *Associated Institutions Pension Fund*, supra, at paragraphs [46] to [48].
- [11] [2013] 4 All SA 639 (SCA), also referred to as the OUTA case.
- [12] 2019
- (6) BCLR 661 (CC).
- [13] See the discussion in Asla,
- [44] to [72].
- [14] This seems to have been acknowledged by the Supreme Court of Appeal in *Commissioner for the South African Revenue Service v Sasol Chevron Holdings Limited* 2022 JDR 0978 (SCA).
- [15] 1957
- (4) SA 234 (C), at 235.
- [16]
- [1984] ZASCA 51; 1984
- (3) SA 623 (A), at 635C.

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