



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

Reportable

Case no: 2016/2022, 810/22, 1225/22, 2017/22

Date heard: 20/10/2022

Date delivered: 10/01/2023

In the matter between:

MAWETHU LAWRENCE SAZIWA

FIRST APPLICANT

THEMBISA MANKAYI

SECOND APPLICANT

NOSEBENZILE GQAGHA

THIRD APPLICANT

NOLINDILE LINAH & ANOTHER

FOURTH APPLICANT

and

MHLONTLO LOCAL MUNICIPALITY

FIRST RESPONDENT

THE MUNICIPAL MANAGER: MHLONTLO

MUNICIPALITY

SECOND RESPONDENT

**THE MEMBER OF THE EXECUTIVE COUNCIL FOR THE
DEPARTMENT OF HUMAN SETTLEMENTS, EC**

THIRD RESPONDENT

O R TAMBO DISTRICT MUNICIPALITY

FOURTH RESPONDENT

JUDGMENT

Notyesi AJ

Introduction

[1] The applicants instituted separate proceedings seeking orders declaring unlawful the respondents' failure to provide them with temporary emergency accommodation subsequent to an alleged disaster which occurred on 8 February 2022 within the first respondent's jurisdictional area.

[2] The applications were consolidated on 19 April 2022 and, henceforth, proceeded as one application under case number 2016/2022 now being considered by this court.

[3] The applicants allege that on 8 February 2022, a hurricane swept through the first respondent's area causing destruction and collapse of their residential places, and resulting in them being displaced, rendered homeless and without shelters over their heads. The applicants contended that the incident was a natural disaster that falls within the ambit of the Disaster Management Act.¹

[4] As a result of this disaster, the applicants vacated their homes together with their children and other family members and sought accommodation from neighbours and extended families. According to the applicants, they reported the incident to their respective ward councillors who are members of the first respondent's council.

[5] After the disaster, the applicants sought assistance from the first respondent, to no avail. The first respondent is cited by the applicants on the basis that it is statutorily bound to, *inter alia*, prepare a disaster management plan for its area according to the prevailing circumstances; to make contingency plans and emergency procedures in the event of a disaster; and to provide prompt response and relief to the residents of its area in the event of a disaster. The second respondent has been cited on the basis that he is the head of the administration for the Municipality and, as such, is under a duty to assist the applicants on behalf of the first respondent. The third respondent is sued on the basis that the Department of Human Settlements of which he is political head has a duty to facilitate the creation of sustainable human settlement, to improve the quality of households and to implement housing and

¹ 57 of 2002.

sanitation programmes. The fourth respondent is sued on the basis that it is bound to establish and implement a framework for disaster management in the district Municipality aimed at ensuring an integrated and uniform approach to disaster management in its area. According to the applicants, the fourth respondent must consult the local municipalities and establish disaster management centres within the local municipalities and, finally, assist local municipalities and its residents in the event of a disaster affecting a local or district municipality.

[6] The applicants seek to hold the respondents constitutionally bound to provide them with temporary accommodation in the form of shelter or temporary structures or dwellings. According to the applicants, the respondents failed to act in terms of the Disaster Management Act and therefore breached their constitutional obligations.

[7] These proceedings are founded on section 6(2)(g) of PAJA² and the principle of legality.

[8] The respondents oppose the application on several grounds.

- 8.1 first, they contend that there was no disaster within the jurisdiction of the first respondent on 8 February 2022 or any other date as alleged by the applicants;
- 8.2 second, a state of disaster must be declared in accordance with the provisions of the Disaster Management Act and that, in this instance, there was no such declaration;
- 8.3 third, the first respondent can only act in terms of the empowering provisions and that there is no provision enjoining the first respondent to provide temporary accommodation or shelter; and
- 8.4 finally, and insofar as the applicants rely on the provisions of PAJA, that the applicants have failed to exhaust internal remedies.

² Promotion of Administrative Justice Act 3 of 2000. A court or tribunal has the power to judicially review an administrative action consisting of a failure to take a decision.

[9] Based on these grounds, the respondents contend that the applicants are not entitled to the relief sought under PAJA and no case made under the legality review.

[10] The third and fourth respondents submitted that there is no case made against them at all and that they have no legal duty to provide temporary accommodation for the applicants. In other words, the third and fourth respondents contend that the applicants have no cause of action against them in law.

[11] This Court must resolve the issues whether -

11.1 the applicants have a duty to exhaust internal remedies;

11.2 the applicants are entitled to any form of relief under PAJA or under the principle of legality; and

11.3 a case has been made against the third and fourth respondents.

The applicants' case

[12] The applicants contend, in the main, that the incident of disaster and the applicants' plight was reported to ward councillors who, in turn, had to report the incident of disaster to the first respondent. The applicants had also requested their councillors to ask for emergency temporary accommodation. The ward councillors had undertaken that they would liaise with the first respondent and revert to the applicants.

[13] After a long passage of time, without any response, the applicants again approached the ward councillors to enquire about the complaint and request. The ward councillor indicated that the first respondent would not provide any assistance for them. The applicants were not given reasons for the first respondent's decision. They were not even advised about the identity of the person who took the decision to decline their request for assistance.

[14] Unhappy with the first respondent's decision, the applicants solicited the assistance of their legal representatives. On 11 February 2022, the legal representatives addressed a letter to the first respondent. In the letter, the first respondent was given until 14 February 2022 within which to consider the application and respond. The relevant passage from the letter reads:

‘ . . .

6. On 8 February 2022 one side of her mud house got dismantled as a result of a hurricane which hit her locality.
7. As a result of the dismantling aforesaid she now resides in the one side remaining room of her mud house aforesaid.
8. The remaining inhabitable side of the mud house poses threat to her life and that of her three children as it may collapse on any day. In addition, there is power supply onto the premises which itself poses risk to the inhabitants of the mud house should the house again collapse on account of inclement weather.
9. Subsequent the demolition of her house she approached the local councillor urging that he liaise with the municipality and urge it to come to her rescue which did not yield any positive results. She also visited the municipal offices but was thrown from pillar to post with no clear direction being given to her at all. . .’

[15] The first respondent responded to the letter on 14 February 2022 and the relevant part of the response reads:

‘ . . .

Our client has indicated that it is not responsible for building houses for rural communities, and as such your letter should have been directed to the Provincial relevant department; as you have indicated that the matter needs to be investigated, our client undertakes to investigate without being responsible thereof.

Such investigation shall be done based on Ubuntu and ‘if no report is received by yourself on or before 30th March 2022, please be advised that your client is free to approach any courts for whatever relief she deems necessary, and our office shall defend such action/application vigorously. . .’

[16] On 15 February 2022, another letter was addressed by the applicants to the first respondent. For the reasons that will become apparent later, I quote from the letter:

‘We refer to your letter of 14 February 2022 and we note the contents thereof with dismay.

Firstly, in circumstances of disaster the local municipality bears the responsibility to afford the affected persons emergency housing so as to protect the subjects constitutional right to shelter. Secondly, expecting the affected person to live without adequate shelter for a period

of over thirty days whilst the municipality conducts the investigation is rather heartless and cannot be allowed in this constitutional dispensation premised on the advancement of human rights.

In the premises, we afford you until close of business on Wednesday 16 February 2022 within which to liaise with your client and come back with the relevant answer on whether the municipality will urgently afford our client the desired shelter or not. Should you either fail to revert as aforesaid or come with unreasonable suggestions we will urgently approach court for the relief.

We await hearing from you in writing as of urgency.'

[17] The first respondent replied on the same day and the response read:

' . . . Our client re-iterates that it is not responsible for building RDP houses, and this mandate is carried by the Provincial Government, hence you directed your previous letter to them. Our client simply collects the data for the people who needs houses and forwards this information to the Department of Human Settlement for building. Even the contract (*sic*) of RDP houses is not appointed by our client at all. . . '

[18] There was further exchange of correspondence. Pursuant to such exchange, the applicants' attorneys launched four separate applications on diverse dates during March 2022. Case number 2016/2022 was launched on 7 March 2022. Case number 2017/2022 was launched on 7 March 2022. Case number 810/2022 was launched on 18 March 2022. Case number 1225/2022 was launched on 18 March 2022.

[19] In addition to the declaratory relief already mentioned, the applicants seek a *mandamus* directing the respondents to provide such temporary accommodations.

The first and second respondents' case

[20] The first and second respondents dispute that there was a disaster on 8 February 2022. They contend that the council never declared a disaster. In the absence of a council declaration of disaster, the first respondent cannot be directed to act in terms of the Disaster Management Act. In such circumstances, the relief sought by the applicants cannot be granted. The first respondent maintained that in circumstances where there was a hurricane, as opposed to normal rainfall or even a storm, the first respondent would have been aware on its own. In terms of the Disaster Management Act, for an incident to qualify as a disaster, it must conform within the

definition of a disaster and usually a disaster would affect a large area. According to the weather forecast during February 2022, there was no hurricane reported within the area of jurisdiction of the first respondent.

[21] In addition to the above contentions, the first and second respondents had requested time until 30 March 2022 to investigate the allegations of the applicants regarding the incident of a hurricane. That request was declined by the applicants' legal representatives. Again, on 7 March 2022, the first respondent informed the applicants that:

'We confirm our telephonic conversation of today, the 7th March 2022, between our Mr Mtshabe and your Mr Mhlawuli; and we write to inform your office that our client has indicated that in order to assist your client, and your potential clients, if any, it is imperative that it [our client], be supplied with the names and identity numbers of your client(s). Thereafter ours will verify if your(s) did apply to be deemed or are indeed homeless; and under which project(s) do they qualify for assistance, if any.

Upon the application by the deemed or homeless individuals, our client will communicate with the Department of Human Settlement along with the OR Tambo District Municipality for the necessary assistance towards your client(s). This process does not take a day or two because of the unnecessary administrative logistics. Our client has informed us that they do not supply even temporary structures at all as they do not have the budget for this; theirs is to collect data and forward it to the necessary Department for processing. . . '

[22] According to the first and second respondents, the information requested was necessary for the investigation of the applicants' case. The applicants, without furnishing the information, launched the application without responding to the correspondence nor furnishing the details of the alleged disaster. On this basis, the first respondent contends that the institution of the proceedings was premature and the applicants failed to exhaust the internal remedies.

Third respondents' case

[23] According to the third respondent, it has no function for providing temporary emergency accommodation and no responsibility to declare a state of disaster. The function of declaring a state of disaster and providing temporary emergency accommodation is the responsibility of the municipality. According to the third

respondent, the Provincial Government only becomes involved if there is an application received from the local municipality requesting assistance during the state of a declared disaster.

[24] The third respondent never received any application from the first respondent and the third respondent was never made aware of any disaster nor was the third respondent made aware of the first respondent's financial position in dealing with such a disaster. On this basis, the third respondent could not legally intervene. The third respondent, therefore, submits that there is no case made by the applicants against the Department of Human Settlements.

Fourth respondent's case

[25] The fourth respondent disputed that there was a disaster as alleged by the applicants. The fourth respondent contended that the function of providing housing is a concurrent function of the National and Provincial Government and that it has not been accredited to provide houses. On this basis, in the event of a disaster, the fourth respondent does not have authority to exercise powers and functions of other spheres of government. The function of the fourth respondent is limited to co-ordination and management of local disasters that occurred within its jurisdiction.

[26] In order for the fourth respondent to co-ordinate and manage disasters, it must be furnished with information by the local municipality and in this case, the fourth respondent was never informed about any disaster within the jurisdiction of the first respondent and thus was never aware that there was a disaster. In these circumstances, the fourth respondent contended that there is no case made by the applicants against it. The Municipal Manager of the fourth respondent, who deposed to an affidavit, disputed that in the O R Tambo area there was a disaster during the month of February 2022. He confirmed to have verified from the website of weather forecast and there was no evidence about the alleged hurricane on 8 February 2022.

Legal framework

[27] In terms of the Disaster Management Act:

“disaster” means a progressive or sudden, widespread or localised, natural or human-caused occurrence which—

- (a) causes or threatens to cause–
 - (i) death, injury or disease;
 - (ii) damage to property, infrastructure or the environment; or
 - (iii) disruption of the life of a community; and
- (b) is of a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources’

[28] Section 23 of the Disaster Management Act deals with classification and recording of disasters and reads:

- ‘(1) When a disastrous event occurs or threatens to occur, the National Centre must, for the purpose of the proper application of this Act, determine whether the event should be regarded as a disaster in terms of this Act, and if so, the National Centre must immediately–
 - (a) assess the magnitude and severity or potential magnitude and severity of the disaster;
 - (b) classify the disaster as a local, provincial or national disaster in accordance with subsections (4), (5) and (6); and
 - (c) record the prescribed particulars concerning the disaster in the prescribed register.

...

- (3) The National Centre may reclassify a disaster classified in terms of subsection (1)(b) as a local, provincial or national disaster at any time after consultation with the relevant provincial or municipal disaster management centres, if the magnitude and severity or potential magnitude and severity of the disaster is greater or lesser than the initial assessment.
 - (a) it affects a single metropolitan, district or local municipality only; and
 - (b) the municipality concerned, or, if it is a district or local municipality, that municipality either alone or with the assistance of local municipalities in the area of the district municipality is able to deal with it effectively.

...

- (5) A disaster is a provincial disaster if–
 - (a) it affects–

- (i) more than one metropolitan or district municipality in the same province;
 - (ii) a single metropolitan or district municipality in the province and that metropolitan municipality, or that district municipality with the assistance of the local municipalities within its area, is unable to deal with it effectively; or
 - (iii) a cross-boundary municipality in respect of which only one province exercises executive authority as envisaged by section 90(3)(a) of the Local Government : Municipal Structures Act, 1998 (Act 117 of 1998); and
- (b) the province concerned is able to deal with it effectively.
- (6) A disaster is a national disaster if it affects–
 - (a) more than one province; or
 - (b) a single province which is unable to deal with it effectively.
- (7) Until a disaster is classified in terms of this section, the disaster must be regarded as a local disaster.
- (8) The classification of a disaster in terms of this section designates primary responsibility to a particular sphere of government for the co-ordination and management of the disaster, but an organ of state in another sphere may assist the sphere having primary responsibility to deal with the disaster and its consequences.'

[29] Section 55(1) of the Disaster Management Act deals with the declaration of the local state of disaster:

'In the event of a local disaster, the council or a municipality having primary responsibility for the co-ordination and management of the disaster may, by notice in the provincial gazette, declare a local state of disaster if–

- (a) existing legislation and contingency arrangements do not adequately provide for that municipality to deal effectively with the disaster; or
- (b) other special circumstances warrant the declaration of a local state of disaster.'

[30] In terms of section 55(2), if a local state of disaster has been declared in terms of subsection (1), the municipal council concerned may, subject to subsection (3), make by-laws or issue directions, or authorise the issue of directions, concerning:

- ‘(a) the release of any available resources of the municipality, including stores, equipment, vehicles and facilities;
- (b) the release of personnel of the municipality for the rendering of emergency services;
- (c) the implementation of all or any of the provisions of a municipal disaster management plan that are applicable in the circumstances;
- (d) the evacuation to temporary shelters of all or part of the population from the disaster-stricken or threatened area if such action is necessary for the preservation of life;
- (e) the regulation of traffic to, from or within the disaster-stricken or threatened area;
- (f) the regulation of the movement of persons and goods to, from or within the disaster-stricken or threatened area;
- (g) the control and occupancy of premises in the disaster-stricken or threatened area;
- (h) the provision, control or use of temporary emergency accommodation;
- (i) the suspension or limiting of the sale, dispensing or transportation of alcoholic beverages in the disaster-stricken or threatened area;
- (j) the maintenance or installation of temporary lines of communication to, from or within the disaster area;
- (k) the dissemination of information required for dealing with the disaster;
- (l) emergency procurement procedures;
- (m) the facilitation of response and post-disaster recovery and rehabilitation; or
- (n) other steps that may be necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster.’

[31] Section 6 of PAJA deals with judicial review of administrative action. Section 6(2)(g) deals with a situation that under the common law would have attracted the remedy known as a *mandamus*. This is an order requiring a public authority to

comply with a statutory duty imposed on it or to perform some act to remedy a state of affairs brought about as a result of its own unlawful administrative action. As with the common law *mandamus*, section 6(2)(g) of PAJA deals with the failure by an administrator to take a decision that the administrator is under a legal obligation to take.³

[32] In *Thusi v Minister of Home Affairs and Others*,⁴ Wallis J held:

‘Where s6(2)(g) is invoked and a mandatory order is claimed by way of consequential relief the applicant must demonstrate that the administrator concerned is under a duty to perform the act in question and has failed to do so. This was also the case with a common law *mandamus*. In *Moll v Civil Commissioner of Paarl*, De Villiers CJ said about this form of relief:

“The wide power possessed by the Court under our law of interdicting illegal acts implies the power, as pointed out in *New Gordon Co v Du Toitspan Mining Board* (9 Juta, 154), of compelling the performance of a specific duty, at all events on the part of a public officer, by mandatory interdict or other form of “mandament.” It also implies the power of correcting an illegality committed by such public officer, so long as it is capable of correction, if the rights of an individual are infringed by such illegality. But it is obvious that relief will not be given where such rights are of a doubtful nature, or where the public officer has acted in the exercise of a discretion left to him, but only where the existence and continued infringement of an absolute legal right have been clearly established.’

When dealing with the appropriate consequential relief in such a case Greenberg J (as he then was) said:

“... prima facie, as the proceedings are based on a complaint that the statutory body has withheld from the aggrieved party the right given to him by statute, it would seem that the more appropriate remedy is to order that he be given that to which he was entitled and which had been withheld; in the present case the applicant’s cause of action is not that they were entitled to a certificate, but to a proper hearing and exercise of discretion – and prima facie the court should grant them what has been withheld . . .”

³ *Thusi v Minister of Home Affairs and Others* [2010] ZAKZPHC 87; 2011 (2) SA 561 (KZP) para 42.

⁴ *Ibid* para 43.

I think that these statements of principle are equally applicable to a review under s6(2)(g) of PAJA.’

[33] PAJA is the statutory framework of the constitutional right to just administrative action, that is, administrative action that is lawful, reasonable and procedurally fair. Section 7(2)(a) of PAJA provides that subject to paragraph (c), no court or tribunal shall review an administrative action in terms of PAJA unless internal remedies provided for in any other law has first been exhausted.

[34] Section 62 of the Local Government: Municipal Systems Act 32 of 2000 (Systems Act) deals with internal appeals in the municipality and provides that a person whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or sub-delegated to the political structure, political office bearer, councillor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision. Subsections (2), (3) and (4) of the Systems Act deals with the procedure to deal with the appeal and the appropriate forums to hear the appeals.

[35] The cause of action chosen by the applicants under PAJA is predicated on the provisions of section 6(2)(g) and the first respondent is relying upon section 7(2)(a) of PAJA as a ground to oppose the relief.

[36] Insofar as the applicants rely on the principle of legality, in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*,⁵ O’Regan J held:

‘The Courts’ power to review administrative action no longer flows directly from the common law, but from PAJA and the Constitution itself. The grundnorm of administrative law is now to be found in the first place not in the doctrine of ultra vires, nor in the doctrine of parliamentary sovereignty, nor in the common law itself, but in the principles of our Constitution. The common law informs the provisions of PAJA and the Constitution, and derives its force from the latter. The extent to which the common law remains relevant to administrative law review will have

⁵ *Bato Star Fishing (Pty) Ltd v Minister of Environment Affairs* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) para 22. See also Cora Hoexter *Administrative Law in South Africa* 2 ed (2011) at 118-119.

to be developed on a case-by-case basis as the Courts interpret and apply the provisions of PAJA and the Constitution.'

[37] In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*⁶ Chaskalson J stated:

'It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that fundamental to the interim Constitution is a principle of legality.'

[38] Section 1(c) of the Constitution provides that the Republic of South Africa is founded on the Supremacy of the Constitution and the rule of law. The principle of legality is an incident of the rule of law.

[39] On these principles, I now turn to address the submissions by the parties.

Whether the applicants have a duty to exhaust internal remedies

[40] Mr *Mtshabe*, counsel for the first and second respondents, contended that insofar as the applicants rely on the provisions of PAJA for their review, they have a duty to exhaust internal remedies. In this regard, Mr *Mtshabe* submitted that first respondent disputes that there was a disaster within the first respondent's area on 8 February 2022. Furthermore, the first respondent requested information from the applicants in order to conduct investigations in relation to the details of the alleged disaster.

[41] Mr *Mtshabe* contended that the proceedings were instituted by the applicants on 7 March 2022 without them providing a response to the first respondent's letters. Consequently, the proceedings were instituted prematurely and on this basis, the relief sought by the applicants should be refused. Mr *Mtshabe*, in this regard, relied on the provisions of section 7(2)(a) which provides that, subject to paragraph (c), no court or

⁶ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 para 58.

tribunal shall review an administrative action in terms of this act unless any internal remedies has been exhausted. Paragraph (c) deals with exemption to exhaust internal remedies. In these proceedings, the applicants have not asked for exemption from complying with the provisions of PAJA. According to Mr *Mtshabe*, the applicants were obliged to appeal the decision, if any, regarding their application for assistance in terms of section 62 of the System's Act. On the applicants' failure to appeal the decision and that of failing to afford the first respondent an opportunity to investigate the disputed incident, Mr *Mtshabe* submitted that that was a failure to exhaust internal remedies and that the matter had been brought before court prematurely.

[42] Mr *Matotie*, counsel for the applicants, had put to counter the submissions by Mr *Mtshabe*. Mr *Matotie* contended that the court should take into account that this was an emergency situation and that the applicants are ordinary persons who seek to assert their constitutional rights. He contended that the first respondent has a constitutional obligation to provide shelter for the applicants in circumstances of a disaster. Mr *Matotie* pointed out that the applicants were rendered homeless as a result of the disaster and that is what the court should consider rather than rejecting the relief sought by the applicants on technicalities. I disagree with this submission that Mr *Mtshabe's* contentions amount to a mere technicality.

[43] The difficulty that I have with Mr *Matotie's* submissions is that in the letter of 14 February 2022, the first respondent indicated that the matter would be investigated and that such investigation would be concluded by 30 March 2022. It also bears mentioning that prior to the applicants approaching legal representatives, there was no evidence that the administration of the first respondent was informed about the alleged disaster. Reporting to the ward councillors is not sufficient evidence and there is no proof that such report indeed, was made to the ward councillors. The ward councillors are not identified by the applicants. Whilst the applicants suggest that they approached the officials of the first respondent, there are no details in this regard. There is paucity of information regarding the person(s) within the administration who were approached by the applicants. The applicants also failed to give dates regarding the meeting with the ward councillors or municipal officials. Absent proof that there was a disaster, in my view, presents serious challenges for the municipality to invoke the provisions of the Disaster Management Act. It should also be borne in mind that

the Disaster Management Act only confers a discretion to the municipal council to provide resources within its budget. That would require an investigation of the incident and a decision that, indeed, the incident amounts to a disaster as defined in the Act.

[44] Not every natural incident such as rainfall or thunderstorms or other similar occurrences would qualify in terms of the Act to be categorised as a disaster. The simple reason is that a disaster is qualified in the Act:

“disaster” means a progressive or sudden, widespread or localised, natural or human-caused occurrence which—

- (a) causes or threatens to cause—
 - (i) death, injury or disease;
 - (ii) damage to property, infrastructure or the environment; or
 - (iii) disruption of the life of a community; and
- (b) is of a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources.’

[45] My other difficulty with the applicants’ case is that the first respondent’s letter of 7 March 2022 had called for a response from the applicants before instituting these proceedings. The applicants did not provide the information which would have enabled the first respondent to investigate the circumstances of the alleged disaster. I do not understand the reason why ward councillors would not have been aware of the disaster in their respective areas, if indeed, it had occurred. I have no doubt in my mind that the first respondent was correct for insisting on the investigation of the allegations about a disaster in these circumstances.

[46] In my view, therefore, the applicants were obliged to exhaust the internal remedies as that would have enabled the first respondent to investigate the truthfulness about the occurrence of the disaster. If I were to accept the applicants’ submissions in this regard, that would lead to untenable consequences of allowing every individual whose property had been allegedly destroyed as a result of natural causes, to approach the court on the basis that such an isolated occurrence was a disaster. The first respondent was entitled to investigate the allegations of the

applicants and, where necessary, invoke the Disaster Management Act if it is shown that there was indeed a disaster as envisaged in the Act. The rush by the applicants in launching the application had a potential to deprive the first respondent of such a rational cause of action in the circumstances of this case.

[47] Most significantly, the applicants have never attempted to approach the administration of the first respondent. The applicants merely rely on the alleged statements made by their unidentified ward councillors to the effect that the request for emergency shelters was denied by the first respondent. There is no affidavit filed by the alleged councillors and they are not identified. The applicants have also failed to divulge the details of the person within the first respondent's governance structures that has refused the request for emergency shelters. The first respondent has both the legislative and executive functions. The municipal manager is the head of administration. There is no allegation that the municipal manager of the first respondent was made aware of the alleged disaster. This is another shortcoming in the applicants' case. The disaster is declared in terms of the Disaster Management Act by the council of the municipality. In terms of the System's Act, the speaker of the council is the chairperson. He, too, ought to have been informed and he was not, on the evidence provided by the applicants. The applicants had a duty to prove that the council was aware that a disaster had occurred within the jurisdiction of the first respondent.

[48] In these circumstances, I agree with Mr *Mtshabe* that the applicants' case was brought before this Court prematurely and that the applicants have failed to comply with the provisions of PAJA and that they are not entitled to any relief under PAJA.

Whether the applicants are entitled to any form of relief under PAJA or legality review

[49] Mr *Matotie* further contended that the applicants are also relying on the provisions of section 1(c) of the Constitution. In this regard, Mr *Matotie* submitted that the principle of legality provides a general justification for the review of the exercise of public power and operates as a residual source of review. I agree with this principle of our law. However, in this case, it remains to be seen whether the applicants have made out a case under legality review.

[50] In circumstances where the applicants invoke a legality review, as is the case here, it remains for this court to consider whether the applicants have made out a case for a declaration that they are eligible to obtain emergency temporary shelters, dwellings or structures pursuant to a disaster that had occurred on 8 February 2022. In order for the court to grant the relief sought by the applicants, it seems to me that the first question is to determine whether there was a disaster on 8 February 2022 and that the respondents have failed to discharge their constitutional obligations in this regard. For the reason that the applicants had based their case on the provisions of the Disaster Management Act, they must prove their case in that regard. The applicants must prove that the respondents have breached their statutory obligations arising from the Disaster Management Act.

[51] The Executive and Legislature in every sphere of Government is constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. In this case, the complaint is that the first respondent is bound in terms of the Disaster Management Act to provide temporary accommodation to the applicants because a disaster had occurred which rendered the applicants homeless or without shelter. Mr *Matotie* contended that the failure by the first respondent to implement their statutory obligations in terms of the Disaster Management Act is illegal and reviewable under the principle of legality. I disagree with the submissions for the simple reason that the first respondent can only act in terms of the empowering provisions of the Disaster Management Act. The applicants failed to prove that there was a disaster and in such instances, no obligations for the respondents arise from the Disaster Management Act.

[52] Section 55 of the Disaster Management Act empowers the council to declare a state of disaster. Once the state of disaster has been declared, sub-section (2) of section 55 confers a discretion upon the first respondent to issue directions, or authorise the issue of directions, concerning the evacuation of persons to temporary shelters of all or part of the population from the disaster-stricken or threatened area, if action is necessary, for the preservation of life; to direct for the provision, control or use of temporary emergency accommodation; and most importantly; direct for the release of any available resources of the municipality including stores, equipment, vehicles and facilities.

[53] In my view, the relief envisaged under section 55(2) of the Disaster Management Act can only be implemented once the council has declared a state of local disaster. In the present case, the state of local disaster was not declared. The council was never informed about any disaster. The occurrence of a hurricane is disputed by the respondents. The applicants have not produced any evidence to substantiate the allegations of a disaster or hurricane within the jurisdiction of the first respondent. Mr *Matotie* drew my attention to some photographs which are attached to the applicants' founding papers. I find no value in those photographs for the reason that it is not clear when they were taken and the identity of the person who took the photographs and for what purpose. On the disputed facts, I accept the version of the respondents and, therefore, find that there was no hurricane which caused a disaster.

[54] It is important to also highlight that section 23 of the Disaster Management Act deals with the classification and recording of disasters. The disaster relied upon by the applicants in these proceedings has never been classified. It is put into dispute that there was a disaster within the jurisdiction of the first respondent during the period alleged by the applicants. Whilst section 23(7) proclaims that until a disaster is classified in terms of the section, such disaster must be regarded as a local disaster, however, it must first be determined that there was a disaster. In terms of section 54, a municipality has responsibilities which include co-ordination and management of a local disaster. In this case, the first respondent was not informed about any disaster within its jurisdiction. The applicants are not seeking an order to compel the first respondent to declare a state of disaster.

[55] For these reasons, the applicants have failed to make out a case under the legality review and, as such, are not entitled to any relief.

Whether a case has been made against the third and fourth respondents

[56] The third and fourth respondents contend that there was no case made against them in view of the fact that they were not even aware of the alleged hurricane. The third respondent submitted that it is only responsible for the provision of housing and that there is a process for the provision of those houses. The third respondent indicated that it is not responsible for the provision of temporary accommodation and that is a sphere of the local municipality. The contention by Mr *Sintwa*, counsel for the

third respondent, was that the third respondent is guided by the Constitution, the Housing Act 107 of 1997 and the Code of the Housing Act. In this instance, there are no allegations that the third respondent has violated any of those provisions.

[57] Mr *Mgidlana*, who appeared for the fourth respondent, made similar submissions that no case was made against the fourth respondent in that the fourth respondent only acts on information received from local municipalities. The function of the fourth respondent is the co-ordination and management of disasters and that the fourth respondent had no obligations to provide emergency accommodation. There was no contrary submission from the applicant's camp, counsel for the applicants.

[58] Mr *Matotie* correctly conceded that, indeed, there is no case made against both the third and fourth respondents. In my view, the concession was properly made on behalf of the applicants.

[59] I agree with both Mr *Sintwa* and Mr *Mgidlana* that no case has been made against the third and fourth respondents. The third and fourth respondents were improperly joined in these proceedings and no cause of action was established against them.

Costs

[60] The application was frivolous in its nature. It was unreasonable for the applicants to launch the application, notwithstanding the undertaking by the first respondent to investigate the allegations about a disaster. I found no evidence that the officials of the first respondent were notified about the alleged disaster. On a proper consideration of the application, it is an abuse of court process. The third and fourth respondents were sued for no valid reasons and they have incurred costs to defend the application.

[61] Initially, I held a view that the principles regarding costs in public litigation as set out in *Harrierlall v University of KwaZulu Natal*⁷ and *Affordable Medicines Trust &*

⁷ *Harrierlall v University of KwaZulu Natal* [2017] ZACC 38; 2018 (1) BCLR 12 (CC).

*Others v Minister of Health and Others*⁸ and *Biowatch*,⁹ should be applicable. On a proper scrutiny of the papers, this litigation was not *bona fide*. The applicants should pay the costs to discourage frivolous litigation.

Conclusion

[62] For all these reasons, the applicants' application must fail with the applicants to pay the costs of litigation. I am not convinced that the applicants should benefit from the principles applicable to public litigations. Public litigation should be genuine and *bona fide* before a losing party should escape payment of costs and this is not the appropriate case.

Order

[63] In the results, I make the following order:

1. The applicants' application is dismissed with costs and such costs to include, where applicable, the employment of two counsel.

M NOTYESI

ACTING JUDGE OF THE HIGH COURT

⁸ *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3; 2006(3) SA 247 (CC); 2005 (6) BCLR 529 (CC) para 138.

⁹ *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14; 2009 (10) BCLR 1014 (CC); 2009 (6) SA232 (CC).

Appearances

Counsel for the applicants	:	<i>Mr Matotie (together with Ms Nyobole and Ms Nqabeni)</i>
Attorneys for the applicants	:	S R Mhlawuli & Associates Mthatha
Counsel for the 1 st & 2 nd respondents	:	<i>Mr Mtshabe SC (together with Ms Mxotwa)</i>
Attorneys for the 1 st & 2 nd respondents	:	N Z Mtshabe Incorporated Mthatha
Counsel for the 3 rd respondent	:	<i>Mr Sintwa</i>
Attorneys for the 3 rd respondent	:	The State Attorney Mthatha
Counsel for the 4 th respondent	:	<i>Mr Mgidlana</i>
Attorneys for the 4 th respondent	:	K B Mabanga Incorporated Mthatha