

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: HCAA14/2020

(1)	REPORTABLE: NO/YES
(2)	OF INTEREST TO OTHER JUDGES: NO/YES
(3)	REVISED.
.....	
DATE	SIGNATURE

In the matter between

HEADMAN ENOS MATOME KOBE

MORUKHU MATOME ALFRED

PHALA NOTME SIMON

KGATLA MASHILO PHILLIP

KUBU NGOAKO ABRAM

LEBOGO MOLOKO COURTLY

LEKWARA MATLOU ALBERT

MAILULA KOLOBE PATRICK

MANAKA NHLODI SAMUEL

MABOYA MKGODI WILSON

MALEKA NTOME DALTON

FIRST APPELLANT

SECOND APPELLANT

THIRD APPELLANT

FOURTH APPELLANT

FIFTH APPELLANT

SIXTH APPELLANT

SEVENTH APPELLANT

EIGHT APPELLANT

NINTH APPELLANT

TENTH APPELLANT

ELEVENTH APPELLANT

MONEYA MADJADJI
THELEDI MANTASE JACOB

TWELVETH APPELLANT
THIRTEENTH APPELLANT

AND

KGOSHI NGOAKO ISSAC LEBOGO
BAHANANWA TRADITIONAL COUNCIL
PREMIER LIMPOPO
MEC OF COGHSTA
CHAIRPERSON OF LIMPOPO
HOUSE OF TRADITIONAL LEADERS

FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT
FIFTH RESPONDENT

JUDGMENT

KGANYAGO J.

- [1] The appellants and/or their predecessors were the recognised headmen/women of various villages which fell under the authority of senior traditional leaders Kgoshi Matome Wilson Lebogo who died in 1979, Kgoshi Matee Collin Lebogo who died in 1999, Kgoshi Ben Seraki Lebogo who died in 2005, and Kgoshi Tlabo Joseph Lebogo whose senior traditional leadership was set aside by the Pretoria High Court on 28th January 2011. Subsequent to the setting aside of the recognition of Kgoshi Tlabo Joseph Lebogo as a senior traditional leader, the Premier of Limpopo (third

respondent) terminated the recognition of Tlabo Joseph Lebogo and issued a certificate of recognition as a senior traditional leader to Kgoshi Ngoako Issac Lebogo (first respondent) with effect from 29th April 2011.

- [2] The appellants avers that after the setting aside of the recognition of Tlabo Joseph Lebogo as a senior traditional leader, and following the recognition of the first respondent as a senior traditional leader by the third respondent, the first respondent started purging all headmen/women whom he labelled as being loyal to Tlabo Joseph Lebogo. The appellants realized that there were new headmen/women who were taking over their responsibilities. On realizing that, on 30th April 2011 the appellants went to the tribal office to enquire about their positions, but the first respondent and members of the second respondent chased them away telling them that they have lost their case in the High Court and that the community does not recognise them as headmen/women. The first respondent even called the police to remove them by force and were also told never to lay foot in the tribal office anymore.
- [3] During July and August 2011 whenever the appellants went to the tribal office to sign pay rolls, the first respondent and his council members denied them access. The appellants lodged a complaint

with the fourth respondent who promised to look into their matter. On 15th September 2011 the appellants received copies of the minutes and resolutions taken by the second respondent at a meeting held on 9th September 2011. At that meeting the chairperson of the second respondent told those attending the meeting that the headmen who were working with Tlabo Lebogo cannot be trusted and that the second respondent had already written a letter to the fourth respondent requesting it to suspend all the salaries of the headmen who were supporting Tlabo Lebogo during their legal battle. The purpose of suspending their salaries was to eliminate them.

- [4] After receipt of the minutes and resolution of the meeting, the appellants were approached by the task team of the first respondent who informed them to stop interfering with the newly identified headmen/women. The appellants approached the third and fourth respondents to try and resolve their matter without success. On 12th April 2012 the first appellant obtained an order in the Pretoria High Court against the first respondent wherein the first respondent was ordered to reinstate him as a headman with all the benefits. The appellants submit that the first respondent never implemented this order.

- [5] According to the appellants, during August 2013 their salaries were not paid, and when they complained to the district manager they were told that it was a mistake and that their salaries will be paid the following month. During September 2013 the appellants received an interdict order from magistrate Bochum obtained by the first respondent on urgent basis wherein the appellants were interdicted to act as headmen/women.
- [6] During March and April 2014 the fourth respondent delegated a task team to investigate whether the first respondent had followed proper procedures in removing the appellants from their positions, and also whether customs and procedures were followed in identifying the new headmen/women. All the affected parties were invited to a meeting which was held at the tribal offices. At the end of the meeting the fourth respondent promised them that the report of its findings will be made within three months. However, that never materialized, and each time the appellants enquired about the report, they were informed that the report was with the office of the third respondent.
- [7] On 27th June 2015 the appellants attended a meeting which was arranged by the chairperson of the traditional council. The purpose of that meeting was to reconcile the two factions of the community. At that meeting the appellants learnt that the third respondent had

removed them as headmen/women and had recognised new headmen/woman.

[8] On 13th July 2015 the appellants and other headmen made a representation to the third respondent that he internally review and nullify his decision to terminate the appellants recognition as headmen/women. On 5th August 2015 the appellants wrote a follow-up letter to the third respondent about the progress of their representation. The third respondent replied them per his letter dated 13th August 2015 informing them that their representation has been forwarded to the relevant person, and that they will be informed about the progress.

[9] The fourth respondent arranged a meeting with the appellants which was held on 17th November 2015, and in that meeting the third and fourth respondents were represented by Mr Lekganyane. In that meeting it was agreed that the other headmen/women who had already instituted their review applications in the High Court must instruct their attorneys to put their matters on hold to enable the third respondent to resolve the matter amicably. The ten headmen who had already launched their applications in the High Court instructed their attorneys to put their applications on hold.

[10] On 19th July 2016 the appellants attended a meeting arranged by Kgoshi Mathebe (advisor to third respondent), advocate Rammutla (legal advisor to third respondent), and Mr Mohlala (director and anthropologist). In that meeting the internal review and the memorandum of complaints were discussed. At the end of the meeting it was agreed that Kgoshi Mathebe will have an urgent meeting with the third, fourth and fifth respondent wherein the appellants' dispute will be discussed; that Kgoshi Mathebe at that meeting will recommend that the appellants' matter be reopened for investigation, and that the appellants were free to call Kgoshi Mathebe about the progress of their matter.

[11] On 15th November 2016 the appellants held a meeting with the fourth respondent, and at that meeting the fourth respondent was represented by Mr Mohlala. In that meeting the issues that were discussed were that the appellants were not given reasons why their salaries as headmen/women were stopped; why the third respondent terminated the appellants' recognition as headmen/women without following proper procedures; and that the second respondent should at its own meeting take a resolution in determining which issues should receive preference. According to the appellants, on 19th November 2016 the appellants and the second respondent held a meeting wherein it was resolved that the

third respondent should continue to resolve the issues of the headmen/women as a matter of urgency.

[12] On 21st February 2017 the appellants, second respondent, third respondent and fourth respondent held a meeting. In that meeting it was resolved that the court order of reinstating the first appellant under case number 69730/2011 be implemented as a matter of extreme urgency, and that the fifth respondent release a report of the investigations conducted during 2014 by the committee of customs and traditions led by Kgoshi Sekororo and Kgoshi Kibi Lebogo, which report will guide the third respondent regarding the appellants' disputes.

[13] During July 2017 the appellants received an invitation that all headmen/women should combine their representation and make one representation about their dispute before the chairperson and the executive of the Provincial House of Traditional Leaders on 20th July 2017. The appellants complied with the invitation. After their presentation, the appellants allege that they were informed by the chairperson of the executive committee that the first respondent had already made his representation, and that he was told that he did not have the authority to remove the headmen in terms of section 13 of the Limpopo Traditional Leadership Act 6 of 2005. The appellants aver that at that presentation, the executive

committee had assured them that they will be reinstated as headmen/women as a matter of urgency, and further that they will be paid all their outstanding salaries from the date the third respondent had unlawfully removed them. The appellants further aver that they were promised by the executive committee that they will be provided with the written report before the end of the year of 2017. They did not receive the report as promised.

[14] Seeing that the report was not forthcoming, during February 2018 the appellants sent their delegates to the House of Traditional Leaders to enquire about the report. Their delegates were advised that the report has been sent to the third respondent for implementation. When the delegates enquired from advocate Rammutla about the report, he told them that the report never reached the third respondent's office. According to the appellants from February 2018 to September 2018 they were taken from pillar to post about the report.

[15] According to the appellants it was during September 2018 that they felt that they have exhausted all the internal remedies and took a decision to embark on a legal route. The appellants launched their review application on 11th February 2019. In their review application they are seeking orders for condonation for late filing of their review application; that the decision taken by the third

respondent to remove them or their predecessors as headmen/women be reviewed and set aside; and that they be reinstated to their positions with full back-pay without any loss of benefits.

[16] The appellants grounds of review are that the third respondent when he took the decision to remove the appellants as headmen/women did not follow procedures for misconduct as laid down in Schedule 2, Part B, and item 2 of Act 6 of 2005; that the third respondent when he took decision to remove the appellants did not follow the provisions of section 13 of the Limpopo Traditional Leadership and Institutions Act 6 of 2005; that first and second respondents have replaced the appellants with other persons who are not even members of the appellants royal families; and that some of them are not even members of the appellants respective communities; that the first respondent or first respondent's royal family is not a proper customary structure to remove the appellants as headmen/women; and that the respondents took the decision to remove the appellants without informing them, and also without giving them an opportunity to make representations.

[17] On receipt of the record filed by the respondents regarding the basis of their decision to remove the appellants as

headmen/women, the appellants filed a supplementary affidavit. In the supplementary affidavit the appellants dispute receiving a letter dated 24th February 2012 which was allegedly from the first respondent informing the appellants of his intention to apply to the third respondent for an approval and decision to remove them as headmen/women. In that letter the appellants are invited to make representation before the Bahananwa Royal Family on 17th March 2012 at 10h00. The said letter was allegedly served by the sheriff on one Gilbert Lebogo-Leader on 10th March 2012 on behalf of all the appellants. The appellants state that Gilbert is not a headman, and not an employee in the tribal office. The appellants further submit that had they been served with that letter, they would have appeared before the royal family and community on 17th March 2012 and make their representation. The appellants also dispute the correctness of the contents of that letter.

- [18] The appellants further submit that according to the resolution of the Bahananwa Royal Senior Council taken at the meeting of the 17th March 2012 and signed by the first respondent and other members of the royal family, the first respondent was supposed to have notified all affected headmen/women of their intention to be removed. The appellants alleges that the first respondent never notified them about that resolution. The appellants further submit

that the senior royal family was not a proper structure to remove them as headmen/women, and that it was their respective royal families which should have done so.

[19] The first and second respondents in their opposing answering affidavit have raised four points in limine. The first point in limine being that of undue delay by the appellants in bringing the review application; second one being that of non-joinder of Bahananwa royal family; third one that of non-joinder of so-called village royal family; and the fourth one that of misjoinder of the fourth, sixth and thirteenth appellants.

[20] The first and second respondents in their answering affidavit have submitted that the protracted legal battle between the first respondent and Tlabo has created division between some royal family and headmen/women within first respondent's area of jurisdiction. According to the first and second respondents, Gilbert Malebogo is a member of the royal family and he supported Tlabo, and that the headmen/women who supported Tlabo viewed Gilbert as their leader, and second in command to Tlabo.

[21] The first and second respondents aver that after the inauguration of the first respondent as senior traditional leader during April 2011, the first respondent made several attempts to unify his

subjects. According to the first and second respondents, some of his subjects did welcome his reconciliatory efforts, and were reinstated to their former positions as headmen/women. However, those who supported Tlabo and Gilbert did not embrace his reconciliatory efforts, and even refused to turn up for meetings, and also to come and sign the payroll. That on 19th January 2012 the first respondent wrote a letter to the third and fourth respondents notifying them that the appellants did not come to sign the payroll due to their allegiance to Tlabo whom they regard as their leader.

- [22] The first and second respondents aver that the senior royal family took a resolution that the headmen/women who have rejected the first respondent's reconciliatory efforts did not display any allegiance to the traditional authority, were in transgression of their customary rules and principles through their conduct, and were persistent in their negligent non-performance of their duties as headmen/women, ought to be relieved of their duties as headmen/women. That the headmen/women who were identified for removal were invited by both the senior royal family and second respondent on numerous occasions to attend meetings but, they failed to honour the invitations. That the royal family of the first

respondent even formed a task team to try and reach out to those who still showed their allegiance to Tlabo without success.

[23] The first and second respondents alleges that after these efforts of trying to reconcile with those who support Tlabo had failed, they wrote a final letter to the appellants which was served by the sheriff of the court on Gilbert Lebogo on 10th March 2012. According to the first and second respondents, on 10th March 2012 the sheriff went to the homestead of the late Seraki Ben Lebogo whose residence was used by the appellants as their offices/workplace with the intention to serve the letters on the appellants. On arrival at Seraki's homestead, the sheriff was met by Gilbert. Gilbert informed the sheriff that he will receive the letters addressed to the headmen/women and will make sure that each of them receive those letters.

[24] The first and second respondents aver that on 17th March 2012 the Bahananwa Royal Family took a resolution that the appellants be removed from their positions as headmen/women since appellants have failed to come and make representations despite being duly notified. Thereafter the royal family waited for a year before they sent their resolution to the third respondent. According to the first and second respondents, the reason why they waited for a year before they sent their resolution to the third respondent was that

they hoped that the appellants will come forward and reconcile with the first respondent. Seeing that the appellants were not coming forward, on 29th March 2013 the royal family informed the third respondent of their decision to remove the appellants as headmen/women.

- [25] The third to fifth respondents have raised three points in limine in their opposing answering affidavit. Their points in limine are that of abuse of the court processes, res judicata and lack of locus standi. On the merits of the application, the third to fourth respondents submitted that a headman is never born, but identified and appointed by the senior traditional leader and the royal family concerned, and can therefore be changed from one family to another in terms of the customs and practices of Bahananwa traditional community. The third to fifth respondents avers that the appellants during their tenure as headmen/women, were found guilty of certain offences and misconduct by first and second respondents that resulted in them being relieved of their responsibilities as headmen/women. The third to fifth respondents submit that according to their records, the appellants were given an opportunity to state their case by the first and second respondents before their removal.

- [26] When this matter came before MG Phatudi J, despite the points in limine raised by the respondents, the parties agreed to argue the merits of the application. MG Phatudi J dismissed the appellants' application for condonation for late launching of their review application, and also dismissed the application for review and setting aside of the decision of the third respondent to remove the appellants or their predecessors as headmen/women.
- [27] The appellants are appealing the whole judgment and order of MG Phatudi J, and the appeal is with the leave of the Supreme Court of Appeal. The appellants' grounds of appeal are that the court a quo erred in refusing to grant the appellants condonation for late filing of their review application; and further that the court a quo erred in dismissing the appellants' application notwithstanding the fact that the removal of the appellants as headmen was not done in accordance with section 13 of the Limpopo Traditional Leadership and Institutions Act 6 of 2005.
- [28] The issues which this court is required to determine are whether the court a quo was correct in refusing to grant the appellants condonation for late filing of their review application, and also in dismissing the appellants' review application. The other question is whether a condonation application was necessary in this application.

[29] The main factor for consideration whether to grant condonation for the late filing of the appellant's application is whether it is in the interest of justice to do so. In **Van Wyk v Unitas Hospital**¹ the Court said:

"This court has held that the standard for considering an application for condonation is the interest of justice. Whether it is in the interest of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success."

[30] The appellants have brought their review application in terms of Rule 53 of the Uniform Rules of Court (the Rules) and section 6 of **Promotion of Administrative Justice Act**² (PAJA). Section 7(1) and (2) of PAJA read as follows:

"(1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after date-

(a) Subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or

¹ 2008 (2) SA 472 (CC) at para 20

² 3 of 2000

(b) Where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and reasons for it or might reasonably have been expected to have become aware of the action and reasons.

(2)(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

(b) Subject to paragraph (c), no court or tribunal must, if not satisfied that any remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.”

[31] According to the first and second respondents, Bahananwa royal family took a resolution on 17th March 2012 to remove the appellants as headmen/women. However, there is no proof that the appellants were notified of that resolution immediately after it was taken. The first and second respondents notified the third respondent about that resolution a year later on 29th March 2013. The third respondent took a decision to remove the appellants as headmen/women on

29th July 2013. There is no proof that the third respondent at any stage brought its decision to the attention of the appellants.

[32] Before the third respondent took a resolution to remove the appellants as headmen/women, the appellants had already initiated a process of trying to resolve their dispute with first and second respondents by engaging the third and fourth respondents. Even after the appellants' salaries were stopped during August 2013, the appellants continued trying to resolve the matter internally. Whilst this process of trying to resolve the matter internally was unfolding, other headmen instituted their review applications. However, there was an agreement between Mr Lekganyane representing third and fourth respondents that those review applications be held in abeyance to give that process of resolving their dispute internally to run its course. That led to a meeting that was held 21st February 2017 where the appellants made their presentations to a committee formed by the third and fourth respondents to resolve the appellants dispute.

[33] At the end of the appellants' presentation, the appellants were promised to receive the outcome of that investigation before the end of year of 2017. The appellants waited for the outcome until September 2018, and seeing that nothing was forthcoming, the appellants felt that they have exhausted all internal remedies and

took a decision to go the legal route. The appellants' review application was instituted on 11th February 2019.

[34] It was never disputed by the respondents that during 2016 there was an agreement between the appellants and Mr Lekganyane representing both third and fourth respondents that the review applications of other headmen be held in abeyance pending the finalisation of the internal remedies the parties have embarked on. The meeting of the executive committee of the 21st February 2017 was never disputed by the respondents. The respondents also did not dispute the appellants' version that they never received the outcome of the meeting of 21st February 2017. In my view, this matter dragged for a long time as a result of the parties trying to resolve the matter internally. In terms of section 7(2)(a) of PAJA any party who intends to review an administrative action must first exhaust internal remedies. In terms of section 21(1) of the **Traditional Leadership and Governance Act**³ which is a national legislation which provides for traditional leadership as an institution at local level on matters affecting local communities, disputes concerning customary law or customs between the traditional communities must first be resolved internally in accordance with customs or claim.

³ Act 41 of 2003

[35] In **Netshimbupfe and Another v Carthcart and Others**⁴ Mothle

AJA in the majority judgment at para 18 said:

“The legislative framework in my view is couched in terms which expect parties to a dispute which arise out of customary law, custom or processes, to first turn to the statutory processes provided for in legislation, before approaching courts. This view finds support in the Framework Act and court precedents. Section 21(1) of the Framework Act, dealing with disputes and claim resolution, provides that the parties to the dispute or claim must seek to resolve the dispute internally and in accordance with customs before such dispute or claim may be referred to the Commission’ (my emphasis). Section 21(2) (a) of the same Act also refers to the house of traditional leaders being obliged to resolve the dispute or claim in accordance with its internal rules and procedures (my emphasis).”

[36] All these years the parties were trying to resolve the matter internally. It was only in September 2018 that the appellants felt that they have exhausted all the internal remedies. When the appellants instituted their review application on 11th February 2019, it was still within the 180 days as stipulated in section 7(1) of PAJA. Therefore, there was no need for the appellants to have brought a condonation application for late filing of their review application.

[37] Even if the appellants were required to bring a condonation application, the interest of justice would have required the granting

⁴ [2018] ZASCA; 2018 3 ALL SA 397 (SCA) (4 June 2018)

of condonation of the appellants late filing of their review application. This is a sensitive matter that has divided the communities on which the first and second respondents had to exercise authority. It is a dispute which should be resolved on its merits even if the outcome of it will not satisfy everybody, for the matter to be laid to rest once and for all. The court a quo correctly pointed out that matters of this nature should be approached with caution because of the impact it has on the lives of the people. The court a quo went on to state that it will make an order to resolve the matter and that reasons for the order will follow.

[38] The reasons for the court a quo to refuse the appellants' condonation application appears in the judgment for leave to appeal. From the judgment of leave to appeal, the court a quo only considered one factor which is the degree of lateness. The court a quo took into consideration that the decision which the appellants are seeking to review was taken during July 2013 which was six years down the line. What the court a quo overlooked was firstly, there was no evidence as to when this decision to remove the appellants was brought to the attention of the appellants for them to be aware of it. Secondly, there were other headmen who instituted review proceedings, but there was an agreement to hold those review proceedings in abeyance in order to give the parties an opportunity

to exhaust their internal remedies. The court a quo therefore did not give any weight to the internal remedies that the parties have embarked on. Thirdly, the court a quo did not deal with the explanation for the delay, prospects of success and the prejudice which the appellants might suffer as a result of the refusal of their condonation application. In my view, the court a quo erred in refusing to grant the appellants condonation for late filing of their review application, whilst in actual fact it was not even necessary for them to have brought a condonation application.

[39] Turning to merits, the first issue to be determined is whether the appellants were given a fair hearing before the first and second respondents notified the third respondent to remove them as headmen/women. The audi-alteram partem rule is a fundamental principle of our law which is enshrined in our constitution. Section 33(1) and (2) of **The Constitution of the Republic of South Africa Act**⁵ read as follows:

- “(1) Everyone has a right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.”

⁵ 108 of 1996

[38] In **South African Roads Boards v Johannesburg City Council**⁶

Milne JA said:

“For the audi principle applies where the authority exercising the power is obliged to consider the particular circumstances of the individual affected. Its application has a two-fold effect. It satisfies the individual’s desire to be heard before he is adversely affected; and it provides an opportunity for the repository of the power to acquire information which may be pertinent to the just and proper exercise of the power.”

[40] The first and second respondents in discharging their duties are performing a public function, and therefore their action amount to an administrative action. A party to an administrative action inquiry must be afforded an opportunity to state his/her case, if such a decision is likely to affect his/her rights. The administrative decision that is prejudicial must be communicated to the affected party to enable that party to rebut such facts.

[41] The appellants were accused by the first and second respondents of not having an allegiance to the first respondent, and the first and second respondents wanted the appellants to give reasons why they should not be removed as headmen/women. It was clear that any adverse decision to be taken against the appellants in relation to these accusations was going to affect their rights and also

⁶ 1991 (4) SA 1 (A) at 13B-C

prejudicial to them. According to the first and second respondents, the appellants were served with notification letters on the 10th March 2012 to attend a hearing which was set down on 17th March 2012. The purpose of that hearing was to give the appellants an opportunity to make representations before the traditional council as to why they should not be removed as headmen/women. According to the sheriff's return of service, the appellants' letters were served on one Gilbert Lebogo. It is the first and second respondents' contention that Gilbert has informed the sheriff that he will receive the letters on behalf of the appellants and that he will make sure that each of them receive those letters. The appellants deny receipt of those letters.

[42] The question is whether the manner in which the appellants were served can be regarded as proper service. According to the first and second respondents, the sheriff was going to serve the letters to the appellants at the house of the late Seraki Ben Lebogo, which house the appellants were using as their office/workplace. The appellants before their removal were headmen/women from various villages, of which each village will have its own traditional office wherein these headmen/women will conduct their usual day to day business. At this stage they were not yet removed as headmen/women. Therefore, their offices would have been their

respective traditional offices. Service of any documents should have been effected at their homesteads or workplaces.

[43] This was a personal matter wherein the status of each headman/woman was going to be decided, and it was therefore vital to have effected personal service on each headman/woman. There is no evidence that Gilbert served the documents on the appellants, except for sheriff in his affidavit alleges that Gilbert told him that he will receive those letters on behalf of the appellants. The appellants aver that their place of employment was Bahananwa tribal offices and that Gilbert was not employed there. In my view, the manner in which the appellants were served with the letters to attend their hearing was not proper. The appellants aver that had they received their notifications, they would have attended the hearing and made their representations. They were denied that opportunity as a result of the manner in which service of the letters was effected on them. In my view, the procedure that the first and second respondents have followed in dealing with the appellants' issues was procedurally unfair, and has offended the provisions of section 33(1) of the Constitution.

[44] The first and second respondents have convened a meeting on 9th September 2011. Those who have attended that meeting, were informed by the chairperson of the second respondent that they

had already written a letter to the fourth respondent to suspend the salaries for all headmen who did not support the first respondent so that they could eliminate them. The newly identified headmen were assured that their positions were safe. It was known that those who did not support the first respondent were the appellants. A decision to eliminate the appellants was taken even prior to the 17th March 2012. Even if the appellants have attended that hearing and make their representations on 17th March 2012, it would not have served any purpose as that hearing was not meant to acquire information which may be pertinent for the first and second respondents to exercise their powers in a just and proper manner. The purpose of that hearing was a mere formality to remove them. In my view, with that preconceived decision, the appellants would not have received a fair hearing even if they had attended it.

[45] The decision of the 17th March 2012 had adversely affected the appellants, however, the first and second respondents did not notify the appellants and also give the appellants written reasons for that decision before transmitting that decision to the third respondent for implementation, despite the decision been taken in the absentia of the appellants. The appellants realised that they were no longer headmen/women at a meeting of the 27th June 2015, two years after the decision, and also without any notification and reasons

for that. The first and second respondents have therefore offended the provisions of section 33(2) of the Constitution in failing to give the appellants written reasons for their decision of the 17th March 2012.

[46] The appellants' successors were identified by the royal family of the senior traditional leader. The procedure for recognising a headman/woman is regulated by section 12 of the **Limpopo Traditional Leadership and Institution Act⁷ (LTLTA)** which read as follows:

“(1) Whenever a position of a senior traditional leader, headman or headwoman is to be filled-

(a) The royal family concerned must, within a reasonable time after the need arises for any of the positions to be filled, and with due regard to the customary law of the traditional community concerned-

- (i) Identify a person who qualifies in terms of customary law of the traditional community concerned to assume the position in question; and
- (ii) Through the relevant customary structure of the traditional community concerned and after notifying the traditional council, inform the Premier of the particulars of the person so identified to fill the position and of the reasons for the identification of the specific person.

(b) The Premier must, subject to subsection (2)-

⁷ 6 of 2005

- (i) By notice in the Gazette recognise the person so identified by the royal family in accordance with paragraph (a) as senior traditional leader, headman or headwoman, as the case may be;
 - (ii) Issue a certificate of recognition to the person so recognised; and
 - (iii) Inform the provincial house of traditional leaders and the relevant local house of traditional leaders of the recognition of a senior traditional, headman or headwoman.
- (2) Where there is evidence or allegation that the identification of a person referred to in subsection (1) was not in accordance with customary law, customs or processes, the Premier-
- (a) may refer the matter to the provincial house of traditional leaders and the relevant local house of traditional leaders for their recommendations; or
 - (b) may refuse to issue a certificate of recognition; and
 - (c) must refer the matter back to the royal family for consideration and resolution where the certificate of recognition has been refused.
- (3) Where the matter which has been referred back to the royal family for reconsideration and resolution in terms of subsection (2) has been reconsidered and resolved, the Premier must recognise the person identified by the royal family if the Premier is satisfied that the reconsideration and resolution by the royal family has been in accordance with customary law.”

[47] What follows is whether the royal family of the first and second respondents which is the royal family of the senior traditional leader, had the powers to identify the successor of the appellants. In

terms of section 1 of the LTLTA a headman/woman is under the authority of or exercises authority within the area of jurisdiction of a senior traditional leader. When the appellants were still headmen/women, they therefore fell under the authority of the first respondent. As I have already pointed out in paragraph 46 above, the successors to the appellants have been identified by the royal family of the first respondent.

[48] The LTLTA is silent as to which royal family between that of the senior traditional leader and headmen/women has the authority and powers to identify a successor to the headman/woman. The royal family plays a pivotal role in the identification of senior traditional leader and headman. In the case of identifying a senior traditional leader, there are no complications since it is only one royal family involved. With regard to the headman/woman, the question is which royal family has the power and authority to identify a successor of a headman/woman since the headman/woman is under the authority or exercises authority within the area of jurisdiction of a senior traditional leader. Since the senior traditional leader is having authority over the headman/woman, does that mean that the senior traditional leader has the authority and power to unilaterally identify the successor and impose him/her to the royal family of the headman/woman.

[49] The LTLTA recognizes the establishment of a royal family for senior traditional leader and that of headman/woman. If it was the intention of the legislature of the LTLTA that the royal family of the headman/woman plays a lesser role, it would have clearly stated that, and the limited role which it was supposed to play. In my view, the royal family of the senior traditional leader will be responsible for the identification of a successor to a senior traditional leader, whilst that of the headman/woman will be responsible for the identification of the successor of the headman/woman. (See **Tshibvumo Royal Family and Another v Rambuda and Others**⁸. It therefore follows that the successors to the appellants' positions were not properly identified and recognised. The appellants' successors were even identified by the first and second respondents before the 9th September 2011, before the appellants could be given an opportunity to make representations. Had this issue of identification of the appellants' successors been left to the appellants' royal family, this situation would not have arisen.

[50] As per memorandum dated 29th March 2012, which was a representation by the first and second respondents to the third respondent for the removal of the appellants as headmen/women, at the hearing of the 27th March 2012 the appellants were found

⁸ [2020] ZALMPHC 9 (9 October 2020) in paras 21-25

guilty of ten counts of misconduct. Schedule 2 Code of Conduct, Part B item 2 of the LTLTA deals with the procedure to be followed in case a traditional leader was accused of misconduct.

[51] Item 2 read as follows:

“(1) If a traditional leader is accused of misconduct as defined in item1, the traditional council of the traditional community concerned must enquire into the allegations in accordance with the customary law of the traditional community concerned. An enquiry in terms of this subsection must observe the rules of natural justice.

(2) If the traditional council is, after the enquiry referred to in subitem (1) of the opinion that a traditional leader is guilty of misconduct, the traditional council may, in consultation with the royal family, refer the results of its enquiry together with a recommendation on the appropriate measures to the Premier.

(3) (a) The Premier must, within seven days of receipt of the results of the enquiry in terms of subitem (2), refer the matter to the provincial house of traditional leaders for its recommendation.

(b) The provincial house of traditional leaders must consider the matter and refer its recommendation to the Premier within 14 days of receipt of the matter from the Premier.

(4) If after receipt of the recommendation of the provincial house of traditional leaders the Premier is satisfied that the traditional leader is guilty of misconduct, the Premier may, with due regard to the recommendations of the traditional council and the provincial house of traditional leaders-

- (a) caution or reprimand the traditional leader;
 - (b) impose on the traditional leader a fine;
 - (c) direct that the traditional leader must not be paid remuneration for a specific period;
 - (d) impose a combination of paragraphs (b) and (c); or
 - (e) refer the matter to the royal family with an instruction that the matter be dealt within accordance with section 13 of this Act, if the Premier is satisfied that the matter falls within the ambit of the said section.
- (5) The Premier may, in his or her discretion, before acting in terms of subitem (4), appoint a committee to carry out a further inquiry into the alleged misconduct.
- (5) The Premier may order that the provisions of Limpopo Commissions of Inquiry Act, 2001 (Act 4 2001) must apply to any inquiry in terms of subitem (5)."

[52] What transpired in the appellants' case was that after they were found guilty of various counts on misconduct on 17th March 2012, the first and second respondents immediately took a resolution that the appellants be removed as headmen/women. That resolution together with their memo was sent to the third and fourth respondent. In turn the fourth respondent prepared a memo on 9th July 2013 to third respondent recommending the removal of the appellants. The said memo was supported by general manager Traditional Affairs, senior general manager Local Governance and Head of Department. The third respondent approved the

recommendations for the removal of the appellants on 29th July 2013. It is clear that third respondent has not complied with the provisions of Schedule 2, Part B, item 2, before approving the appellants' removal as headmen/women.

[53] What transpired in this matter was a serious miscarriage of justice.

The appellants were found guilty of various counts of misconducts by an inquiry constituted by the first and second respondents. What should have followed after that guilty verdict, was for the first and second respondents to have sent the results of that inquiry with their recommendations to the third respondent. At that stage it was still premature for the first and second respondents to have taken a resolution to remove the appellants. The third respondent on receipt of the results of the inquiry was supposed to act in terms of item 2 of Part B of Schedule 2 Code of Conduct of which he has failed to do so. Instead of following that procedure the fourth respondent embarked on its own procedure not provided for in the Code. The first and second respondents would have been competent to take a resolution, (if they had those powers to recommend for the removal of the appellants) if the third respondent had opted to act in terms of item 2(4)(e) of Part B of Schedule 2 Code of Conduct.

[54] The manner in which the inquiry was held by the first and second respondents was procedurally unfair towards the appellants; the

royal family of the first and second respondents did not have authority and powers to identify the successors to the appellants; and the third and fourth respondents in removing the appellants as headmen/women have disregarded the material procedure provided for in Part B of Schedule 2, Code of Conduct. Therefore, in terms of section 6(2)(b) of PAJA, this court is empowered to review the administrative action taken by the third respondent. In my view, the procedure followed by the respondents in removing the appellants is full of several serious irregularities which will not be condoned.

[55] In the result the following order is made:

55.1 The appeal is upheld with costs.

55.2 The order of the court a quo is set aside and substituted with the following:

“55.2.1 That there is no need for the applicants to bring a condonation application.

55.2.2 That the decision of the Limpopo Premier to remove the applicants’ and/or their predecessors as headmen or headwomen of their respective villages of Bahananwa Traditional Community which was taken on 29th July 2013, is reviewed, set aside and nullified.

55.2.3 That the applicants and/or their predecessors are reinstated as headmen or headwomen of the Bahananwa Traditional Community with immediate effect.

55.2.4 That the Premier of the Limpopo Province is ordered to pay the applicants and/or their predecessors monthly salary arrears from the date of their removal (29 July 2013) until the date of the granting of this order. The arrears to include annual increments to be calculated by the Human Resource Department of the Premier and the Department of Co-operative Governance, Human Settlement and Traditional Affairs.

55.2.5 The respondents jointly and severally to pay the costs of the applicants in the review application, the one paying, the other to be absolved.”

MF KGANYAGO J

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO
DIVISION, POLOKWANE**

I AGREE

EM MAKGOBA JP

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO
DIVISION, POLOKWANE**

I AGREE

G MULLER J

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO
DIVISION, POLOKWANE**

APPEARANCES

FOR THE APPELLANTS : ADV M MONYEMORATHO

INSTRUCTED BY : MMAMPHIWA PHIHELA ATTORNEYS

FOR 1ST & 2ND RESPONDENT: ADV J SCHOEMAN

INSTRUCTED BY : ESPAG MAGWAI ATTORNEYS

FOR 3RD, 4TH & 5TH RESPONDENTS: ADV R TSHIKORORO

INSTRUCTED BY : STATE ATTORNEY POLOKWANE

DATE HEARD : 28TH MAY 2021

DATE OF JUDGMENT : 28TH JUNE 2021