IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, MTHATHA

Case no. 1606/20

In the matter between:

Saziso Mndiyata	**First Applicant**
Liziwe Sonjica	**Second Applicant**
Zodwa Langazana	**Third Applicant**
and	
Umgungundlovu CPA	**First Respondent**
Thulani Eugine Mchunu	**Second Respondent**
Irvin Mhlongo	**Third Respondent**
Mpendulo Frank Simamane	**Fourth Respondent**
Thulisile Happyness Tshutsha	**Fifth Respondent**
Sibongile Danca	**Sixth Respondent**
Director-General: Rural Development and Land Reform	**Seventh Respondent**
Minister of Rural Development and Land Reform	**Eighth Respondent**
Regional Land Claims Commissioner,	

Eastern Cape **Ninth Respondent**

Nedbank Limited **Tenth Respondent**

JUDGMENT

Coltman AJ:

INTRODUCTION

[1] Although this application was launched on 3 June 2020 as one of urgency on truncated time periods in which the applicants sought a rule *nisi* in the notice of motion, the first to sixth respondents opposed the matter and filed an answering affidavit. The applicants have subsequently filed their replying affidavit. The relevant relief sought by the applicants (by way of an interim order) is set out as follows in the notice of motion:

> "1. …
>
> 2. That *Rule Nisi* do issue calling upon the Respondents to show cause, if any, before this Honourable Court on ____ day of _________2020 at 09h30 or so soon thereafter as the matter may be heard, why an order in the following terms should not me made:-
>
> 2.1 That, pending final decision on the course of action recommended by the independent mediator in the Mediation Report, dated 29 February 2020 –
>
> 2.1.1 the Seventh Respondent is directed to take over the First Respondent's administration with immediate effect;
>
> 2.1.2 the First Respondent be and is hereby interdicted and restrained from paying any remuneration and salary to any member of the CPA Executive Committee, including the Second, Third, Fourth, Fifth and Sixth Respondents;

2.1.3 the Second, Third, Fourth, Fifth and Sixth Respondents are all hereby restrained and interdicted forthwith from operating any bank accounts held under the name of Mgungundlovu Communal Property Association (the First Respondent), including Nedbank Current Account, Investec Account and Nedbank Money Trader Account;

2.1.4 the Tenth Respondent be and is hereby ordered and directed to freeze or preserve funds standing to the credit of the First Respondent's Nedbank Current Account and Nedbank Money Trader Account and is accordingly directed to restrain the Second, Third, Fourth, Fifth and Sixth Respondent's access to such bank accounts or such access by any other person acting on their authority;

2.1.5 that the First, Second, Third, Fourth, Fifth, Sixth, Seventh Respondents, jointly and severally, shall bear the costs of the application, on a scale as between the Applicants and their own attorney.

3. That the applicants are granted interim relief in the form of paragraphs **[2.1], [2.1.1], [2.1.2], [2.1.3]** and **[2.1.4]** above, pending final determination of this application.

4 Further and/or alternative relief."

[2] The first, second and third applicants ("the applicants") are members of the first respondent, the Mgungundlovu Communal Property Association ("the MCPA").

[3] The applicants stated in the founding affidavit that they are the chairperson, secretary and co-ordinator of the Concerned Land Claimants (the Concerned Group), respectively, which represent a minority group of members who are dissatisfied with the management of the CPA.

[4] The second, third, fourth, fifth and sixth respondents are the chairperson, vice-chairperson, secretary, deputy secretary and treasurer of the MCPA, respectively.

[5] The seventh respondent is the Director-General: Rural Development and Land Reform ("the Director-General"), the accounting officer responsible for the administration of the Communal Property Association Act[1] ("the CPAA") by the Department.

[6] The tenth respondent is a bank where a bank account(s) of the CPA is held.

[7] The application is opposed by the first to sixth respondents, who I shall collectively refer to as "the respondents" in this judgment. It will be noted that no relief is sought against the eighth and ninth respondents. They have been cited as respondents because of their interest in the matter as the executive authority for overseeing the implementation of the CPAA by the Department of Rural Development and Land Affairs ("the Department") and as Regional Commissioner having jurisdiction over the claimed land, respectively. They have played no part in these proceedings.

<u>OBJECTIONS *IN LIMINE*</u>

<u>*Answering affidavit not properly commissioned*</u>

[8] In their replying affidavit the applicants raised the issue that the answering affidavit initially delivered by the respondents ("the first affidavit") has not been properly commissioned. They also pointed out that the Commissioner – apart from his signature on the last page - failed to initial the other pages, while the deponent failed to initial some of the pages of the annexures to the affidavit. The respondents, subsequently, delivered a second answering affidavit (which is identical to the first one, but this time properly commissioned and initialled), together with an application for condonation of the late filing thereof. Adv Madikizela, who appeared for the applicants, submitted that was no answering affidavit before court. I granted the condonation application and undertook to set out my reasons in this judgment. Those reasons follow hereunder.

[1] No. 28 of 1996.

[9] In support of his argument in respect of the failure to initial the pages of the affidavit and annexures, Mr Madikizela referred the Court to Rule 23(v) of the Joint Rules of Practice of this court, which provides that: "Every page of any affidavit, including annexures thereto, must be initialled by the deponent and the commissioner of oaths", and submitted that the said affidavit did not comply or substantially comply with the Rule in question.

[10] He further submitted that the attestation clause indicates that a "she" person had signed the affidavit and the person administering the oath's designation is not stated on the affidavit, thus failing to comply with the Rules Governing the Administering of an Oath or Affirmation.

[11] He, therefore, argued that the first affidavit is fatally defective and that the respondents should first have applied for leave to withdraw this affidavit, before filing the second affidavit. He further submitted that, in any event, the second affidavit had been filed out of time and opposed the condonation application.

[12] Adv Sibanda, who appeared for the first to sixth respondents, argued on the other hand, that there was, substantial compliance with the commissioning of the first affidavit and that it was, in fact, not even necessary for the respondents to have filed the second affidavit. He referred me to several authorities to support his argument, all of which I have taken into consideration. He further argued that the second affidavit is, in fact, the same as the first one, except for the rectification of all the issues regarding the commissioning thereof.

[13] In my view, the submission regarding the failure to initial pages of the affidavit and annexures is highly technical and elevates form over substance. In this regard, the second respondent pointed out that the applicants do not dispute the correctness of any of the annexures, several of the annexures formed part of the papers in the previous proceedings in the Labour Court in which the applicants were involved, some of the annexures the applicants would have been aware of prior to or during the present proceedings and do not cause prejudice to the applicants. (All the annexures referred to above are listed in the affidavit accompanying the application for condonation.) This was not disputed by the applicants.

[14] Furthermore, the second respondent (who deposed to the answering affidavit on behalf of the respondents) stated at the beginning of the affidavit that he is an adult male. There is no evidence that another person other than the first respondent appeared before the Commissioner. The applicants simply ask this court to infer that, as the affidavit refers to a "she" in the attestation clause, it could not have been the first respondent who had signed the affidavit. It will be noted that the word "she" forms part of the pre-typed document that must have been placed before the Commissioner. If the Commissioner had, for instance, personally written the word "she" in the attestation clause, it could have made for a stronger case for the applicants. It is, therefore, clear that this must have been an error on the part of the Commissioner.

[15] With regard to the failure of the Commissioner to state his designation, I have had regard to the case of *Liviero Civils (Pty) Ltd and Another v Amatola Water Boards*[2]*,* where Pickering J dealt with a situation where the Commissioner failed to print his full name and designation. The learned judge remarked as follows:

> "[19] The third point *in limine* raised by defendant related to the attestation of the supporting affidavit to the notice of application for summary judgment which was deposed to by one Martjin Groot, it being submitted that the affidavit did not comply with the provisions of regulation 4(2) of the Regulations Governing the Administration of an Oath or Affirmation made in terms of section 10 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963. Regulation 4(2) thereof reads as follows:
>
> "*The Commissioner of Oaths shall –*
>
> *(a) Sign the declaration and print his full name and business address below his signature; and*
>
> (b) *State his designation and the area for which he holds his appointment or the office held by him if he holds his appointment* ex officio."
>
> [20] The full names of the Commissioner of Oaths who completed the attestation clause in the present matter were not printed and his signature is illegible. His

[2] (2614/2018) [2018] ZAECGHC 117 20 November 2018, paras [19] – [25].

designation is also not stated. There is, however, a South African Police Services stamp affixed below his signature from which it appears that the affidavit was commissioned at the "*Client Service Centre, Midrand*." The Commissioner has also appended above his signature what is clearly his force number.

[21] Mr. Ntlokwana submitted that in view of the requirement that the Commissioner "*shall*" print his full name and business address and state his designation the provisions of regulation 4(2) were peremptory and that in consequence thereof the application for summary judgment fell to be dismissed because there was in effect no affidavit before the Court.

[22] Mr. Ntlokwana's submission to the effect that the provisions of regulation 4(2) were peremptory is without merit. There is a wealth of authority to the effect that the provisions of regulation 4 are directory and not peremptory.

[23] The facts in the matter of Adriaan Jurgens Basson and Another v On-Point Engineers (Pty) Ltd and Others, unreported North Gauteng High Court, Pretoria case number 64107/2011 dated 7 November 2012, to which I was referred by Mr. De Vos, who appeared for the applicants, were similar to the present matter in that the full names of the commissioner were not printed, his designation was not stated, a business address was not provided, and the area for which the Commissioner held office was not indicated. At paragraph 4.3 of the Basson judgment Potterill J stated as follows:

"*The Full Bench of this Division in S v Msibi 1974 (4) SA 821 (T) found that the compliance with regulation 4 is directory and a court can exercise its discretion in admitting such affidavit if there is substantial compliance with the regulation. The Commissioner did not provide a business address and the area the Commissioner held office and his/her designation. This is in fact a requirement of Regulation 4(2) and not 4(1) as complained of. The stamp of the Commissioner clearly indicated that the Commissioner was in the South African Police Services at the Management Information Centre, Rosebank. I cannot express myself better than in the words of Page AJ in the Dawood matter* supra *[1979 (2) SA361 (D and CLD)] at 367 C-E:*

> "In deciding whether the non-compliance is of such a nature that the Court should refuse to entertain the affidavit it is clearly relevant to have regard to the nature and purpose of the requirement with which there has been failure to comply. In the present case it seems to me that the reason for the

> requirement that the commissioner should furnish his business address is to facilitate the task of anyone who might thereafter wish to locate him for any purpose connected with the affidavit and its execution. In the present case the information supplied is sufficient to enable anyone of ordinary intelligence to deduce that the business address of the commissioner of oaths is…"

at the office of the SAPS Rosebank Management Information Centre. The commissioner is thus at minimum designated for the area of Rosebank ex officio. On this paltry defect I cannot refuse to accept the affidavit into evidence. The replying affidavit was commissioned at the SAPS Client Service Centre, Rosebank. The full names of the Commissioner on both the applicants' affidavit are not printed. On the replying affidavit the force number of the Commissioner is printed and the Commissioner can be easily traced from this. The purpose of the requirement of the full names of the Commissioner can once again only be to identify the Commissioner for any enquiry pertaining to the attestation. I am certain that with little trouble the Commissioner of the founding affidavit will be located through visiting the Rosebank Management Information Centre of the SAPS and enquiring whose signature is on the document."

[24] Similarly, in the present case, the Commissioner of the affidavit would be easily located through visiting the Client Service Centre of the SAPS, Midrand and enquiring whose signature was on the document.

[25] It is clear therefore in my view that there was substantial compliance with the provisions of regulation 4(2)."

[16] In the present matter, the Commissioner's full names and work address are similarly clearly stated. He would, therefore, be easily located through visiting the Community Service Centre at the South African Police Service in Port Edward and his designation thereby established.

[17] In any event, I agree with Mr Sibanda, that, if the answering affidavit is indeed defective as contended by the applicants, the latter would have been obliged to deliver a Rule 30 notice that the delivery of the answering affidavit constituted an irregular step before filing the replying affidavit.

[18] In the result, I found that there was substantial compliance with the regulation and, therefore, exercised my discretion in favour of allowing the answering affidavit.

Answering affidavit filed out of time

[19] Even if I am wrong in the above findings, the second respondent subsequently corrected the defects by having the Commissioner initial the said pages and by personally also initialling those pages that he previously omitted to initial. He also corrected the incorrect reference to his gender. Mr Sibanda further explained the delay in filing the affidavit, which was essentially caused by the practical difficulties in having to draft the affidavit at such short notice and submitted that there was no prejudice to the applicants – as, amongst others, the respondents' attorneys tendered to pay the wasted costs, including not charging the respondents for the application for condonation. He submitted that – on the other hand – the respondents would suffer substantial prejudice if the answering affidavit were not allowed.

[20] In *Ardnamurchan Estates (Pty) Limited v Renewables Cookhouse Wind Farms 1 (RF) (Pty) Ltd and Others*[3], Kroon AJ was similarly faced with a scenario where the answering affidavit was delivered out of time. In that matter, however, the applicant failed to apply for condonation. In a comprehensive and well-reasoned judgment, the learned judge remarked as follows:

> "*I pause to mention that a further step in proceedings has been held to include the filing of a replication in action proceedings and an answering affidavit in application proceedings. There can be little doubt that a replying affidavit is an act which advances the proceedings one stage nearer completion and is accordingly a further step in the proceedings*".[4] (footnotes omitted)

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[3] (1408/2015) [2020] ZAECGHC 132 (1 December 2020).

[4] Para 20.

[21] He concluded that:

> "*In the Court's view there is much to be said for the argument advanced by Mr Kirk-Cohen that the Applicant has an election to either invoke Rule 30 or to deliver a replying affidavit notwithstanding the irregular answering affidavit.*
>
> *An analogous situation arose in Mynhardt v Mynhardt where the wrong form of the notice of motion was utilised. There the Court held that because the respondent had elected to answer (and not to object), he had effectively abandoned or given up his right to challenge the admittedly irregular notice.*
>
> *In this matter it is difficult to see why similarly the Applicant should be permitted to have it both ways, namely to answer to the allegations contained in the answering affidavit but in the same breath to contend that the answering affidavit should be regarded as pro non scripto.*
>
> *Thus, leaving aside the circumstance that the delivery of the replying affidavit would constitute a further step immunising the answering affidavit from attack, there is a material inconsistency in delivering a substantial replying affidavit to an answering affidavit which for all intents, so it is contended by the Applicant, does not exist. Notwithstanding the protestations contained in the introduction to the replying affidavit, the very delivery of a replying affidavit is in the Court's view an acceptance of the fact that the answering affidavit was not to be treated as a nullity.*

Expressed differently, in my view where, as in this case, an answering affidavit is delivered out of time and an applicant takes a further step by delivering a replying affidavit, that applicant is in the same position as an applicant who has agreed in terms of Rule 27(1) to afford a respondent an extension for the delivery of the answering affidavit.

If condonation was going to be an issue, then the Applicant was required to have engaged the First Respondent on this issue and to have conveyed to it that it regarded its answering affidavit as an irregular step because it had been delivered outside of the period allowed in terms of the Rules and that the First Respondent was required to file an application for condonation prior to the Applicant being required to deliver a reply.

If the response of the First Respondent had been that it did not intend to apply for condonation then it would have been open to the Applicant to have elected not to deliver a replying affidavit and to have adopted the stance that the application was unopposed"[5]. (footnotes omitted)

[22] As stated earlier, in the present matter, the applicants likewise failed to challenge the late delivery of the answering affidavit by means of Rule 30 as an irregular step, but instead elected to deliver a replying affidavit.

[23] For the reasons set out hereinbefore, I ruled that the answering affidavit be admitted.

The striking out application

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[5] Paras 22 – 28.

[24] The applicants further brought an interlocutory application that sought to have a number of paragraphs struck out in the answering affidavit, that is, paragraphs 17 to 81, together with the relevant annexures attached in support of the allegations contained in those paragraphs, namely annexures SM1 to SM28. The applicants contended that the allegations contained in these paragraphs (and annexures) constitute irrelevant historical background, argumentative matters and vexatious material regarding the third applicant's involvement in the Mbizana Development Trust. Mr Sibanda, therefore, submitted that the answering affidavit was unnecessarily wordy and an abuse of the court process.

[25] The respondents, on the other hand, although admitting that the answering affidavit *"was unusually lengthy"* submitted that it was necessary for the respondents to give a full account of all the material facts relating to this matter and that it was also necessitated by the allegations made by the applicants in the founding affidavit.

[26] The answering papers are indeed voluminous, comprising 506 pages. However, apart from the allegations contained under the subheading "The Establishment of the MCPA"[6] in the answering affidavit, the striking out application in respect of the remainder of the impugned paragraphs, has no merit. I say this for the following reasons. The applicants' main thrust of their application is their "disgruntlement arising from irregular and improper decisions taken by the CPA committee, contrary to the overriding 'principle of equity' which governs the acts and decisions of the Committee"[7]. The founding affidavit then sets out a list of "improper and contentious decisions taken by the CPA Committee in April 2018"[8]. The list includes allegations that the committee employed themselves, paid themselves salaries and other benefits, retained accountants and attorneys on a fulltime basis and misappropriated a portion of the R1 million ex gratia payment by TranSun to the MCPA and portion of film royalties. They further alleged that during about October

[6] Paras 34 – 39 of Answering Affidavit (AA), pp 118 – 122 of record.
[7] Para 29 of Founding Affidavit (FA), p 14.
[8] Para 30 of FA, p 14.

2018 the second, fourth and fifth respondents took several "self-benefitting decisions without authority of general members"[9], namely:

"(a) to register all 3 of them as directors of the CPA Company (Fireside Trading and Investment Proprietary Limited);

(b) to register all 3 of them (in contravention of clause 9 and 10 of the Deed of Trust) as the only trustees of uMgungundlovu Community Development Trust ('the Trust');

(c) to appoint each other (in contravention of clause 9.3 of the Deed of Trust) as board members representing the Trust in the Board of Directors at the Wild Coast Sun International, in which the CPA company is the BEE equity partner, from which they draw director's remuneration;

(d) to remove a democratically-elected chairperson (Z. Tshusha) from his position in February 2016 and replace him with his then deputy (second respondent), along with his treasurer who was replaced by the sixth respondent"[10].

[27] Laying the basis for their contention that it is not for the first time that the applicants have instituted legal proceedings without setting out the full material facts, the second respondent (under the sub-heading "The Land and Forced Removal" gives a brief background of himself and Mgungundlovu in paragraphs 17 to 22. The allegations contained in these paragraphs are brief and to the point. It then leads into the next sub-heading entitled "The Land Claim Process", which immediately brings to the fore the contention that the issue of the representation of the community always seemed to have been at the heart of these disputes. The second respondent narrated how the third applicant became a trustee of the Bizana Community Development Trust, which held a 30% stake in the Wild Coast Sun (Pty) Ltd ("Wild Coast Sun") and still participates in the latter's management, whilst the Mgungundlovu Land Claim Committee was involved in litigation with the Wild Coast Sun for the restoration of the land. What is further interesting, is that following

[9] Para 31 of FA, p 15.
[10] Sub-paras 31(a) – (d) of FA, p 15.

elections that were held under the auspices of the Independent Electoral Commission and during which the second respondent was elected as a representative, the third applicant launched urgent proceedings in the Land Claims Court challenging the election results and seeking a declarator that she and others were the true representatives. This occurred during the course of 2014.[11] It shows the long history of this matter and provides a proper context against which the present application should be understood.

[28] Furthermore, it is clear that the application is primarily based on the Mediation Outcome Report ("the mediation report")[12] compiled by the mediator, Gcolotela & Peter Attorneys ("GPA"), appointed by the Director-General as a consequence of the long-running and protracted dispute between the applicants and the executive committee of the MCPA ("the committee"). In the founding affidavit the applicants, for instance, alleged that the second, fourth and fifth respondents took "the … self-benefitting decisions without authority of general members … to remove a democratically elected chairperson"[13], that is, the former chairperson, Mr Zweledinga Tshutsha. They found support for this allegation in the mediation report that made a finding "that it was improper and irregular for the CPA committee to remove a chairperson (Mr Zweledinga Tshutsha) democratically elected in an election meeting which elected the committee and to replace him with someone merely nominated amongst the Committee members but not elected from a general meeting".[14] Yet, when the respondents challenged these allegations by setting out its response thereto[15], the applicants want these responses to be removed from the answering affidavit.

[29] Under the sub-heading "The Development Funds and Governance Policies", the first respondent narrated how – through consultations with the community from 28 September 2017 – the Development Funds were to be utilised, financial controls

[11] Paras 23 – 33 of AA, pp 114 – 118.
[12] Annexure "S3" to FA.
[13] Para 31 of FA, p 15.
[14] Para 46(a) of FA, p 20; See further S3, p 84, paras 3 and 4.
[15] Paras 40 – 45 and para 76 of AA, pp 122 -127 and 143. See further annexures SM5 and SM6, pp 230 to 235, which are the committee's letters to Mr Tshutsha and another suspended member, Ntombizethu Tshutsha, advising them of their suspension. The attendance registers of the meeting which took the decision to suspend them were attached to the letters.

and policies were developed “to manage the portion of the fund in the MCPA’s operation account”[16] and service providers were identified and appointed to assist in the proper administration of the MCPA – for instance, a firm of accountants, Lockhat Incorporated (“Lockhat”), was appointed to provide financial advisory services in respect of budgeting and investing some of the funds of the MCPA. The financial control polices and particulars regarding the investment of funds are detailed.[17]

[30] Under the sub-heading “MCPA Operational Account Budget: May 2018 to February 2019”, the answering affidavit deals with developing a budget for the said period with the assistance of Lockhat, the provision of salaries for four members of the committee, the approval of these items by the community members, the appointment of DB Consulting to compile a list of household representatives as required by the MCPA Constitution[18] (as there was no list to that effect). This was done following a legal opinion on the issue of quorum as raised by the Concerned Group. DB Consulting simultaneously obtained household resolutions to ratify the budget. Of the 117 households, 80 returned the resolutions and nominated household representatives and ratified the budget, despite opposition from the Concerned Group.[19]

[31] In answer to the applicants’ complaint[20] that the committee “misappropriated a portion of the R 1 million ex gratia payment donated by TransSun to the CPA members and portion of film royalties”[21], the first respondent explained in paragraph 81 of the answering affidavit that:

“The applicants complain about the R 1 million *ex gratia* payment from the Wild Coast Sun. I do not understand their complaints. All payments to beneficiaries were made equally. The applicants benefitted as little or as much as we did. The balance funded a contribution for Lockhat’s administratively taxing management of the process of paying 117 households. The terms of the payment appear from the letter annexed hereto marked ‘**SM28’”.**

[16] Para 50.2 of AA, p 129.
[17] Paras 46 – 64 of AA, pp 127 – 138.
[18] See clause 3.1.2 of the Constitution (Annexure “S1”).
[19] Paras 65 – 80 of AA, pp 138 – 145.
[20] Para 30(d) of AA, pp 14 – 15.
[21] See further Annexure SM28.

[32] The applicants further stated that annexure SM29, which is an explanatory affidavit filed with the Land Claims Court on behalf of the Director-General, the Minister, the Chief and Regional Land Claims Commissioners in an urgent ex parte application brought by the applicants in February 2019, is "unnecessary and irrelevant and "must be struck out".[22] It will be noted, however, that the applicants stated in the founding affidavit (under the heading **"FAILURE OF DEPARTMENTAL INTERVENTION**"[23]) that between the period October 2016 and July 2018, they approached the Department, the Director-General, the Minister, the Chief and Regional Land Claims Commissioners for assistance, more particularly, seeking intervention and the immediate disbandment of the committee and the election of new members. However, no assistance was forthcoming. In answer to these allegations, the respondents attached the said explanatory affidavit, which sets out in detail what steps had been taken by the Department in order to resolve the issues between the respective parties (including mediation attempts and meetings with the different parties). Clearly, the contents of the explanatory affidavit are relevant to the adjudication of the matter, as it shows that the applicants had not been candid in placing their version of events before the Court.

[33] The allegations regarding the establishment of the MCPA[24] are common cause, as the essence of these facts have already been canvassed in the founding affidavit. It was, therefore, not necessary to repeat it and is, accordingly, struck out.

[34] However, the application to strike out the remainder of the paragraphs in question is dismissed.

<u>INTERIM RELIEF</u>

[35] In *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*[25] Moseneke DCJ observed that:

[22] Para 65 of Replying Affidavit (RA), p 525.
[23] Paras 32 and 33, p 16.
[24] Paras 35 – 39 of AA, pp 118 – 122.
[25] (CCT 38/12) [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) (20 September 2012.

"The High Court relied on the well known requirements for the grant of an interim interdict set out in *Setlogelo* and refined, 34 years later, in *Webster*. The test requires that an applicant that claims an interim interdict must establish (a) a prima facie right even if it is open to some doubt; (b) a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; (c) the balance of convenience must favour the grant of the interdict and (d) the applicant must have no other remedy."[26] (footnotes omitted)

[36] The approach to be adopted in determining an applicant's entitlement to interim relief in motion proceedings has been expressed by Selikowitz J as follows in *Spur Steak Ranches Ltd and Others v Saddles Steak Ranch, Claremont and Another*[27]:

"In determining whether or not the applicants crossed the threshold, the right relied upon for a temporary interdict need not be shown by a balance of probabilities, it is enough if it is prima facie established though open to some doubt.

The proper approach is to take the facts set out by the applicants together with any facts set out by the respondents, which the applicants cannot dispute, and to consider whether having regard to the inherent probabilities the applicants should, not could, on those facts obtain final relief at the trial.

It is also necessary to repeat that although normally stated as a single requirement, the requirement for a right prima facie established, though open to some doubt, involves two stages. Once the prima facie right has been assessed, that part of the requirement which refers to the doubt involves a further enquiry in terms whereof the Court looks at the facts set up by the respondent in contradiction of the applicant's case in order to see whether serious doubt is thrown on the applicant's case and if there is a mere contradiction or unconvincing explanation, then the right will be protected. Where, however, there is serious doubt then the applicant cannot

[26] Para 41.
[27] 1996 (3) SA 706 (C) at 714E-F.

> succeed. See *Webster v Mitchell* 1948(1) SA 1186 (W) at 1189; *Gool v Minister of Justice and Another* 1955(2) SA 682 (C) at 688."

[37] It needs to be added that the Constitutional Court cautioned in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* that:

> "When it evaluates where the balance of convenience rests, a court must recognise that it is invited to restrain the exercise of statutory power within the exclusive terrain of the Executive or Legislative branches of Government. It must assess carefully how and to what extent its interdict will disrupt executive or legislative functions conferred by the law and thus whether its restraining order will implicate the tenet of division of powers. Whilst a court has the power to grant a restraining order of that kind, it does not readily do so except when a proper and strong case has been made out for the relief and, even so, only in the clearest of cases.
>
> A court must carefully consider whether the grant of the temporary restraining order pending a review will cut across or prevent the proper exercise of a power or duty that the law has vested in the authority to be interdicted. Thus courts are obliged to recognise and assess the impact of temporary restraining orders when dealing with those matters pertaining to the best application, operation and dissemination of public resources. What this means is that a court is obliged to ask itself not whether an interim interdict against an authorised state functionary is competent but rather whether it is constitutionally appropriate to grant the interdict."[28]

THE RELEVANT FACTS

[38] In 1995, the Umgungundlovu community instituted a land claim in respect of ancestral land situated in the Bizana administrative area. It is common cause that the Wild Coast Sun has been operating a hotel, casino and golf course on the land claimed. As the claim was opposed, it ended up in the Land Claims Court, where a

[28] Paras 65 and 66.

settlement was eventually reached. Pursuant to the settlement agreement[29], the MCPA was established and registered in 2015 to "… acquire, hold and manage the Properties …"[30] on behalf of its members.

[39] It is, however, common cause that - what should have been a proud and joyous occasion - was also beset with internal strife amongst some of the members of the community for a significant period of time. Hence, it appears from the founding affidavit that the Concerned Group "… have long been disgruntled and therefore vocal against the current committee. As a direct consequence, a long-standing squabble and stand-off resulted between the CPA committee and the Concerned Group, as early as 2015"[31].

[40] According to the applicants, the transactional account of the MCPA was the most accessible and that these funds had been mismanaged. As their approaches to the Department and other officials met with no success, they obtained the aforementioned Rule Nisi in the Labour Court, which order suspended with immediate effect payment of monthly salaries by the MCPA to its executive members, restrained and interdicted the executive members from accessing and/or operating the MCPA's bank accounts and directed the Director-General to take over the management of the affairs of the MCPA until further notice. (It is significant that the terms of the order are essentially the same relief the applicants are seeking in this application.)

[41] Pursuant to a reconsideration of the aforesaid order, the Labour Court dismissed that application on 2 May 2019. Very importantly, according to the applicants, the parties then agreed that the Department and the Director-General would mediate the dispute. It is again significant that the applicants omitted to mention the fact that the Department did, in fact, initially appoint a mediator – an attorney, Ms Phakade – to mediate the dispute. Ms Phakade was for the first time introduced to the beneficiaries at a meeting on 18 June 2019)[32], but her attempts to mediate the dispute appear to have been unsuccessful. I mention this fact as

[29] Annexure SM3 to AA, p 209.
[30] See Introduction in S1, p 34.
[31] Para 29 of FA, p 14.
[32] Para 88 of AA, p 147.

indicative of and an illustration of the many instances where the applicants either deliberately made false statements in their papers (for instance, the Department and the Director-General failed to intervene and the latter's failure or tardiness in the appointment of a mediator) or failed to mention crucial facts (namely, the convening and facilitation of several meetings with the respective parties and the households by the Department [33]).

[42] The applicants further alleged that on 4 May 2019, their attorneys wrote to the Department and the ninth respondent requesting that a temporal moratorium be placed on the financial activities of the MCPA, pending the mediation process. However, nothing was forthcoming.

[43] Although the applicants alleged that the mediator was eventually appointed in September 2019, the respondents alleged that this was, in fact, done in August 2019. This was not contested by the applicants in the replying affidavit.

[44] According to the applicants, however, the committee did not co-operate with the mediator, who finalised the process on 29 January 2020 and compiled S3. It is also common cause that, apart from the finding in respect of Mr Tshutsha, the mediator made the following further findings relevant to this matter:

44.1 That the allegations of "discrimination, isolation and preferencing certain members of Mgungundlovu CPA over other is a direct contravention of the constitution". It further found that the "allegations are critical and damning allegations that display undemocratic practices which explicitly transgress the constitution of the Mgungundlovu CPA."[34]

44.2 That the "door to door voting system adopted to approve the budget is most certainly against the basic principles of the Mgungundlovu CPA constitution and COMMUNAL PROPERTY ASSOCIATIONS ACT, NO. 28 OF 1996"[35].

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[33] Para (a) – (f) of SM29, pp 362 -363.
[34] Para 2 of S3, p 87.
[35] Para 2 of S3, p 88.

44.3 That: "*Any benefit derived from the passing of the said budget in the abovementioned circumstances by any member of the CPA members is unjust enrichment and gives rise to 'Improper Conduct' as envisaged in Clause 3.1.7 of the constitution*"[36]*.* (italics appear in the original text)

44.4 That "any appointment of members from the CPA committee" as trustees of the Mgungundlovu Development Trust "certainly is in contravention of the Trust Deed" and also constitute "improper conduct"[37].

[45] The above findings constitute the principal allegations that are levelled by the applicants against the committee, as outlined when I dealt with the striking application.

[46] The mediator, therefore, recommended that:

"1. Immediate steps be taken to dissolve that uMgungundlovu CPA Committee;

2. Elections of a new uMgungundlovu CPA Committee be undertaken;

3. Members of the current uMgungundlovu CPA Committee be disqualified from standing for any future elections"[38].

[47] The second respondent dealt with the applicants' allegations in a comprehensive manner. In refuting these allegations, he attached various documentation in support of the respondents' version.

[48] He alleged that the complex nature of the settlement agreement meant that the implementation thereof required specialist knowledge. In proof of this allegation, a copy of the settlement agreement[39] was attached to the answering affidavit. This is undoubtedly so, as not only are the amounts involved enormous (R50 million rand compensation, the restoration of vast tracts of valuable land to the community, the

[36] Para 3 of S3, p 88.
[37] Paras 3 and 4 of S3, p 90.
[38] Para 5 of S3, p 90.
[39] Annexure SM3 to AA, pp 209 – 227.

lease of the portion of the land on which the hotel is situated to the Wild Coast Sun, the 28.4% shareholding in the Wild Coast Sun and the development of the restored land), but the technical terms of the agreement most certainly required the involvement of persons with, at least, appropriate experience and knowledge in the financial, legal and development field.

[49] On the proposal of the Chief Land Claims Commissioner, the MCPA recommended the appointment of Vumelana Advisory Fund ("Vumelana") to the beneficiaries. According to the second respondent, "Vumelana specialises in transaction advisory services for partnerships between communities and private investors"[40]. Although the beneficiaries supported the appointment of Vumelana, Mr Tshutsha and the treasurer, Ms Ntombizethu Tshutsha ("Ms Tshutsha"), opposed this decision. The upshot of this development was that, as a result of other complaints against them, the beneficiaries conducted a meeting on 2 November 2016, where it was resolved to suspend the Tshutshas. A new executive committee was also elected from the existing committee members.

[50] This put paid to the mediator's finding (and the applicants' allegation) that Mr Tshutsha had been removed in an undemocratic and illegal manner. It also adversely impacts on some of the other findings made by the mediator.

[51] On 29 September 2017, the MCPA convened a community meeting to discuss the release of the Development Funds (which funds were held by the State) to the community, in accordance with the Settlement Agreement. The appointment of Lockhat, whose services had been procured by the MCPA with the assistance of Vumelana, was also approved by the community at the same meeting. The Director of Legal at the CLCC's office, Mr Isaac Peter, was also invited to the meeting.

[52] To dispel the applicants' allegations that the committee may "squander" the MCPA's funds, the second respondent sets out in detail how the Development Funds had been dealt with. On the recommendation of the Commission on Land Rights and in accordance with a resolution taken by the community at the meeting of 29

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[40] Subpara 41.2 of AA, p 123.

September 2017, R20 million was transferred into a long-term investment account, which require three signatories for the funds to be released (the MCPA's attorney, Mr Richard Spoor, Ms Funeka Malusi, a Director at the Department and a committee member, presently, the second respondent). As at 31 May 2020, this amount has grown to R22,681,842.57. On the advice of Lockhat, the MCPA invested R5 million in the Nedbank Money Trader account, which amount is earning interest and has never utilised; and R2 167 646.00 were to be utilised for operational expenses in terms of a budget approved by the community. The committee, however, does not have a bank card to access these funds in the MCPA account. In order to transact on this account, the MCPA issues instructions to the financial advisors to make payments on behalf of the MCPA, which is done in accordance with the MCPA budget and financial control policies, and made under Lockhat's supervision.

[53] Lockhat developed seven financial control policies[41] in consultation with the MCPA for the MCPA, which was approved by the community on 1 December 2017. These financial control policies were also sent to the office of the Chief Land Claims Commission and Regional Land Claims Commissioner for their input.

[54] After a 10-month budget was developed with officials of Lockhat and sent to the RLCC and CLCC for their comment and input - which budget, firstly, included provision for salaries for four members of the committee for the work they do (instead of the seating allowances as envisaged in the financial control policies), secondly, retrospective payments for work done by committee members over the years (also not provided for in the financial control policies) – a meeting was held with Mr Imraan Lockhat, Yashrien Naidoo and Jayuri Naidoo (all of them of Lockhat), Ms Malusi and Mr Thamsanqa Malusi (of Richard Spoor Incorporated). Two bankers from Nedbank and Investec also attended the meeting on 25 April 2018. It was then decided that the budget should be presented to the community for approval.

[55] A meeting was, accordingly, convened for this purpose on 18 May 2018, with officials from the RLCC and the CLCC also in attendance. The members of the

[41] The Reimbursive Expense and Allowance Policy, Office Use Policy, Petty Cash Policy, Code of Conduct Policy, Committee Members Remuneration Policy (which deals with the fees payable per meeting to committee members) , MCPA Procurement Policy and Procedures Manual, and MCPA Financial Recording Procedures (SM11 – SM17).

Concerned Group, who had been sent invitations by the MCPA's attorneys, also attended the meeting. After extensive debate, the budget was approved by a majority of the community members. The second respondent alleged that the Concerned Group members became aggressive, complaining that the meeting had not been quorate. This is, however, denied by the second respondent. In support of his denial, he attached the attendance register[42] for the meeting, which shows an attendance total of 138. This was not disputed in the replying affidavit.

[56] As a result of the applicants' accusations of a lack of quorum at the meeting, a legal opinion was obtained, which identified "a gap in the MCPA system in that we did not have a list of household representatives". DLB Consulting was, therefore, appointed to independently obtain household resolutions nominating household representatives. Despite opposition from the Concerned Group, 80 out of the 117 households signed the resolutions, who all nominated household representatives and ratified the budget (this is what was referred to as the "door-to-door voting system").

[57] The second respondent furthermore alleged that the committee has treated all beneficiaries equally and that the applicant's allegations that members of the Concerned Group had been treated unfairly and unequally are vague and untrue. He also stated that the constitution does not bar the appointment of committee members to the Trust. He also denied that the appointment of committee members to Fireside was a breach of the committee's fiduciary duties or the constitution. He added that "by that stage, neither entity was in operation as both were superseded by the MCPA"[43].

[58] He also denied that the committee refused to co-operate with the mediator. He stated that the committee simply asked the mediator to first introduce themselves to the community, which request they refused. As the committee represent the community, in addition to other grievances the committee had with the mediators, efforts to cause the committee to meet with the mediators were unsuccessful.

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[42] SM22, pp 333 – 335.
[43] Para 179 of AA, p 177.

EVALUATION AND LEGAL PRINCIPLES

Prima facie right

[59] As alluded to under the striking out rubric, the applicants' case is primarily based on the mediation report. They, consequently, argue that they have established a prima facie right to compel the Director-General to implement the mediators recommendations, pending his final decision. It is, therefore, noticeable from their papers that they themselves do not provide any evidentiary proof, other than the mediation report, in support of the various allegations against the committee members.

[59] It is evident the mediation report that the mediators first met with the Concerned Group on 16 September 2019, where reports to the mediators concerning the history of the matter were made, including the various allegations that form the substance of the allegations against the applicants. Apart from the mediators, eleven persons attended the first session (including the second and third respondents, as well as Mr Tshutsha).

[60] The second session was held with the MCPA committee members. It is common cause that this was unsuccessful, as the MCPA insisted on the mediators first being introduced to the community, as well as other issues. As a general observation, whilst it might have been appropriate for the mediators to first meet with the representatives of the respective groups, in my view, it could have rendered the mediation process and outcome more acceptable and credible if the mediators, at least, had one session each with the community members on whose behalf the Concerned Group and the MCPA acted, respectively. Hence, one is then faced with the scenario where the Concerned Group "advised" the mediators that they represented 59 to 60 households[44], whereas the respondents claim the contrary (which is not contested in the replying affidavit). At the same time, the mediators could have been in a better position to source whatever information they needed "from the horse's mouth". Thus, in a matter as the present, where the respondents,

[44] Para 5 of S3, p 60.

for instance, attached attendance registers showing the actual number of persons present at meetings and signed resolutions (as in the case of the quorum issue), it should not come as a surprise that the latter trumps the vague reports made by Concerned Group members to the mediators. As matters stand, the mediation report - in simple terms - merely consists of information received from the Concerned Group, which clearly has not been verified by the mediators, if regard is had to the documentation attached to the answering affidavit, which plainly gives a contrary picture of what is painted in the mediation report.

[61] Although the fact that the Concerned Group represents a minority of the members of the MCPA does not deprive them of redress in terms of both the MCPA's constitution and the CPAA, it is worthwhile to note that the respondents state that:

"… there are roughly only 10 to 15 people that align themselves with the concerned group (including the individuals mentioned in the preceding paragraphs). These people come from only three or four households of the 117 beneficiary households. These people purport to represent a large number of the 117 household claimants. That is not true. Tellingly, there is also no evidence before the Court to support this claim".[45]

[62] The applicants did not present any evidence in this regard and elected not to reply to these allegations. The unfortunate consequence thereof for the applicants is that the respondents' contentions on this aspect are, therefore, uncontested.

[63] The second and third sessions with the Concerned Group were held on 23 October 2019 and 2 November 2019, which 16 and 28 persons attended, respectively (again with no indication as to how many households had been represented at the sessions).

[64] What is also striking, is that throughout the mediation report, phrases along the lines of: "it was brought to the attention", "the concerns that were raised", "it was reported", "we were provided with", are employed, without any indication as to the

[45] Para 77 of AA, pp 143 – 144.

particular that had furnished the information. It is, therefore, not grounded in fact and cannot be considered as evidence as required in applications of this nature.

[65] In *Quatermark Investment v Mkhwanazi*[46], the Supreme Court of Appeal stated that:

> "… It is trite that in motion proceedings affidavits fulfil the dual role of pleadings and evidence. They serve to define not only the issues between the parties, but also to place the essential evidence before the court. They must therefore contain the factual averments that are sufficient to support the cause of action or defence sought to be made out. Furthermore, an applicant must raise the issues as well the evidence upon which it relies to discharge the onus of proof resting on it, in the founding affidavit."

[66] In my view, the applicants wrongly construed and elevated the "reports" and "concerns" raised by members of the Concerned Group to the status of evidence of maladministration, improper conduct and misappropriation of funds by the committee, which it is not.

[67] Furthermore, in *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others*[47], Jaftha J made the following remarks regarding the role of a Director-General in relation to Communal Property Associations:

> "[49] Once registration is effected, the Director-General assumes other responsibilities in respect of the registered association. She may inspect the affairs of the association to determine whether it continues to comply with the Act and its constitution. In performing this function, the Director-General may demand to be furnished with any relevant information. In carrying out inspections, the Director-General may peruse and make copies of any document relating to the affairs of an association and may also subpoena any person with relevant information. If a dispute arises within an association, the Director-General must hold an enquiry or appoint a conciliator to assist in resolving the dispute. She may even initiate proceedings to have an association placed under administration, if the association is

[46] 2014 (3) SA 96 (SCA) at para 13.
[47] (CCT231/14) [2015] ZACC 25; 2015 (6) SA 32 (CC); 2015 (10) BCLR 1139 (CC) (20 August 2015), para [49].

unable to pay its debts. The Director-General must help any member of an association to challenge the validity of transactions which do not comply with section 12 of the Act." (footnotes omitted)

[68] In an exhaustive analysis of the relevant sections of the CPAA and Regulations, Hartle J stated as follows in *Grootboom and Others v Mkele and Others*[48]*:*

"[25] Perhaps the most important role which the Department has in keeping oversight of an association's affairs is acting when any dispute arises within the body. The relevant provisions of the CPAA are set out below and demonstrate the level of involvement on its part under the leadership of the Director-General. Firstly, conciliation by skilled and credible officials or organizations is offered as a tool to assist community members with vested interests in an association's affairs to resolve disputes. Section 10 provides in this regard that:

'(10)

(1)…

(2) The Director-General may, of his or her own accord or at the request of a community, an association, a provisional association or any member thereof, appoint a conciliator acceptable to the parties to a dispute to assist in resolving any issues for the purpose of the preparation or adoption of a constitution or to resolve a dispute between an association or provisional association and its members or between members or committee members: Provided that if the parties to the dispute do not reach agreement on the person to be appointed, the Director-General may appoint a person who has adequate experience or knowledge in conciliating community disputes.

[48] (3922/2015) [2016] ZAECPEHC 80 (27 September 2016), paras 25 – 28.

(3) A conciliator appointed in terms of subsection (2) shall attempt to resolve the dispute

(a) by mediating the dispute;

(b) by fact-finding relevant to the resolution of the dispute;

(c) by making a recommendation to the parties to the dispute;

(d) in any other manner that he or she considers appropriate.

(4) The conciliator shall report to the Director-General and the parties on the result of his or her conciliation and make recommendations in relation thereto.

(5) All discussions taking place and all disclosures and submissions made during the conciliation process shall be privileged, unless the parties agree to the contrary.

(6) …

(7) …

(8) …'

[26] Secondly, the Director-General may himself take certain steps to resolve disputes, aiming to do so in accordance with the provisions of the relevant association's constitution. Sections 11 (6) and (7) provide as follows in this regard:

'(6) If a dispute arises within an association or provisional association the Director-General may, of his or her own accord, or at the request of a member of the association or provisional association-

(a) undertake an enquiry into the activities of the association or provisional association, in which event he or she shall take reasonable steps to ensure that interested parties are made aware of the enquiry and of its outcome;

(b) advise the association or provisional association and the members of their respective rights and obligations;

(c) make a conciliator contemplated in section 10(2) available to assist in the resolution of the dispute;

(d) require the members to conduct an election for a new committee, if the integrity, impartiality or effectiveness of the committee or any member of the committee is in question;

(e) initiate proceedings contemplated in section 13; or take such other reasonable measures as he or she considers appropriate in the circumstances.

(7) When acting in terms of subsection (6) the Director-General shall be guided by the aim of resolving the dispute in accordance with the provisions of the constitution of the association.'

[27] The Director-General may also initiate proceedings to have an association placed under his administration or place it under liquidation where, because of insolvency or maladministration or for any other cause the association is unable to pay its debts or meet its obligations, or when it would otherwise be just and equitable in the circumstances to seek such relief. It would appear that the Director-General might do so under circumstances where members are unable to resolve disputes among themselves or through the Department's agency, which drag on interminably, and result in the association not being managed effectively.

> *[28] Finally, the Director-General may help any member of an association to challenge the validity of transactions which do not comply with section 12 of the CPAA."*

[69] I have quoted at length in this judgment from *Grootboom,* as it clearly has a bearing on the material issues in the present matter. The applicants wrongly contended that:

> "The director-general is bound by the factual findings contained in the mediation report, and is not at liberty to simply ignore them because he does not agree with them. This is so because the duty to mediate disputes between the Association and its members is that of the director-general and mediators appointed by him, hence are the extension of his bureaucratic hand and act on his behalf or in his stand."[49]

[70] Again, the answers to this contention are to be found in *Grootboom,* where the learned judge stated that:

> "[43] I am not in agreement with the submission made on behalf of the applicants that the general provision in section 10 (3) (d) of the CPAA, namely that the conciliator may attempt to resolve the dispute "in any other manner that he or she considers appropriate" extends to or covers over Ms Goci purporting to "regularize" the association as she did, however well intentioned she might have been in this regard. It is apparent from the provisions of section 11 (6) of the CPAA that the power of even the Director-General himself is limited to *requiring the members to conduct an election for a new committee* once the integrity or impartiality or effectiveness of the committee or any member of the committee is called into question.
>
> "[45] It is worth mentioning incidentally that Isibane's constitution has its own unique provisions for the mediation of disputes which require such between members to be undertaken by a disciplinary committee appointed by the committee and acting as a mediator, and between a member and the committee to be undertaken by members elected at a general meeting to mediate the dispute. Specific complaints of the abuse of power or the transgression of the constitution are to be addressed by a disciplinary committee appointed by the committee which may be referred to the general membership. If disputes and complaints cannot be resolved at either of those levels then and only in that event are the parties entitled to resort to outside mediation and, failing that, to litigation. Although somewhat ambiguously stated in the constitution, aggrieved members have the right to appeal (I suppose in the ordinary context of the word) to the Director-General and the court

[49] Para 86 of RA, p 530.

> for "appropriate relief and redress." Finally, the costs of any mediation will be for the account of the parties to the dispute and will not be the responsibility of Isibane."
>
> [46] Even when constitutional resort may be had to conciliation in terms of the CPAA, it is plain that this too follows a democratic process which respects the rights of both parties to the dispute. Although a member may ostensibly have the decision of the Director-General to conciliate the dispute foisted on him in the sense that he or she may not be in agreement that there is a dispute or at least on the terms complained of, that party is still entitled, for example, to be involved in the choice of an appropriate conciliator to be appointed. The very concept of conciliation further requires the conscious involvement of both parties in the process who are evidently not obliged to accept the possible outcome suggested to them by the neutral third party conciliating the issues between them. The role of the conciliator is limited to *assisting* in the resolution of the dispute in my view to the extent that the parties are prepared to go along with his or her suggestions regarding the manner in which the matter can be resolved. Whilst the shunning of the advice given or possible resolution of the dispute may result in the Director-General seeking an order of court placing the belabored association under his administration or being placed under liquidation if the particular malady (occasioned by the dispute) constitutes the requisite basis for such drastic action, a party is certainly not obliged to adopt what is proposed to him or her as an outcome. Axiomatically, the departmental official tasked with attempting to assist the parties to resolve a dispute cannot make a binding decision in this regard."

[71] It follows that the mediation report is, therefore, not binding on the Director-General. While I am in agreement with the applicants that the Director-General cannot simply ignore the mediation report, he certainly did not. He called for comments. The applicants acted prematurely by bringing this application without allowing the Director-General to exercise his powers and make an election as to which course to follow in terms of the relevant provisions of the CPAA.

[72] Having considered the papers and the facts holistically, I conclude that the applicants have failed to establish a prima facie right and, as shown above, I, in any event, have serious doubts about the veracity of the applicants allegations against the committee members.

A reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted

[73] The respondents have shown that with the financial controls in place, there is little chance (if any) of the funds being dissipated during the period that the Director-General finalises the process of resolving the dispute. In any event, I accordingly find that the applicants failed to prove this requirement as well.

The balance of convenience

[74] Insofar as the balance of convenience is concerned, it certainly favours the course adopted by the Director-General. In the circumstances of this matter, I conclude that the granting of interim relief will unduly interfere with and prevent the proper exercise of the powers of the Director-General, as contained in the legislation and expounded in *Grootboom.*

Suitable alternative remedies

[75] Prior to the launching of these proceedings, the Director-General had already called for comments on the mediation report to be submitted by 15 June 2020. Various options are available to the applicants in the scheme of the CPAA. In my view, the applicants should avail themselves of those remedies.

URGENCY

[76] In order to provide a proper context for the issue of urgency, I deemed it necessary to first deal with all the issues aforementioned.

[77] On their own version, the applicants' attorneys wrote to the Department and the RLCC as early as 4 May 2019 (prior to mediation commencing) requesting "to put in place temporal moratorium on the financial activities of the CPA (by suspending payment of salaries and remuneration to the executive members) pending the outcome of the mediation process. The Department flatly ignored this request for temporal intervention."[50]

[50] Para 65 of FA, p 26. See further para 42 of

[78] Having been advised on 3 February 2020 that the mediator had completed his Mediation Outcome Report and furnished it to the Director-General, the applicants' attorneys wrote to the Director-General on 5 February 2020 requesting the latter to immediately intervene in the financial affairs of the MCPA by restraining access to the MCPA finances, suspending payment of the salaries and other remuneration, and dissolving the committee, pending the Director-General's decision on the recommendations.

[79] The applicants also requested the Department to stop the passing of the latest budget on 31 January 2020, as this was purportedly in disregard of the mediation process, but again with no success.

[80] As justification for bringing this matter on an urgent basis, they further alleged that they only became aware that the mediator had recommended the dissolution of the committee when they received the report on 22 May 2020. On 25 May 2020 they held a virtual consultation with their legal representative and counsel "prepared a Certificate of Urgency, which he only finalised and sent on Friday, 29 May 2020."[51]

[81] They submitted that it was not necessary to bring this application prior to receiving the report, as the Department had the powers and authority to intervene and grant the required temporal relief. However, the Department failed to do so.

[82] They further alleged that the majority of the members of the Concerned Group are unemployed and come from poor families, and therefore did not have the necessary funds to cover the costs of litigation. On the other hand, the committee members use MCPA funds in their legal battles and, furthermore, continue to draw salaries and other benefits to the prejudice of the MCPA and the other beneficiaries. That they would not be able to obtain substantial redress in due course and that it was, accordingly, just and equitable and in accordance with the principle of equity that the relief be granted.

[51] Para 79 of AA, p 30.

[83] Interestingly, in support of their contention that there "is a great likelihood that the director-general will approve and follow the mediator's recommendations to dissolve the CPA committee"[52], the applicants attached an email received from the Department that stated that the Director-General had drafted an internal memorandum to that effect[53]. It will be noted that it is not clear from the email (dated 28 May 2020) what position the author thereof holds in the Department and in what capacity it had been sent. The said internal memorandum furthermore refers to the MCPA being placed under administration, which course of action, in my view, may be open to a valid legal challenge.

[84] In the face of the fact that this matter has a long and protracted history and that it is not the first time that the applicants have either brought an application of this nature or made requests to relevant officials for substantially the same relief as in the present matter, the applicants submitted that they could only bring the application once they became aware of the mediators recommendations.

[85] Unfortunately, this contention was based on the wrong premise that the mediation report was binding on the Director-General. I have already dealt with this contention. However, although I was of the view that no urgency, I decided to exercise my discretion and hear the matter.

Conclusion

[86] I am, accordingly, satisfied that the applicants have failed to make out a case for the relief sought in the notice of motion.

[87] There is no reason why costs should not follow the event.

[88] In the result an order in the following terms is issued:

1. The application is dismissed with costs.

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[52] Para 69, p 27.
[53] S9, p 100.

J C Coltman

Acting Judge of the High Court

APPEARANCES

For the applicants:	Adv S Madikizela Instructed by: B Makade Attorneys, Mthatha
For the 1st to 6th respondents:	Adv M Sibanda Instructed by: Potelwa & Co, Mthatha

Dates heard: 06 & 27/08/2020

Date delivered: 28/01/2021