

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE LOCAL DIVISION: MTHATHA]**

Case no. 2779/2020

In the matter between:

SITHELO ROYAL FAMILY

1st Applicant

THULANI PATRICK SITHOLE

2nd Applicant

and

THE PREMIER OF EASTERN CAPE

1st respondent

THE MEC FOR CO-OPERATIVE GOVERNMENT

& TRADITIONAL AFFAIRS

2nd Respondent

KHIWA ROYAL FAMILY

3rd Respondent

MPUMALANGA GWADISO

4th Respondent

JUDGMENT

JOLWANA J

[1] This matter concerns the incumbency of the headmanship of Lower Ndungunyeni Administrative Area (Lower Ndungunyeni) in the district of Ngqeleni. Lower Ndungunyeni is part of and falls under Amakhonjwayo Traditional Community which is under the Amakhonjwayo Traditional Council. The royal family of Amakhonjwayo Traditional Council is the Khiwa Royal Family.

[2] The applicants instituted motion proceedings on 26 August 2020 under case no. 2779/2020 (the current proceedings) in which they seek the following relief:

- “1. That the first and second respondents’ refusal to consider and decide the royal family’s resolution of the first applicant in culmination for the recognition of the second applicant in line with the recommendations of the house of traditional leaders

dated 22 March 2017 to be the headman of Lower Ndungunyeni administrative area in the district of Ngqeleni be reviewed and set aside.

2. That upon the decision for the recognition by the first respondent in paragraph 1 supra the second respondent must process all the administrative processes like publication in the Government Gazette upon culmination for payment, after the due process such payment be effected within (30) thirty days.
3. That the second and fourth applicant (sic) be and are hereby interdicted from interfering with the affairs of Sithelo Royal Family specifically (sic) the process of royal family resolutions forthwith.
4. That the refusal by the first, second, third and fourth respondents to do so be declared invalid, unlawful and without any legal cause.
5. That the respondents pay costs of this application the one paying the other to be absolved."

[3] I have referred to this matter as the current proceedings to distinguish it from a different matter in which the almost similar if not the same relief was sought under case no.4159/2018 (the withdrawn proceedings). The withdrawn proceedings were instituted on 29 August 2018 and were withdrawn by the applicants' attorneys in terms of a notice of withdrawal filed with the registrar of this Court on 19 February 2020. During the currency of the withdrawn proceedings the applicants were granted an order by this Court on 11 December 2018 in unopposed motion proceedings in which the first and second respondents were ordered to recognise the second applicant as the headman of Lower Ndungunyeni.

[4] Although the applicants do not deal with this issue in any details in the founding affidavit it appears from the first and second respondents' answering affidavit that in fact the second applicant was instated as the headman of Lower Ndungunyeni and paid the attendant emoluments, in compliance with the resolution of the Eastern Cape House of Traditional Leaders dated 22 March 2017 annexed to the founding affidavit as annexure TP28 and the court order dated 11 December 2018. The

second applicant does not dispute these facts in the replying affidavit. I therefore accept them as being correct.

[5] The protracted history of this matter and its factual matrix includes the fact that on the 18 May 2018 the second respondent addressed a letter to the applicants in which the following issues were brought to their attention:

1. That the intended recognition of the second applicant as headman of Lower Ndungunyeni was published in the provincial government gazette dated 9 August 2017.
2. The said publication attracted an objection from the 3rd respondent who claimed that the rightful person to ascend to the headmanship of Lower Ndungunyeni was the 4th respondent.
3. That because of the said objection the second applicant's recognition could not be processed unless the 3rd respondent agreed.
4. That there was a decision by the 2nd respondent to start a process of recognising Thozamile Sithelo as an acting headman to act in that position for and on behalf of the 4th respondent.
5. That the intended recognition of Thozamile Sithelo as an acting headman of lower Ndungunyeni would be published in the provincial gazette in which interested parties would be invited to submit comments within 21 days from the date of publication.
6. That once the name of Thozamile Sithelo had been published in the provincial gazette the applicants would be provided with a copy of the notice and should there be objections to the intended recognition of Thozamile Sithelo the second

respondent would consider those objections and take a decision on the person to be recognised as the headman of Lower Ndungunyeni.

[6] The above is a truncated content of the letter dated 18 May 2018. It appears that the applicants received it in that they have annexed it to the founding affidavit as annexure TP29.

[7] The applicants do not engage with this letter despite its obvious importance. There is no clear indication of what they did about it. I will deal with the relevance of this letter and the applicants' failure to deal with it later herein as its content may very well be one of the decisive issues to the entire case. Suffice it for now to mention that they deal with it passively as follows in their founding affidavit:

“22. ... I hasten to allude further that the same Khiwa Royal Family objected in the government gazette intended to recognise me by filing an objection that Mpumalanga Gwadiso is another person identified by Khiwa Royal Family and that was in a letter dated 18 May 2018 which is marked as PT(sic) 29 annexure hereof.”

[8] I have hereinbefore mentioned the court order dated 11 December 2018 in terms of which the first and second respondents were ordered to recognise the second applicant in unopposed motion court proceedings. It appears that the said court order was later rescinded following an application launched by the 3rd respondent and one chief Dumisani Gwadiso who is not cited in these proceedings. The said court order in terms of which the rescission application was granted is dated 6 February 2020. In addition to rescinding that court order the court also issued the following order:

“3. The respondent herein (Thulani Sithelo) is hereby directed to file his supplementary amended and/or amplified founding papers, if he so wishes within fifteen days of the granting of this order.”

[9] It appears from the court order dated 6 February 2020 that the second applicant, Mr Thulani Sithelo was legally represented when the rescission application and the above as well as other orders were granted. Instead of filing supplementary papers in terms of the order dated 6 February 2020, the applicants in these proceedings filed a notice of withdrawal of the entire application under case no. 4159/2018 on 19 February 2020 which was 13 days from the date on which the rescission application was granted. The withdrawal of case no. 4159/2018 is mentioned in passing by the applicants as follows in the founding affidavit without any explanation for the withdrawal of those proceedings:

“29. I hasten to allude that through my current attorneys of record there was another litigation under case no. 4159/2018 which resulted to my appointed by means of a court order and such a court order was rescinded by Khiwa Royal Family on behalf of Mpumalanga Gwadiso their incumbent and the facts were deposed to by their chairperson Dumisani Gwadiso.”

[10] One would have thought that chief Dumisani Gwadiso has an obvious interest in these proceedings. After all he is the chairperson of the 3rd respondent. He was also an applicant in the rescission application which was granted on 6 February 2020. The fourth respondent is acting in his position as a senior traditional leader of AmaKhonjwayo Traditional Community. Furthermore, if I read the court order dated 6 February 2020 correctly, the rescission order, the court also ordered that Chief Dumisani Gwadiso be joined in those proceedings. This has not been done.

[11] The second applicant thereafter alleges that after the rescission he instructed his attorneys to write a letter to the offices of the 1st and 2nd respondents asking them to take administrative action to consider and make a decision regarding his recognition in line with the recommendations of the house of traditional leaders on the basis that those recommendations still stood. The said letter is not annexed to

the founding affidavit but is annexed as SPM1 to the applicants' replying affidavit. The applicant alleges that it was written on 21 February 2020. From this point onwards the founding affidavit derails into other irrelevant issues about what he calls a "*huge feud*" in which the 4th respondent and other people are alleged to have attacked certain persons with sticks, bushknives and spears resulting in some people being injured. I do not understand how that attack, even if it happened, is relevant to whether or not the second applicant is entitled to the orders sought in the notice of motion. Thereafter, the founding affidavit further derails into some issues about the fact that he could not refer the matter to Nyandeni Great Place for some reason. Thereafter the founding affidavit largely consists of an attempt to summarise the provisions of some sections of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) in an attempt to make a case for judicial review. The above, is to a lesser or greater extent, a summary of the applicants' averments as contained in the founding affidavit where the applicants would have been expected to make out their case.

[12] One of the issues raised by the respondents, very pointedly is the undue delay in launching the current proceedings. The respondents contend that these proceedings should have been instituted within a reasonable time, more specifically within 180 days.

[13] The 180-day rule is provided for in section 7(1) of PAJA as follows:

"7 (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 the 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

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

[14] The 3rd and 4th respondents contend that this application was filed on 26 August 2020 way after the second applicant was advised of the decision to refuse to recognise him and the reasons for such refusal. It is indeed common cause that the second applicant was advised of the decision to refuse recognising him following the objections received from the 3rd respondent. The letter containing the refusal decision is annexed to the applicants’ own papers as annexure TP29. It is dated 18 May 2018.

[15] In part it reads:

- “2. Kindly be advised that after publishing the intended recognition of Thulani Sithelo as Headman of Lower Ndungunyeni Administrative Area under Khonjwayo Traditional Council per Provincial gazette dated 09 August 2017, the department received an objection from Khiwa Royal Family claiming that the Headmanship belongs to Nkosi Mpumalanga Gwadiso from Khiwa Royal Family who is currently acting as a Senior Traditional Leader on behalf of Dumisani Gwadiso.
3. Due to the said objection, recognition of Thulani Sithelo could not be processed without concurrence of the Khiwa royal family and Chairperson of Khonjwayo Traditional Council.”

[16] Besides the fact that the applicants should have dealt with this letter more meaningfully and not in passing as they did in the founding affidavit, they content themselves with dealing with it in the replying affidavit again without engaging meaningfully with its content. Furthermore, the first prayer in the notice of motion does not make sense if regard is had to the letter dated 18 May 2018. This is because that letter contained among other things, a decision to refuse to recognise the second applicant.

[17] This failure to engage with the issue of delay is more glaring regard being had to the replying affidavit. The applicants' replying affidavit to the 3rd and 4th respondents' answering affidavit passively refers to paragraphs 1, 2, 3, 4 and 5 of the 3rd and 4th respondents' answering affidavit. Thereafter it makes no reference to paragraphs 6, 7 and 8 but jumps to paragraph 9. Paragraph 9 of the 3rd and 4th respondents' answering affidavit merely prays for the dismissal of the application based on contentions made in paragraphs 6, 7 and 8 which deal pointedly with the unreasonable delay.

[18] In dealing with the unreasonable delay in the replying affidavit the applicants make the following contentions:

“

15.

Ad paragraph 9; In these proceedings the undue delay and 180 days is disputed in the sense that on the **23rd August 2018** I instituted the other proceedings under case number **4159/2018** with similar cause of action which is the dispute of headmanship and the notice of motion is marked as **SPM1** annexure hereof and the court order was granted by **Honourable Judge President Mbenenge** on the **11th December 2018** and such an order is marked as **SPM2** annexure.

16.

This order was operational and effective until the **6th February 2020** after a year and one month wherein it was rescinded by the third and fourth respondents in the circumstances this delay was not wilful in that there is a defence of **lis pendens**.

17.

The time period of **180** days was lawfully disturbed by the proceedings which at some stage was solved by court order later rescinded although I withdrew such proceedings to start the new proceedings and a notice of withdrawal is marked as **SPM3** annexure hereof and the same third and fourth respondents

were involved on this point alone the respondents contention be dismissed with costs.

18.

I am further not aware of any letter depicted **TP29** except the one which is **TP21** annexure whose author is **F.D. Xhasa** the Member of the Executive Council Eastern Cape signed on the **15th May 2018** by the same MEC.”

[19] All these contentions are irrelevant to the issue of when the second applicant became aware of annexure TP29, the letter dated 18 May 2018 which he annexed in his own founding affidavit. He does not address the issue at all. Instead there is an attempt to deny the knowledge of TP29. This attempt at denial is expressed in paragraph 18 of the replying affidavit referred to above. How the applicants could not be aware of a document annexed to their own founding affidavit is mind boggling. Instead of dealing with TP29 the second applicant professes to be only aware of TP21 which he says is a letter signed by the 2nd respondent on 15 May 2018. TP21 is an annexure to the applicants’ founding affidavit. It is captioned “Registration and Listing of Royal Family Members”. This is a far cry from being a letter dated 15 May 2018 and is in fact signed on 25 March 2014. The incoherence and lack of serious attention in how the applicants’ papers were drafted and the jumbling of the annexures is incredible, to put it mildly.

[20] The applicants’ case is based on the resolution of the Eastern Cape House of Traditional Leaders. That resolution is annexed to the second applicants’ founding affidavit as TP28 and is dated 22 March 2017. The second applicant relies on it explicitly in the founding affidavit.

[21] He says:

“

21.

In the process of this dispute the officials of the department and the house of Traditional leader came in our area to investigate this calamity and concluded that I am the rightful heir of Lower Ndungunyeni in the district of Ngqeleni and such recommendations are dated **22nd March 2017** and marked **TP28** respectively and such recommendations still stand.

22.

The **paragraph 3** of the said resolutions this Khiwa Royal Family and Thozamile Sithelo were advised that in the event of non-satisfaction they are at liberty to appeal to the Premier and this was never done. I hasten to allude further that the same Khiwa royal family objected in the government Gazette intended to recognize me by filing an objection that **Mpumalanga Gwadiso** is another person identified by Khiwa royal family and that was in a letter dated **18th May 2018** which is marked as **PT29** annexure hereof.”

[22] If there was any doubt about the applicants’ reliance on the resolution of the Eastern Cape House of Traditional Leaders (TP28), paragraphs 21 and 22 of the founding affidavit and the first prayer in the notice of motion put paid to such doubt. The notice of motion in the current proceedings specifically refers to it in no uncertain terms as do paragraphs 21 and 22 of the founding affidavit.

[23] The applicants do not indicate when they received TP28 in the founding affidavit despite relying on it for the relief they seek presumably because they saw no need to apply for the condonation of any unreasonable delay. Even when the issue of unreasonable delay is raised in the answering affidavit of the 1st and 2nd respondents the second applicant is not only curtly dismissive of it but it appears that the applicants do not wish to confront it and deal with it more meaningfully and explain why there was no undue delay. This is very surprising considering that the 180-day rule is a statutory requirement in the first place. In the second place the manner of dealing with it is also statutorily prescribed. Section 9 of PAJA provides for it as follows:

“9. Variation of time

- (1) The period of –
 - (a) 90 days referred to in section 5 may be reduced; or
 - (b) 90 days or 180 days referred to in sections 5 and 7 be extended for a fixed period by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.
- (2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require.”

[24] In this case the letter from the Eastern Cape House of Traditional Leaders is dated 22 March 2017. The proceedings were launched on 26 August 2020, some three years and a little over four months later. When the issue of unreasonable delay is raised by the respondents the applicants seek refuge in the withdrawn proceedings which were instituted under case no. 4159/2018. There are a number of problems with relying on those proceedings. Putting aside the fact that the second applicant withdrew those proceedings on 19 February 2020 and instituted the current proceedings on 26 August 2020, there are other insurmountable problems. I say insurmountable in the context of the fact that the applicants obviously on the advice of those representing them elected not to apply for condonation or the extension of the period of 180 days.

[25] Some of the problems are that the 90-day period referred to in section 5(1) of PAJA would, if calculated 30 days after the 22 March 2017, end in July 2017. I interpose here to again make mention of the fact that the applicants rely on the respondents’ failure to implement the resolution of the Eastern Cape House of Traditional Leaders and not on TP29, the second respondent’s letter dated 18 May 2018. I must emphasize that in his founding affidavit the second applicant does not even mention that a decision was ever taken to recognise him and that he got paid

as a headman of Lower Ndungunyeni. It seems to me that if the applicant wanted to rely on the letter from the Eastern Cape House of Traditional Leaders (TP28) to advance his cause of action in any way he wanted to, he then needed to deal with the fact that he only applied to this Court in these proceedings in August 2020. He should have dealt with that issue in the founding affidavit.

[26] Therefore, trying to meet the unreasonable delay challenge with reference to the withdrawn proceedings which were themselves instituted way out of time on 23 August 2018 is both misguided and unsustainable. If he had based his cause of action on the letter of the second respondent dated 18 May 2018, he might, in that regard have been understandable in taking the risky option of not applying for condonation in those proceedings. But even then once those proceedings were withdrawn, I am not sure that he is entitled, without more, to resuscitate them for purposes of dealing with the failure to apply for condonation. There may very well be merit in the view that once proceedings are validly withdrawn, there is nothing left of them. They are as good as dead. Therefore, the interruption of the 180-day period by non-existent proceedings is a long short, at best unless carefully pleaded in the founding papers. I was not referred to any authority for the proposition that withdrawn proceedings remain valid for the interruption of the 180-day period so as to dispense with the need to apply for condonation without even pleading the issue properly. In any event the relevance of the withdrawn proceedings for purposes of interrupting the 180-day period escapes me. This is because in prayer 1 of the notice of motion of the withdrawn proceedings the second applicant sought an order setting aside the refusal to recognise him based on something that was not mentioned in that notice of motion which unnamed thing is dated 18 June 2018. That speaks to a different cause of action in my view.

[27] The centrality of the time frames within which the review proceedings must be instituted cannot be overemphasized. The applicable principles in dealing with the issue of the 180-day requirement have become crystalized and are trite. They were recently restated in *ASLA Construction*.¹ In that case which incidentally emanated from this Division, the Constitutional Court said:

“The standard to be applied in assessing delay under both PAJA and legality is thus whether the delay was unreasonable. Moreover, in both assessments the proverbial clock starts running from the date that the applicant became aware or reasonably ought to have become aware of the action taken. However, it is important to note that the assessment is not the same. A distinction between the assessments of the delay under PAJA versus the principle of legality turns on the prescribed time period of 180 days. This distinction was succinctly described by the Supreme Court of Appeal in *Opposition to Urban Tolling Alliance*, which found that s 7 creates a presumption that a delay longer than 180 days is ‘*per se* unreasonable’:

‘At common law application of the undue delay rule required a two stage enquiry. First, whether there was an unreasonable delay and, second, if so, whether the delay should in all the circumstances be condoned Up to a point, I think, s 7(1) of PAJA requires the same two stage approach. The difference lies, as I see it, in the legislature’s determination of a delay exceeding 180 days as *per se* unreasonable. Before the effluxion of 180 days, the first enquiry in applying s 7 (1) is still whether the delay (if any) was unreasonable. But after the 180 day period the issue of unreasonableness is pre-determined by the legislature; it is unreasonable *per se*. It follows that the court is only empowered to entertain the review application if the interests of justice dictates an extension in terms of s 9. Absent such extension the court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters. The decision has been “validated” by the delay’.

[28] As I have said before, the applicants elected not to apply for an extension of the 180-day period, or for the condonation of any delay even out of caution, if they believed that it was not necessary. They have not done so. On the authority of *Opposition to Urban Tolling Alliance* which was cited with approval by the Constitutional Court in *ASLA Construction*, this Court has no jurisdiction to even entertain the review application and therefore, this application stands to be dismissed on this ground alone. There cannot even be considerations of what is in the interests of justice, absent the issue being pleaded and a condonation

¹ *Buffalo City Metropolitan Municipality v ASLA Construction (Pty) Ltd* 2019 (4) SA 331 (CC) at para 49.

application being made as even the interests of justice cannot be determined in a vacuum.

[29] For reasons that are altogether unfathomable, the applicants have disavowed any knowledge of TP29, an annexure to their own founding affidavit as stated hereinbefore. This is inexplicable and makes no sense to me. In any event, I am satisfied that the disavowal of the knowledge of the 2nd respondents' letter dated 18 May 2018 can only be disingenuous or even worse if regard is had to the fact that it is annexed to the founding affidavit. That letter brings me to the last issue that I consider necessary to deal with. That issue is the fact that the letter dated 18 May 2018 annexed as TP29 to the founding affidavit communicated a number of decisions taken by the 2nd respondent. They are:

1. That there was an objection to the second applicant's intended recognition and a claim that the correct person to be recognised was the 4th respondent.
2. That as a result of the said objection the 2nd applicant's recognition was not going to be processed.
3. That another decision had been taken to start a process of recognising one Thozamile Sithelo as an acting headman on behalf of the 4th respondent.
4. That the intended recognition of Thozamile Sithelo would be published in the provincial government gazette and that comments thereto would have to be made within 21 days of publication.
5. That once the publication of the intended recognition of Thozamile Sithelo was done the second applicant would be furnished with a copy of the notice of publication. Most importantly if there were objections to the intended recognition of

Thozamile Sithelo the second respondent would consider the objections and take a decision.

[30] I have again briefly re-encapsulated the contents of the letter dated 18 May 2018 for emphasis and also to highlight the fact that the second applicant does not deal with these fundamental decisions at all. It is not clear to me why the second applicant did not challenge the decision not to process his recognition. Equally surprising is his decision not to challenge the decision to recognise Thozamile Sithelo as an acting headman of Lower Ndungunyeni. The letter dated 18 May 2018 must be read together with the letter dated 24 March 2020 addressed by the 2nd respondent to the second applicant. In the letter dated 24 March 2020 the second applicant was informed that his services as a headman of Lower Ndungunyeni were being terminated and that he had 30 days within which to vacate his headmanship. That letter is annexed to the 1st and 2nd respondents' answering affidavit as MN3 and is dealt with at paragraph 45 thereof. Very surprisingly the second applicant is dismissive of the said letter of the termination of his services. He does not say he did not receive it; he merely dismisses it as having no bearing to this application. I find it breath-taking that a dismissal letter can be said to have no bearing in proceedings in which the applicant is basically seeking reinstatement.

[31] The facts are that he was dismissed as a headman of Lower Ndungunyeni. He has not challenged his dismissal. In these proceedings he is not challenging his dismissal. He is asking this Court to again order the 1st and 2nd respondents to recognise him in terms of the letter dated 22 March 2017, as if it was never done before and as if he was not dismissed later. At paragraph 47 of the answering affidavit of the 1st and 2nd respondents it is submitted that Thozamile Sithelo has since been recognised and his recognition was done on the 2 October 2020. A

memorandum which is said to be in terms of the Eastern Cape Traditional Leadership and Governance Act 1 of 2017 recognising Thozamile Sithelo is attached as annexure MN5 to the said answering affidavit. Very significantly the second applicant does not plead ignorance of the said recognition in his replying affidavit. He laments a number of things and his laments are incoherent and difficult if not impossible to make sense of. Be that as it may the fact of the matter now is that Thozamile Sithelo has since been recognised as the acting headman of Lower Ndungunyeni acting in the stead of the 4th respondent. The second applicant was told by the 2nd respondent that the recognition of Thozamile Sithelo was being processed as far back as May 2018. There could therefore be no surprise when it was finalized in October 2020.

[32] The recognition of Thozamile Sithelo is not being challenged in these proceedings. The second applicant seeks an order that this Court should order the 1st and 2nd respondents to appoint him to a position that is currently occupied by Thozamile Sithelo. He does this without seeking that the appointment of Thozamile Sithelo as an acting headman for the 4th respondent should be set aside. In fact, he has, to date, not challenged the process that led to the appointment of Thozamile Sithelo nor has he sought that his appointment be set aside. In other words, he wants to be recognised to a position that he knows is occupied by Thozamile Sithelo on behalf of the 4th respondent. I do not see how that is even legally possible. In all these circumstances the applicants' application must fail. I do not consider it necessary to deal with the other issues raised by the respondents. This is because regardless of what this Court may find on those issues the outcome of this application would still be the same, namely the applicants' application must still be dismissed.

[33] There is something very disturbing about the manner in which the applicants' papers were drafted. The respondents have, in any event, raised the issue pointedly. The state of the applicants' papers is atrocious. I am horrified to see and read papers of a legally represented litigant in such a shockingly poor state reflecting everything from carelessness, gross negligence to downright incompetence on the part of those representing the applicants. The applicants' papers reveal a level of incompetence that is thankfully not a reflection of the standard of litigation or even drafting of pleadings in this Division. One does not often encounter such a level of abysmal incompetence which is clearly a disgrace to the legal profession and a terrible disservice to the applicants. I considered inviting the legal representative of the applicants to make submissions on why costs should not be on an attorney and client scale and be paid *de bonis propriis*. In this judgment I have referred to a number of instances that point to disgracefully poor legal representation, carelessness and incompetence.

[34] In addition to all that is already mentioned elsewhere in this judgment there are other glaring examples that I must mention. They include the failure to describe the first applicant, annexing a number of annexures without dealing with them in the affidavits. The attachment of no less than 12 confirmatory affidavits from some relatives of the second applicant which are irrelevant, meaningless and which serve no useful purpose at all if regard is had to their content. Litigation is not a game, let alone a game of chance where litigants just throw in documents and make meaningless averments or submissions in their papers. The required careful attention must be paid to the pleadings and where the legal representative does not have the required time to do a decent *albeit* not a perfect job, he or she must simply

not take the instruction as a professional duty owed to the client and out of respect for his calling.

[35] In *Multi-Links*² Fabricius J expressed the following sentiments with which I am in respectful agreement:

“Costs are ordinarily ordered on the party and party scale. Only in exceptional circumstances and pursuant to a discretion judicially exercised is a party ordered to pay costs on a punitive scale. Even more exceptional is an order that a legal representative should be ordered to pay the costs out of his own pocket. It is quite correct, as was submitted, that the obvious policy consideration underlying the court’s reluctance to order costs against legal representatives personally, is that attorneys and Counsel are expected to pursue their client’s rights and interests fearlessly and vigorously without undue regard for their personal convenience. In that context they ought not to be intimidated either by their opponent or even, I may add, by the court. Legal practitioners must present their case fearlessly and vigorously, but always within the context of set ethical rules that pertain to them, and which are aimed at preventing practitioners from becoming parties to a deception of the court. It is in this context that society and the courts and the professions demand absolute personal integrity and scrupulous honesty of each practitioner. See *Kekana v Society of Advocates of South Africa* 1998 (4) SA 649 (SCA) at 655-656 [also reported at [1998] 3 All SA 577 (SCA) – Ed].

It is true that legal representatives sometimes make errors of law, omit to comply fully with the Rules of Court or err in other ways related to the conduct of the proceedings. This is an everyday occurrence. This does not, however, *per se* ordinarily result in the court showing its displeasure by ordering the particular legal practitioner to pay the costs from his own pocket. Such an order is reserved for conduct which substantially and materially deviates from the standard expected of the legal practitioners, such that their clients, the actual parties to the litigation, cannot be expected to bear the costs, or because the court feels compelled to mark its profound displeasure at the conduct of an attorney in any particular context. Examples are, dishonesty, obstruction of the interests of justice, irresponsible and grossly negligent conduct, litigating in a reckless manner, misleading the court, and gross incompetent and a lack of care.

See for instance Herbstein & Van Winsen: *The Civil Practice of the High Courts of South Africa* (5ed by Cilliers and others) Volume 2 at page 984. See also *Ward v Sulzer* 1973 (3) SA 701 (AD) at 706-707 [also reported at [1973] 3 All SA 628 (AD) – Ed].”

[36] The whole of the applicants’ papers are littered with a plethora of instances where the papers themselves call for the costs to be paid, not by the litigants but by those representing them. The applicants’ papers speak for themselves in this regard. However, Mr Mkhongozeli who appeared for the applicants apologised for

² *Multi-Links Telecommunications Ltd v Africa Prepaid Services, Nigeria Ltd; Telkom SA Soc. Limited and Another v Blue Label Telecoms Limited and Others* [2013] 4 All SA 346 (GNP) at 369 paras 34-5.

the state of the applicants' papers and I consider that apology to be genuine. I therefore will not order that he personally pays the costs. This is done in the hope that he has learnt his lessons. Furthermore, the respondents indicated that they did not insist on a costs order on an attorney and client scale. It was submitted on their behalf that costs should be awarded on a party and party scale. Indeed, while I considered make a punitive order for costs against the second applicant to be paid *de bonis propriis* I am persuaded by the concessions made by Mr Mkhongozeli on a number of what he called procedural flaws in the applicants' papers and his apology for them. Therefore, in the judicial exercise of my discretion I will make a simple order that the application must fail and that costs should follow the results.

[37] In the result the following order shall issue:

1. The application is dismissed with costs.
2. The second applicant is ordered to pay costs on a party and party scale.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances:

Attorney for the Applicants: H.N. Mkhongozeli

Instructed by: H.N. Mkhongozeli Attorneys

MTHATHA

Counsel for the 1st and 2nd Respondents: L.L. Sambudla

Instructed by: State Attorneys

MTHATHA

Attorney for the 3rd and 4th Respondents: V.V. Msindo

Instructed by: V.V. Msindo & Associates

MTHATHA

Heard on: 12 August 2021

Delivered on: 17 August 2021