

**REPORTABLE
IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION : MTHATHA**

CASE NO. 107/99

In the matter between:

THE PREMIER OF THE EASTERN CAPE **1st Applicant**

**THE MEMBER OF THE EXECUTIVE COUNCIL
FOR RURAL DEVELOPMENT AND
AGRARIAN REFORM, EASTERN CAPE** **2nd Applicant**

and

Z. K. DLAVA & OTHERS **1st Respondent**
**THOSE RESPONDENTS CITED IN
ANNEXURE :NoM 1” HERETO**

JUDGMENT

GRIFFITHS, J.:

[1] Case Flow Management is at present being introduced by the judiciary in the various divisions of the High Court in this country. This case, more than any, exemplifies the need for case flow management and had it been in existence in 1999 and 2000 when the many actions which are the subject of this application were instituted, the unhappy circumstances which I shall describe hereinafter would probably not have occurred.

INTRODUCTION

[2] The applicants in this matter are the Premier of the Eastern Cape and the Member of the Executive Council for Rural Development and Agrarian Reform, Eastern Cape. The respondents are the plaintiffs in 309 separate actions against the applicants, and/or their predecessors, and others. Apart from five of these actions which were instituted during the years 2000 and 2001, all these actions were launched during 1999.

[3] The applicants seek an order in the following terms:

- “1. That the actions instituted in the above Honourable Court by the First Respondent and those Respondents cited in annexure “NoM 1” as plaintiffs against the Premier for the Province of the Eastern Cape and the Member of the Executive Council for Agriculture and Land Affairs, Eastern Cape, as defendants, under case number 107/99 in respect of the First Respondent and those case numbers set out in annexure “NoM 1” in respect of the further Respondents, be and are permanently stayed.

2. Alternatively to paragraph 1 above, that the individual actions instituted in the above Honourable Court by the First Respondent and those Respondents cited in annexure “NoM 1” as plaintiffs against the Premier for the Province of the Eastern Cape and the Member of the Executive Council for Agriculture and Land Affairs, Eastern Cape, as defendants under case number 107/99 in respect of the First Respondent and those case numbers set out in annexure “NoM 1” in respect of the further Respondents be and are individually stayed pending:
 - (a) Payment in full by each Respondent as plaintiff in his or her individual case of all costs owing by such Respondent to the defendants as taxed by the taxing master, arising out of interlocutory proceedings in the abovementioned cases from the date of issue of summons until the present; and
 - (b) Furnishing of security for costs by each Respondent as plaintiff in his or her individual case in the sum of R250 000.00 (two hundred and fifty thousand rand) or such other sum as this Honourable Court may determine;
3. Alternative relief; and
4. Costs of suit against the Respondents jointly and severally, the one paying the other to be absolved.”

[4] The applicants have premised their case on various foundations all of which the applicants allege amount to an abuse of the process of this court and result in serious injustice to the applicants. It is their case that the respondents, in pursuing these actions, have acted in breach of an agreement concluded by the parties' attorneys of record, that the litigation is frivolous and vexatious and that its continued pursuit is an exercise in futility in light of the judgment in the matter of **Z R Twani and Others v The Premier of the Eastern Cape and Others**¹ ("Twani"). The applicants have also in this regard relied on the inevitably fruitless incurring of extensive costs which, they have alleged, the respondents will almost certainly not be able to pay in view of their continued protestations of impoverishment.

HISTORY (BEFORE THE TRIAL IN Z R TWANI AND OTHERS v THE PREMIER AND OTHERS)

[5] On 10 July 1997 the Premier of the Province of the Eastern Cape ("the Premier"), purporting to act in terms of the provisions of section 13(1) of the Corporations Act² issued Proclamation 10 of 1997 in terms of which he purported to dissolve the then existing Transkei Agricultural Corporation ("Tracor"). This resulted in an urgent application being launched in this court by 47 former employees of Tracor against the Premier, the Member of the Executive Council for Agriculture and Land Affairs, Eastern Cape and Tracor itself ("the Cekeshe application") in which application the applicants sought a rule nisi calling upon the respondents in the Cekeshe application to show cause, *inter alia*, why

¹ Case No. 460/99 (Transkei Division) – a judgment of Kroon J delivered on 3 March 2005

² No. 10 of 1985 (Transkei)

Proclamation 10 ought not to be declared unconstitutional and invalid and set aside. They were also called upon to show cause why those respondents ought not to be interdicted and restrained from unlawfully closing Tracor; terminating, altering adversely or in any manner interfering with the employment and conditions of service of those applicants; withholding, reducing, refusing to pay or in any manner interfering with the salaries and benefits enjoyed by those applicants in terms of their conditions of service with Tracor; or evicting, hindering, harassing or in any manner interfering with those applicants' occupation of residential premises allocated by Tracor in terms of their respective conditions of service.

[6] In the Cekeshe application it was averred that the decision to dissolve Tracor was unlawful, unreasonable, procedurally unfair and in violation of those applicants' right to administrative justice. It was averred that Tracor's employees had been excluded from the decision making process and had thus not been consulted with regard to the dissolution of Tracor and the consequences thereof for Tracor employees.

[7] In opposing the Cekeshe application, the respondents in that application did not raise or canvas the extensive period of negotiation which had apparently preceded the issue of Proclamation 10, resting their case on an argument that the actions of the Premier did not amount to "administrative action" but were rather legislative in nature. It was thus argued that the Premier was, in issuing the proclamation, making original legislation not subject to the rights protected by section 33 of the Constitution.

[8] This argument did not find acceptance by Van Zyl J who heard the matter³. In his judgment he found that by exercising his power terms of section 13 of the Corporations Act, the Premier did not create original legislation and that his actions constituted administrative action. Because, on the case as made before him by the respondents, they had not established compliance with the *audi alteram partem* principle, the decision was unlawful and Proclamation 10 together with the consequential termination of those applicants' employment was set aside. Van Zyl J's judgment was duly appealed against but was dismissed by the full court⁴.

[9] The success of those applicants in the Cekeshe application spawned the issue of summonses by the respondents in this matter, amongst others, who are all ex-Tracor employees. As a matter of convenience, I shall, in the balance of this judgment, refer to the respondents as "the plaintiffs". Although the number of plaintiffs has been reduced, it appears that initially there were 597 actions. The plaintiffs' cause of action in each instance was based, in the main, on the finding by Van Zyl J to the effect that the dissolution of Tracor constituted unlawful administrative action. Delictual damages were claimed in each instance based on the decision made by the Premier, as first defendant, and further damages resulting from an *injuria* allegedly sustained in consequence of the closure of Tracor. One group of plaintiffs had been employed by Tracor under what was referred to as the "Qamata Irrigation Scheme" ("Qamata"). This set of plaintiffs ("the Qamata plaintiffs") alleged in addition to the foregoing that there existed a contractual relationship between them and the Department of Agriculture

³ Cekeshe and Others v Premier, Eastern Cape and Others 1998 (4) SA 935 (Tk)

⁴ Premier, Eastern Cape, and Others v Cekeshe and Others 1999 (3) SA 56 (TK D)

and Land Affairs of the Province of the Eastern Cape. Based hereon, they pleaded an alternative claim founded on an alleged breach of contract arising from the termination of their employment, together with a further alternative claim that such employment had not in fact been terminated resulting in an entitlement to their full emoluments consequent upon a tender of their services.

[10] These actions were all defended by the applicants. It is, however, common cause on the papers that the combined summonses issued in all these matters were irregular and excipiable which resulted in a further series of interlocutory applications. Before dealing with the further conduct of these actions, it is necessary to mention that on 8 July 2008 the offices of the applicants' attorneys in Mthatha, X M Petse Incorporated, were apparently mysteriously destroyed in a fire. During the course of this inferno the entire contents of all the files in these actions were destroyed. It became necessary for the applicants' attorneys to reconstruct these files from the material then available to them, including the court files (which were apparently woefully incomplete) and documentation kept by counsel. Accordingly, the further conduct of the litigation as set out in the founding affidavit was based upon these reconstructed, and incomplete, files. A further problem which faced the applicants in this regard is the fact that the original combined summonses are apparently missing from the court files in the vast majority of these actions.

[11] To illustrate the importance of the original combined summonses, when the Twani matter (which I shall describe later in this judgment) came before the court as a form of test case a claim originally pursued against the second defendant in one of the Qamata actions was abandoned

by a subsequent amendment, and was later sought to be reintroduced by a further amendment after it had prescribed. In another instance, a claim against the second defendant which had not existed in the original particulars of claim was introduced by way of an amendment after it had prescribed. Special pleas in this regard were upheld in the Twani matter when it eventually came to trial.

[12] In the founding affidavit, a litany of disastrous attempts to rectify the problems existing in the particulars of claim is described. By way of illustration, on 23 April 1999 the defendants concerned issued and served a notice in terms of Rule 30 of their intention to apply for the striking out of certain paragraphs of the plaintiffs' particulars of claim in certain matters. In response, each of the plaintiffs concerned filed a notice of amendment setting out the paragraphs they intended to amend and dealing with issues raised in the Rule 30 notice. On 10 May 1999, those defendants issued and served a notice of motion seeking to set aside the particulars of claim as irregular proceedings. These matters were argued during June 1999. The plaintiffs did not oppose the defendants' application to strike out paragraphs 9 to 16 of each of the particulars of claim, but simply opposed the costs order sought without success. Judgment in this regard was granted in favour of the defendants by Jafta AJ (as he then was) on 9 July 1999.

[13] A subsequent application for leave to appeal was heard in these matters on 23 September 1999 but was dismissed on 30 September 1999. As reflected in the founding affidavit, this marked the commencement of some 41 interlocutory applications occasioned by the irregular and improper conduct of the matters dealt with on behalf of the plaintiffs prior to the first day of trial in the Twani matter. In all but one of these

interlocutory matters, the costs of such applications were awarded to the defendants.

[14] Subsequent to delivery of the notices of intention to defend, the plaintiffs' attorney was called upon in terms of Rule 7 to prove his authority to act. Notwithstanding the fact that this notice precluded his acting further in the matter until such proof was forthcoming, notices of intention to amend the particulars of claim were subsequently delivered on behalf of the plaintiffs. Pursuant to such notices, amended pages were delivered but were met variously by notices of intention to except or notices of intention to apply for the setting aside of the pages as irregular proceedings in terms of Rule 30.

[15] In apparently at least 18 of these matters, notices of bar were improperly delivered notwithstanding the fact that the Rule 23 notices had afforded the plaintiffs in those matters an opportunity to remove the cause of complaint. In 124 of the actions, a document entitled "PLAINTIFF'S REPLY TO DEFENDANTS NOTICE IN TERMS OF RULE 23" was delivered. No provision for such a notice is made in the Rules of Court. As pointed out by the deponent to the founding affidavit, although these documents were, for all practical purposes, meaningless, each such document was required to be read and considered and a further appropriate application in terms of Rule 30 was required to be prepared.

[16] Notwithstanding their lack of success in the matter referred to earlier, the other plaintiffs apparently persisted with the irregular pleadings they had filed which resulted in a further order granted by Maya AJ (as she then was) in almost identical terms to the order granted

by Jafta AJ, save that, on this occasion, the plaintiffs were ordered to pay the defendants' costs on an attorney and client scale.

[17] The next salvo from the plaintiffs was an apparent attempt to address the shortcomings then existing in the particulars of claim by delivering further amended pages in most of the actions during October and November of 1999. These amendments had not been preceded by notice in terms of Rule 28 and, not surprisingly, were again met by notices in terms of Rule 30. Furthermore, between September 1999 and November 1999, exceptions were filed in the vast majority of the actions.

[18] Because of the shambolic manner in which these matters were proceeding as described, an agreement was apparently concluded between the legal representatives of the parties to the effect that a single order would be taken by consent in terms of which the plaintiffs undertook to pay the defendants' costs with regard to a number of procedural steps which had been necessitated by the plaintiffs' improper conduct of these actions. It is apposite to mention that the draft order, which is appended to the founding affidavit, runs into some 59 pages in its description of the notices and/or pleadings which were to be withdrawn pursuant to the order sought as it was necessary to set out in each case the notice or pleading due to be withdrawn. There were 597 matters involved and each of these matters is referred to in the draft order together with the notice/pleading in question. This provides some illustration as to the extent of the documentation which was involved in all these actions.

[19] Despite this, as averred in the founding affidavit, the process of amending pleadings and objections thereto in this mountain of

applications, continued unabated. Because of the destruction of the files of X M Petse Incorporated in the fire, the applicants were unable to obtain copies of all the judgments and orders issued during the course of the ensuing period. However, those relevant documents which they were able to obtain are fully described in the founding affidavit. Unfortunately, because of the extent of the interlocutory litigation in these matters, it is necessary to detail these matters.

[20] On 30 March 2000, Kruger AJ granted an order setting aside and striking out with costs certain amended pages in one of the actions. Sometime after October 2000, Bloem AJ delivered a judgment setting aside the plaintiff's notice of intention to amend his particulars of claim, with costs, in another matter. In that judgment, Bloem AJ stated that *"Between the issue of the summons and now the plaintiff has given notice of his intention to amend his particulars of claim on no less than 4 occasions"*.

[21] On 15 October 2001 Kruger AJ delivered a judgment in another matter in which the applicant had sought an order consolidating the various actions brought by the plaintiffs against the defendants into two actions. This application was dismissed with costs. Of importance, at the time of argument in that application, applications in terms of Rule 30 were pending in various matters based on the following: a challenge brought in terms of Rule 7 to the authority of the plaintiffs' attorney to act; Rule 30 applications based on non-compliance with Rule 18, and exceptions brought in terms of Rule 23.

[22] On 26 April 2001, Miller J granted an order setting aside notices of intention to amend dated 10 October 2001 which had been delivered by

18 plaintiffs. He ordered them to pay the costs of the 3 defendants in those matters. On 22 November 2001, Miller J delivered a further judgment in another matter involving 73 plaintiffs who had applied to amend their particulars of claim. Miller J referred to the fact that the amendment application had been necessitated by a successful exception and recorded that the court had, in a judgment delivered on 22 February 2001, upheld the defendants' exception with costs and had granted the plaintiffs leave to amend within 15 days of the grant of that order. It is apposite to record what the learned judge said in this regard:

"The plaintiffs have made application that the late filing of the notice on 29 March 2001 be condoned. The failure by the defendants to comply with the order of court is technical in the sense they that took positive steps to comply with the time limit set by the court. The withdrawal of the previous 2 notices in terms of rule 28(1) is as a result of the incompetent drafting of the particulars of claim which have been a hallmark of this matter, as it has been in a number of other matters of a similar nature in which the plaintiffs are represented by the same attorney. There have been in this matter, since the issuing of summons, no less than five notices of intention to amend."

[23] On 29 January 2002, Matyumza AJ made an order relating to ten of the plaintiffs granting them leave to amend their particulars of claim and directing that they pay the costs occasioned by the delivery of Rule 28(3) notices. He granted another plaintiff leave to amend her particulars of claim and ordered certain plaintiffs, who had withdrawn applications to amend their particulars of claim, to pay costs in those matters.

[24] On 14 March 2002, Miller J delivered a further judgment relating to six plaintiffs who had excepted to the defendants' pleas. Such exception had been premised upon a contention that because, in the Cekeshe application, this court had set aside Proclamation 10 as being invalid, the plaintiffs were not entitled to plead that the issue of the proclamation had followed upon various consultations with the plaintiffs (the contention of the excipients being that this issue had effectively been dismissed in the Cekeshe matter) and that this accordingly disclosed no defence. Counsel for the defendants apparently argued in that matter that the Cekeshe application fell to be distinguished from the actions brought by the plaintiffs as the Cekeshe application had been concerned with the question of administrative law and issues of procedural fairness in dealing with administrative action. On the other hand, the actions of the plaintiffs were premised in delict. Miller J held that the if first defendant in the principal litigation was able to satisfy the trial court that his conduct in issuing Proclamation 10 did not constitute a culpable delictual wrong, then he would succeed in avoiding the plaintiffs' claims. Accordingly, Miller J dismissed the exception in each such matter with costs, including the costs consequent upon the employment of two counsel.

[25] On 12 August 2002, Norman AJ delivered a combined judgment in two interlocutory applications brought before her in matters involving 66 plaintiffs. These plaintiffs sought leave to amend their particulars of claim and an order in terms of rule 35(14) to the effect that the defendants were to make available for inspection an agreement between the trade union SAAPAWU and the Eastern Cape government. Both applications were dismissed with costs.

[26] On 30 January 2003, Maya J (as she then was) delivered a judgment in which exceptions had been raised against the plaintiff's particulars of claim. The exceptions were upheld and the plaintiff was ordered to pay the defendants' costs.

[27] On 3 April 2003, Maya J delivered a further judgment relating to 69 plaintiffs seeking amendments to their particulars of claim. In this judgment, she pointed out that almost all the objections raised by the defendants to the proposed amendments had been raised in other related matters in which she had already handed down judgments. She granted the respective plaintiffs leave to amend their particulars of claim in respect of certain amendments prayed, and disallowed others. She directed the plaintiffs to pay the defendants' costs.

[28] On the day after she had delivered this judgment, Maya J delivered a further judgment in three applications involving 110 plaintiffs which had been argued together and in which amendments were sought. During the course of this judgment she again reflected that a number of the objections raised had been argued and dealt with in other matters in which she had already delivered judgments, referring specifically to the judgment mentioned in the previous paragraph. Again, she granted certain plaintiffs leave to amend their particulars of claim in certain respects, refused them leave in other respects and ordered them to pay the defendants' costs.

THE TRIAL IN Z R TWANI AND OTHERS v THE PREMIER AND OTHERS

[29] During the period April to August 2002 the majority of the plaintiffs once again amended their particulars of claim and the defendants in those actions pleaded thereto. On 30 July 2002 it was ordered that the matter of Z R Twani be consolidated with 18 other actions. A further application to consolidate all the other matters with the matters then so consolidated, was dismissed.

[30] Subsequent thereto, the attorney acting for the plaintiffs proceeded to set down for trial some, but not all, of the consolidated matters, as well as some of the matters not included in the consolidation order. It is alleged in the founding affidavit that because this situation was clearly untenable, an agreement ("the agreement") was reached between the legal representatives to the effect that a further application for consolidation of the matters would be brought by consent, the matters so to be consolidated constituting a representative sample of the various categories of plaintiffs. This agreement is simply denied by the plaintiffs in this application.

[31] The application (by consent) to consolidate these matters has been annexed to the founding papers. That application was brought by the twenty eight plaintiffs whose names appear on a schedule to the notice of motion. The notice of motion reflects that it was indeed Mr. Tshiki (the plaintiffs' attorney who has acted for them since the inception of these actions and before) in the form of "M TSHIKI AND SONS INC." who brought the application on behalf of those plaintiffs. The founding affidavit was attested to by Mpeleki Tshiki who briefly set out the background to the matter and proceeded to state:

"Following from this the parties agreed that it was in the interests of all concerned to constitute a representative sample of matters and to proceed to finality in respect thereof so that a decision could inform the further conduct of the Tracor litigation."

[32] He stated further:

"7. Thus for instance, while issues are similar, some of the Tracor litigants were members of management, some were members of SAAPAWU the recognized trade union at Tracor and some worked at Qamata. A further category is constituted by Tracor litigants against who the defendants have pleaded prescription. A recognition of these differences underlie the parties desire to constitute a representative sample.

8. With this in mind, and by special arrangement with the Acting Judge President the matter of Twani & 18 others has been set down for hearing for an extended period commencing on 22 April 2003.

9. The parties wish to further consolidate the matters listed in paragraph 2 of the notice of motion with that of Twani & 18 Others v The Premier and Others.

10. I respectfully submit that it is in the interests of all concerned, including the interests of the administration of justice that an order be granted in terms of the Notice of Motion. A decision on a representative sample has every prospect of avoiding or at least curtailing, further litigation."

[33] It is of importance to record that notwithstanding the express description of the agreement between the parties as contained in this

affidavit of the plaintiffs' attorney, as alluded to earlier the existence of the agreement is denied by the plaintiffs in their answering affidavit

[34] The order sought by consent in this application was granted on 24 March 2003 and, as foreshadowed in the affidavit quoted above, the trial commenced before Schoeman J on 22 April 2003. However, on 25 April 2003 she recused herself.

[35] After certain initial delays, the trial commenced the *de novo* before Kroon J on 20 August 2003. In essence, the pleadings were premised on a pleaded division between 2 groups of plaintiffs – those who alleged that they had been in the employ of Tracor at the time of the issuing of Proclamation 10 ("the Tracor plaintiffs") and those who were working at Qamata, which was administered by Tracor, and who alleged that they were employed by the Department of Agriculture and Land Affairs.

[36] The claims of the Tracor plaintiffs were founded in delict and based on the wrongful termination of their employment pursuant to the declaration that Proclamation 10 was unlawful. In a second claim, they sought recovery of damages from the Premier for alleged *injuria* in the form of impairment of dignity alleging that the manner of termination of their employment had rendered them unable to attend to the needs of their families etc.

[37] The Qamata plaintiffs' alleged that the defendants had, acting with the consent of the entire cabinet of the Eastern Cape Provincial Government, made a decision to liquidate and dissolve the Eastern Cape agricultural parastatals and their associated irrigation schemes, including Tracor and Qamata. They alleged further that pursuant to this decision

two proclamations, including Proclamation 10 purporting to dissolve Tracor, were issued resulting in the termination of their employment and that such termination was wrongful and unlawful as they had not been consulted. They also pursued an alternative cause of action against the Member of the Executive Council for Agriculture and Land Affairs alleging that in fact the dissolution of Tracor and Qamata did not terminate their contracts of employment with the Department of Agriculture and Land affairs, that notwithstanding their alleged tender of employment of their services and demand for payment of their emoluments as against such tender, the Department had repudiated their employment contracts and they had thus suffered a loss of their employment benefits and emoluments.

[38] The Qamata plaintiffs pursued a further alternative claim based on a wrongful termination of their employment and a second claim based on *injuria* in the form of impairment of dignity.

[39] Shortly after the commencement of the trial, the plaintiffs' attorney was called to testify on behalf of the plaintiffs. *Inter alia*, he was cross-examined with regard to the question of consultations prior to the promulgation of Proclamation 10. Counsel then acting for the plaintiffs objected to this cross-examination arguing that the matter was *res judicata* by virtue of the outcome of the Cekeshe application, a matter which had been settled by Miller J in a full judgment as mentioned earlier. Kroon J, not surprisingly, ruled that such evidence was indeed admissible.

[40] Approximately three and a half weeks into the trial, Kroon J granted an order reducing the number of plaintiffs to nine, with the

remaining matters being postponed part heard. Kroon J did this because of the prolixity of the matters and in an attempt to curtail the duration of the trial. It was agreed that these nine cases remained representative of the identified categories of actions. However, in due course two of these actions were again joined in the consolidated action for reasons of convenience and to ensure representativity as discussed earlier.

[41] The trial ran from 21 August 2003 to 29 August 2003 and from 2 September to 5 September 2003. It recommenced on 8 September and ran to 12 September 2003. It thereafter ran from 15 to 19 September and on 20 and 23 September 2003, when it was postponed to 14 October 2003. Upon recommencement it ran from 14 October to 17 October 2003 and from 20 October to 23 October 2003, on which date it was postponed to 20 November 2003. On 20 November 2003 it was postponed to 20 January 2004 after which it proceeded to 23 January 2004 with various interruptions when witnesses were unavailable or had not been subpoenaed to testify on behalf of the plaintiff. At this stage an additional plaintiff was joined.

[42] The plaintiffs thereafter closed their case and an application for absolution from the instance was made. In due course, Kroon J upheld special pleas of prescription which had been raised by the second defendant as against the Qamata plaintiffs who remained in the consolidated action, but found that evidence had been tendered on the remaining issues on which the court could possibly find for the plaintiffs.

[43] It should be mentioned at this stage that these causes of action in respect of which Kroon J upheld special pleas of prescription, remain causes pursued to this day by the majority of the Qamata plaintiffs.

[44] The trial resumed thereafter and proceeded intermittently from 15 March 2004 until 20 April 2004. Argument was presented from 10 May 2004 and the typed transcript of the proceedings, excluding argument presented on behalf of the defendants, runs to some 73 volumes.

[45] On 3 March 2005 Kroon J handed down a comprehensive judgment of 168 pages in which he nonsuited all the plaintiffs in the consolidated actions, directed them to pay the costs of the defendants including the costs of two counsel, and further directed the plaintiffs' attorney of record to pay the costs of 3 days of the proceedings *de bonis propriis*. Not only was this judgment important by reason of the fact that it had been agreed that it would be a test case in order to inform the conduct of the remaining matters, but because the learned judge dealt with every possible defence raised on behalf of the defendants. In some instances he found that a certain defence raised was a complete defence to the plaintiffs' claims but, nonetheless, proceeded to deal with all the other defences in the knowledge that this was, in effect, a test case and despite the fact that such would probably amount to an *obiter dictum*.

[46] In summary, I can do no better than to list such findings as set out in the founding affidavit as follows:

- “(a) The Qamata employees were employed by Tracor, and not the Department of Agriculture and Land Affairs, and accordingly their claims against the second Defendant premised upon a contract of employment between them and that department were unsustainable.

- (b) The plaintiffs had not raised in their pleadings an alleged failure by the Premier (the first Defendant) to comply with the provisions of section 199 of the act Labour Relations Act, No 66 of 1995, or an alleged failure on the part of the first Defendant to comply with the terms of a recognition agreement which Tracor had concluded with the Food and Allied Workers Union, and accordingly the plaintiffs were not entitled to rely on such provisions to establish wrongfulness on the part of the first Defendant, as had been contended in argument on behalf of the plaintiffs.
- (c) The first Defendant's decision to issue Proclamation 10 was not wrongful for want of proper and adequate compliance with the *audi alteram partem* rule, and there was proper and adequate compliance with the rule in the form of consultations with, and affording a hearing to the plaintiffs, and that the first defendant's decision was accordingly not wrongful on that score. This had been a core issue raised by the plaintiff's in their pleadings, and went to the heart of their cause of action.
- (d) The first Defendant's decision to issue Proclamation 10 was not wrongful on any other grounds advanced by the plaintiffs.
- (e) The first Defendant did not act culpability in issuing Proclamation 10.
- (f) The plaintiffs could not establish *animus injuriandi* on the part of the first Defendant, and accordingly their *injuria* claims could not succeed.

- (g) The discharge forms signed by all Tracor employees, including the Qamata employees, before receipt of *ex gratia* or severance packages which had been financed by the national government, constituted a waiver of the rights of the plaintiffs to pursue the claims they had introduced against the defendants."

[47] The Twani plaintiffs, notwithstanding the comprehensive nature of the judgment delivered by Kroon J, sought leave to appeal against it. This application was initially set down for hearing on 18 April 2005 but, because counsel for the plaintiffs was improperly prepared, it was postponed. It was subsequently set down for hearing in Port Elizabeth on 24 June 2005, an agreed date. However, the plaintiffs' counsel and attorney attended at the High Court in Grahamstown and arrived in Port Elizabeth too late for the matter to be argued to completion. It was again postponed. It was set down for hearing on 11 and 12 October 2005. This approach of the plaintiffs' legal representatives significantly increased the costs of that application. By the time the matter was ultimately argued, the plaintiffs' counsel had withdrawn and it was dealt with by their attorney notwithstanding that he had testified on their behalf during the trial.

[48] The notice of appeal had been objected to by the defendants. Their contention was that the notice was fatally defective by virtue of its failure to comply with the requirements of rule 49(1)(b) which requires the grounds of appeal to be clearly and succinctly set out. This notice of appeal ran to some 69 pages. Kroon J, in his judgment on the application for leave to appeal, described this document thus:

"... it was indeed a rambling, repetitive document which required sifting for the grounds of appeal to be discerned as opposed to extensive argument in support of the grounds."

[49] That notice was withdrawn and a second notice was filed which ran into 65 pages. In respect of this subsequent notice a similar objection was raised. Kroon J held that this objection was likewise not misplaced but accepted it "despite its shortcomings". He however dismissed the application for leave to appeal with costs, including the costs of two counsel.

[50] The applicants allege that during the course of this application for leave to appeal the plaintiffs' legal representative sought to advance argument which had either not been advanced in the court *a quo*, or was in conflict with the argument so advanced, and that this was the first indication to them that the litigation was henceforth to be approached on a basis which had not previously formed the substance of the case brought on their behalf.

[51] The plaintiffs sought special leave to appeal from the Supreme Court of Appeal, which application was dismissed with costs. A subsequent application for leave to appeal to the Constitutional Court, was likewise dismissed.

POST TWANI

[52] It appears that, notwithstanding the agreement struck between the parties as evidenced in the application for consolidation referred to above,

and the despite the resoundingly clear outcome of the litigation in the Twani matter, the plaintiffs have continued unabated to pursue their actions against the applicants, albeit on a new purported cause of action. It is again necessary to record this.

[53] During August 2006 two plaintiffs, Xalisa and Sibozo, served notices of intention to amend their particulars of claim. These notices recorded their intention to replace all except the formal averments then in their particulars of claim. This was thus a clear attempt to plead these two plaintiffs' entire case afresh. In the one instance, the notice of intention to amend ran to 37 pages and in the other, to 23 pages. In the Xalisa matter, six further attempts to amend the particulars of claim followed before a substantive application to amend those particulars was heard, whilst a further seven attempts to amend the particulars of claim in the Sibozo matter followed before the substantive application to amend was heard simultaneously with the Xalisa matter. On 2 August 2007, these applications for amendment were dismissed with costs by Alkema J. Applications for leave to appeal against the judgments in these two matters were noted, but never prosecuted.

[54] In order to best understand the manner in which these matters were generally proceeded with, is apposite at this stage to repeat a portion of the founding affidavit describing these applications before Alkema J.

"The matter was set down for hearing before Mr. Justice Alkema in Port Elizabeth on 19 June 2007, at which stage he advised the plaintiff's attorney that the plaintiff's papers were in a state of disorder, and that it was not clear what relief the plaintiff was in fact seeking. This resulted from the fact that the plaintiff's attorney had presented supplementary heads of

argument to which were attached yet another new draft of the plaintiff's particulars of claim. His Lordship inquired whether the defendants' representatives would not be prepared to consent to the amendment of the plaintiff's particulars of claim in accordance with the draft particulars of claim, and then raise any objections by way of exception or special plea or other appropriate means in respect of such amended particulars. Upon examination of the draft particulars of claim, the defendants' representatives noticed that the new draft contained further new matter in respect of which no notice had been given, and the defendants' lead counsel advised his Lordship that he considered it inappropriate to be required to make a decision in respect of his Lordship's inquiry under the pressure of the time constraints that prevailed. His Lordship then postponed the matter, directing that, unless the Premier's representatives had consented to the amendment in terms of the new draft particulars of claim by noon on 22nd June 2007, the applicant/plaintiff was to bring a formal application for amendment of his particulars of claim in accordance with the new draft particulars of claim which had been attached to the heads of argument. The plaintiff failed to bring such application, lodging instead on 27 June 2007 an application for consolidation of all the previous applications for leave to amend the particulars of claim, and then for leave to amend the existing particulars in accordance with the new draft, furnishing no coherent foundation for the amendment in the terms now sought."

[55] It is of some significance to note that the Sibozo application was supported by an affidavit deposed to not by the plaintiff Sibozo, but by the other plaintiff, Xalisa. Xalisa averred that he was authorized to depose to the affidavit on behalf of Sibozo in view of the fact, so he averred, that

Sibozo was seriously ill. No proof of such alleged authorization was, however, furnished.

[56] Despite the failure to plead this purported further cause of action, and the dismissal of the earlier attempt by Alkema J, Xalisa filed a further notice of intention to amend his particulars of claim on 14 August 2007. This notice, as on the previous occasion, sought to substitute the formal averments in the then existing particulars of claim. It was again a prolix document of 27 pages. It was withdrawn on 13 September 2007 after it was opposed and was replaced on the same day by a further notice of intention to amend which, without annexures, ran into 28 pages. After notice of opposition thereto was delivered, Xalisa filed a further amended notice of application for leave to amend his particulars of claim. The Sibozo matter followed a similar pattern.

[57] These applications were opposed on numerous grounds. They sought to introduce claims that had long since prescribed, contained averments that were excipiable, both because they were vague and embarrassing and because they disclosed no cause of action, and they sought to introduce averments in respect of which there was no evidence to support them, in other words there was no triable issue. The proposed amendments made serious allegations regarding the conduct of the National Government and the Executive Council of the Province of the Eastern Cape without having had them joined as parties. The Xalisa application was heard by Dawood J on 11 March 2008 and was subsequently dismissed by her, with costs. Of significance, she said in her judgment that:

"the plaintiff has to come to the realization that he cannot chop and change his case indefinitely and at some stage has to present the court with a coherent set of papers that properly sets out a cause of action."

[58] As I have indicated, the Sibozo matter followed a largely similar pattern of conduct and was opposed on essentially the same grounds. However, once again the founding affidavit upon which the plaintiff relied was not deposed to by the plaintiff herself, but by the plaintiff Xalisa who averred that he did so as he had been duly authorized so to do by Sibozo by virtue of his acquaintance with the facts of the matter. When this authority was disputed in the answering affidavit, he did not raise the fact of Sibozo being seriously ill (as he had done in the previous application for amendment) but maintained that, as he had been involved in the Twani case, and for other reasons, he was "better placed to depose to the affidavit". The application by Sibozo was likewise dismissed by Dawood J after it and the Xalisa matter had been heard together.

[59] Because it appeared that the plaintiffs and their attorney, Mr. Tshiki, did not intend to honour the agreement which had led to the consolidation application and the subsequent Twani trial, and believing that it was necessary to complete the part heard matters which had been separated during the course of the Twani matter, the applicants' attorney called for a rule 37 conference in respect of these matters. This was held on 17 October 2007. During the course of this conference, the plaintiffs' attorney took the view that, despite the fact that these cases had been separated from the others during the course of the trial, they were not part heard. He also recorded his intention to amend the pleadings in those

matters but has, notwithstanding, refused to sign the minute of that conference.

[60] On 31 July 2008 further notices of intention to amended particulars of claim were served on behalf of both Xalisa and Sibozo. In the Xalisa matter, and on the same date, an application in terms of Rule 6(11) was served in which was sought the joinder of both the national and provincial governments. Both of these applications were opposed. On 8 August 2008, Xalisa served a notice of withdrawal of a page of his notice of amendment and sought to file a "corrected" page in substitution. On 2 September 2008, Xalisa served an application in the long form for an order joining the Minister of Agriculture and Land Affairs in the main action. This application was subsequently withdrawn, but Xalisa persisted in the application having effected service thereof upon the office of the State Attorney in East London. On 10 September 2008, he served a formal application for leave to amend his particulars of claim. He also served an application seeking condonation for the use of the provisions of Rule 6(11) in the application to join the three additional defendants. Once again, and in order to avoid repetition, it should be mentioned that the Sibozo matter followed a similar pattern.

[61] Another plaintiff, Kwezula, also filed a notice of intention to amend his particulars of claim together with a notice of application to join additional defendants on 31 July 2008. This matter followed a similar pattern to the applications of the other two plaintiffs.

[62] Once again, in view of the fact that these plaintiffs appeared to want to prolong the proceedings despite the judgment in the Twani matter and despite the fact that their various applications for amendment had

been dismissed, the defendants' attorney issued a notice in terms of rule 37(4) in which was raised certain inquiries with regard to specific plaintiffs. It was agreed with the plaintiffs' attorney that a pre-trial conference would be held on 22 October 2008. Despite this, he wrote a letter on 17 October 2008 indicating that he was no longer available and proposed alternative dates which had come and gone, and other dates that did not exist.

[63] On 9 April 2009 an application was served in the name of one of the plaintiff's (Mphahlwa) and 433 others, seeking, *inter alia*, consolidation of their actions. On the same day, a similar application in the name of another plaintiff (Dintsi) and 159 others, purportedly former employees employed at Qamata, was served. The artificial separation between the Tracor and Qamata employees was thus sought to be perpetuated. Certain of the applicants in these applications were those who had been litigants in the Twani matter and whose cases had been postponed part heard. These applications, together with the joinder and amendment applications, were eventually set down for hearing before Nhlangulela AJ (as he then was) on 17 June 2009.

[64] These consolidation applications were opposed on the following bases:

- "(a) It is not competent to consolidate matters that are part heard with matters in which the trial has not commenced.
- (b) It is not competent to consolidate matters in which interlocutory applications for the joinder of

additional parties are pending, with matters in which no such joinder is contemplated or sought.

- (c) It is not competent to consolidate matters in which applications for the amendment of pleadings are pending with other matters in which no such amendments are or have been sought, prior to the finalization of the amendment applications.
- (d) It is not competent to consolidate matters in which plaintiffs have died, and there has been no substitution of new plaintiffs for the deceased plaintiffs, with other matters, prior to the completion of such substitution.
- (e) It was accordingly not convenient to consolidate the cases of the applicants in these applications."

[65] When the matter served before Nhlangulela J, the above-mentioned points were raised. The plaintiffs' attorney initially sought to deny that certain matters were indeed part heard, but the court was referred to the transcript of the record in the Twani matter where Kroon J made an order by agreement postponing these matters after a substantial amount of evidence had been led. Regarding the consolidation applications where certain plaintiffs had died and no substitution had been effected, it was pointed out that in a number of cases powers of attorney had been filed on behalf of the estates of the plaintiffs concerned, but that no substitution had indeed taken place.

[66] By virtue of these responses, Nhlangulela J suggested that the plaintiffs' attorney rectify these matters before proceeding with the applications, to which he agreed. Accordingly, orders were granted in both consolidation applications postponing those matters and directing those plaintiffs to pay the costs occasioned by such postponements, including the costs of two counsel. It is alleged that, thereafter, the plaintiffs' attorney asked lead counsel for the applicants to assist him in identifying those cases in which the plaintiffs were deceased. He was invited to contact lead counsel, which invitation he apparently did not take up.

[67] Despite this, and in due course, notices in terms of Rule 15(3) in which was sought to substitute the plaintiffs in those matters with new plaintiffs was served upon the applicants' attorney of record in twelve of the matters. In this regard, the founding affidavit proceeds as follows:

"I state that it is not apparent how the respondents' attorney could have been taking instructions from the deceased plaintiffs in the above matters before the substitution of the new plaintiffs, and that serious concern must exist as to whether any such instructions have been or are being issued at all. Furthermore, as is apparent from the affidavit annexed hereto of ISLAND SIQITI MAQOMA, there is at least one further plaintiff, namely Nomatshawe Maqoma, case no 600/99, who has been deceased for a considerable time, and on whose behalf the respondents' attorney continues to purport to act. This plaintiff was purportedly an applicant in the Mphahlwa consolidation application, and a costs order was obtained against her along with other applicants in that application, but she was long deceased when that application was launched. The founding affidavit in that application was

deposed to by the ubiquitous THEMBILE XALISA who averred in paragraph 2 thereof as follows:

"I depose to this affidavit on behalf of the applicants in this application being duly authorized by them to do so".

[68] A further averment contained in that affidavit which is of significance to this application is to be found at paragraph 9 thereof, where the deponent states:

"After the judgment on the 11 consolidated matters aforesaid, all the plaintiffs in the rest of the matters decided to pursue their pending claims that had been waiting on (sic) the wings for finalization of the 11 consolidated matters. They decided to further amend their combined summonses before proceeding to trial. The plaintiffs, however, decided that an amendment be pursued in respect of one Tracor matter such matter being my matter and of one QIS matter such being the matter of NTOMBOZI SIBOZO so that once the process of amendment in our matters succeeds, the respondents' attorney would be requested to agree that the combined summonses in the rest of the Tracor and QIS matters be amended by consent in line with the amendment effected in our two matters.

It is not apparent how these averments could have been true in respect of at least the abovementioned deceased plaintiffs. However, it is plain that the case advanced on behalf of all the plaintiffs is that the continued abortive applications for the amendment of their pleadings form part of a strategy common to all the Respondents as plaintiffs, and with which they identify themselves."

[69] Subsequent to the postponement of these matters and on 22 January 2010, the plaintiffs' attorney filed a notice of withdrawal of some of the applicants in the Mpahlwa application for consolidation. However this application, the Dintsi consolidation application and the applications for amendment of the pleadings remain extant.

[70] On 28 April 2010, the plaintiffs' attorney served an application in the name of Pumla Mphahlwa and 166 others for leave to intervene as co-applicants in the Mpahlwa consolidation application. This application was served on the offices of X M Petse Incorporated who had previously represented the defendants but, by this time, had withdrawn as such. Precisely why Mpahlwa sought to be joined as a co-applicant in an application in which she was already cited as the first applicant, was not explained. This application for leave to intervene was set down for 6 May 2010, but not enrolled. On 14 May 2010 it was again served, this time at the offices of the State Attorney, recording the date of set down as being 6 May 2010, a date which had already, by then, come and gone. This application has subsequently not been proceeded with.

RECOVERY OF COSTS

[71] The applicants have also described in their founding affidavit the significant problems that their representatives have encountered in their attempts at recovering costs from the plaintiffs. As will be evident from the foregoing, due to the slew of litigation in these matters, such costs have become significant. As early as 2008, returns of non-service were received from the Sheriff in respect of a number of plaintiffs which prompted the applicants' then attorney to seek accurate information regarding the whereabouts of certain plaintiffs in order to proceed with

execution. These inquiries appear to have been assiduously avoided by the respondents' attorney.

[72] The service of writs of execution issued in respect of a multiplicity of cases could only be successfully effected in three instances as the vast majority of the plaintiffs' addresses were either incorrect or fictitious, as appears from the returns of non-service. Furthermore, and of significance, a return of non-service was received in respect of the plaintiff Sibozo, the plaintiff who brought repeated unsuccessful applications for amendment of the pleadings resulting in great cost to the applicants.

[73] The plaintiffs' case in reply to the applicants' allegations with regard to the recovery of costs appears to be twofold: firstly, it is suggested that the returns of service upon which the applicants rely and which have been put up as annexures in this matter, constitute inadmissible hearsay and, secondly, the addresses that have been given in the plaintiffs' combined summonses are, indeed, correct and not fictitious. As pointed out by the applicants, should there not be a stay of these proceedings, the defendants are obliged to continue resisting the flow litigation from the plaintiffs with no prospect of ever recovering their costs.

[74] The defendants have not, furthermore, been able to recover the taxed costs which were awarded in their favour by Kroon J in the Twani case *de bonis propriis* against the plaintiffs' attorney, which order was made on 3 March 2005, a matter to which I shall return later.

THE RESPONDENTS' (PLAINTIFFS') CASE

[75] The answering affidavit has been deposed to by the respondent Tembile Xalisa. Apart from stating that he is an adult male and a *de facto* ex employee of the former Transkei Agricultural Corporation Limited, he does not disclose his level of education. In that affidavit he has alleged that he deposed to the affidavit "*on the request of our attorney, in the interest of the rest of the respondent's and in my capacity as one of the respondents.*" Nowhere does he allege that he indeed acted with the authority of the other plaintiffs. There are no confirmatory affidavits from the other plaintiffs and, although a large portion of the affidavit deals with matters to which the plaintiffs' attorney was privy, no confirmatory affidavit has been placed before the court by such attorney.

[76] The answering affidavit, a document of 111 pages, is certainly not a document which one would expect from a layman to the law. It is exceptionally difficult to discern from this document that which is admitted and that which is disputed in the founding affidavit. It is full of unbounded legal argument and takes no heed of the warning given in 1996 that the time was long "*overdue for a return to a much more disciplined form of practice*"⁵. For example, near the commencement of the affidavit is a heading "*Preliminary points in limine*" and under that a further heading, "*Ad permanent or temporal stay of proceedings*". There follows some 21 pages in small print of extensive argument as to why the stay of proceedings should not be granted. Even in this regard it is difficult to tell whether the preliminary points, or points *in limine*, are complete at that point as thereafter, and once again, follow another 6 pages of legal argument.

⁵ Reynolds NO v Mecklenburg (PTY) LTD 1996 (1) SA 75 (WLD) at 78G -80A

[77] The balance of the answering affidavit, insofar as can be ascertained, appears to be devoted to an argument that the plaintiffs are indeed possessed of a cause of action, despite the fact that their cases as currently pleaded were found to be entirely without substance in the Twani matter. As far as disputes of fact are concerned, it is so that in numerous instances the answering affidavit, in response to allegations in the founding affidavit, disputes such. However, on a further reading of the lengthy responses, in many instances it becomes abundantly clear that such disputes are not disputes of substance but are disputes which are based, in the main, on evidence which can only be regarded as hearsay as the deponent refers to the actions of his attorney. In other instances, it is clear that the disputes raised are not genuine disputes of the material facts pleaded by applicants.

[78] In this regard, the majority of the allegations made by the applicants in the founding affidavit are supported to the hilt by written documentation in the form of extensive annexures. In my view, the only material dispute of fact which arises from the answering affidavit is the denial that an agreement was concluded between the parties as has been described in paragraphs 30 - 33 above.

[79] The allegations of the applicants in this regard are to the effect that they, in the form of their attorney, approached the legal team of the defendants with a suggestion that they reach an agreement with regard to consolidation and a test case. The deponent to the answering affidavit states that their attorney was indeed approached by the applicants' legal representatives with a request that they agree to an expansion of the

consolidated case to 28 plaintiffs, purportedly to accommodate more representativity. He then proceeded to state:

"We agreed to this expansion with the hope that the consolidated case would then be a test case such that if it succeeds, the rest of the matters would succeed and if it fails, the rest of the matters would be withdrawn. The consolidation of twenty matters was expanded, by means of a court order by consent, to twenty-eight matters. This was in 2002."

[80] In apparent pursuance of this ideal, the deponent stated further:

"Upon the consolidation of twenty-eight matters being achieved, our attorney, duly instructed by ourselves, wrote a letter to the applicants' attorneys requesting that the judgment in the twenty-eight matters be held to bind on the remaining matters which were not to go for trial giving effect to what he thought of the whole idea of using categories and expanding the consolidated action of twenty plaintiffs to twenty-eight plaintiffs. The remaining matters, in terms of the said request, would be withdrawn if the plaintiffs in the consolidated action of twenty-eight matters failed and the applicants would pay the plaintiffs in the remaining matters if the plaintiffs in the consolidated action of twenty-eight matters succeeded. Our request was met with a flat refusal by the applicants' legal team. They preferred a situation where the parties retain their options but only agree that the judgment in the consolidated action of twenty-eight plaintiffs just informs the parties of the remaining actions as to what to do with the actions in the face of the judgment in the consolidated action."

[81] Apart from this, the answering affidavit does not deal with the allegations made by the applicants as to the nature of the agreement concluded by the parties which is reflected in the affidavit of their attorney in support of the application for consolidation relating to the test case in the Twani matter, as summarized in paragraphs 31 - 32 above. The applicants' reply to the foregoing was to, indeed, point this out. The deponent to the replying affidavit proceeded to say the following:

"Once again, the deponent disputes the veracity of the averments of his attorney, and it is clear that his attorney cannot continue to represent him or, by necessary inference, the remainder of the Respondents whose case the deponent purports to advance. I have no personal knowledge of the letter purportedly written by the Respondents' attorney, and it is instructive that no copy of such letter is attached to the answering affidavit. It is further instructive that there is no confirmatory affidavit of the Respondents' attorney, and the averments contained herein are accordingly hearsay and fall to be disregarded. The defendant further does not indicate who the "applicants' legal team" are who are alleged to have met the unsubstantiated proposal with a flat refusal, and I am accordingly unable to deal with these vague and embarrassing averments, which are not admitted."

DISPUTES OF FACT

[82] As I have indicated, a number of matters raised by the applicants have been disputed by the plaintiffs. In my view, most of these disputes are, as I have mentioned, either groundless in view of the fact that the majority of the allegations made in the founding affidavit have been supported by an extensive array of documentation, or are immaterial to

this application. Other disputes which may have bordered on being material are matters which clearly reside within the sole knowledge of the attorney acting for the respondents and are thus hearsay.

[83] What clearly cannot be disputed are the main milestones in this matter as succinctly set forth in the founding affidavit. The many, and extensive, applications which have been brought to court in this matter and the many judgments delivered and annexed to the founding affidavit, simply cannot be wished away. Of great significance, is the fact that the respondents accept, as they have to, that a select group of matters, agreed to be representative of the various categories of plaintiffs and their causes of action, came to trial before Mr. Justice Kroon in the Twani matter. That is a matter of record. The extensive judgment delivered by Kroon J in the matter is also not disputed, and the findings therein are, once again, a matter of record. They reflect that each and every variation of the plaintiffs' causes of action were without foundation and that the defences raised by the applicants thereto, were solid. It is also not disputed that a fully argued application for leave to appeal was refused by Kroon J and that both the Supreme Court of Appeal and the Constitutional Court refused leave to appeal.

[84] As indicated earlier, there is in my view only one material dispute of fact in this matter, that being the question as to whether or not an agreement as averred by the applicants was indeed concluded between the parties which set the scene for the Twani trial. As I have indicated, the plaintiffs appear to simply deny that such an agreement was concluded. There is no affidavit in support of this denial filed by their attorney despite the fact that the applicants have relied on an affidavit in the consolidation application deposed to by the plaintiffs' very same attorney

as founding the basis for this agreement. It seems that he (the Plaintiff's attorney) deliberately refrained from providing such an affidavit as he personally appeared to argue the matter before me, a matter I shall deal with more fully later. On this basis alone, this dispute must be resolved in favour of the applicants.

[85] Furthermore, it is trite that:

"...where the allegations or denials of the respondent are so far-fetched or clearly untenable the Court is justified in rejecting them merely on the papers..."⁶

[86] In my view this is a matter where, in the circumstances, the effective denial is indeed so far-fetched or clearly untenable that it can be rejected out of hand on the papers. There is no explanation whatsoever as to why the plaintiffs' attorney, Mr. Tshiki, would, in 2002, on oath and in an affidavit founding an application for a particular order before the High Court, state that such an agreement existed when it in fact did not. Had such an agreement indeed not existed, the averments in his affidavit would have amounted to perjury. Furthermore, the fact that the trial proceeded for such a length of time before Kroon J on this very basis is further grist for the mill in this regard. It is clear on a reading of the judgment of Kroon J that he was fully alive to the fact that this agreement indeed existed, hence the fact that he dealt with all the defences raised by the applicants as defendants therein with the very purpose of ensuring that, in my view, there would be finality to this extensive litigation. Indeed, he alluded to this when he said in his judgment in the application for absolution:

⁶ Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 231

"Prior to the commencement of the hearing and the present proceedings two applications were successfully brought for an order for consolidation of actions. The purpose behind the application was stated to be the attainment of a representative spread of the different categories of Tracor and Qamata Irrigation Scheme employees who had instituted action, the decisions in which would inform the attitudes to be adopted in the remainder of cases."

[87] He furthermore confirmed this in his main judgment. Finally, this point is underscored by the deponent to the plaintiffs' answering affidavit as quoted above in stating that the respondents instructed their attorney to attempt to reach an agreement which would have the effect of curtailing these protracted proceedings.

[88] This dispute must clearly be resolved in favour of the applicants and I accordingly hold that such an agreement was indeed concluded between the parties.

[89] I should at this stage pause to mention that this is a clear dispute raised on the papers in that the very existence of the agreement was denied. Furthermore, as I shall deal with below, in the application for an amendment by Xalisa, Xalisa also denied that this agreement had been concluded. However, despite all this, during the course of argument and when taxed in this regard by me, Mr. Tshiki ultimately stated that the plaintiffs' defence was not a denial that the agreement was in fact concluded, but related to the, in his words, "import" of the agreement. This despite the fact that extensive documentation and argument had up to that point been directed to this very question and the fact that the

deponent to the answering affidavit had, in unambiguous terms, denied the very existence of this agreement.

[90] However, the matter does not end there. In the answering affidavit, the deponent has raised a further alleged bar to the application of this agreement in the present matter. It is alleged that there exists a special defence of *res judicata* by virtue of the findings made by Dawood J in her judgment mentioned in paragraph 57 above. In that judgment, she dealt with the application for an amendment by Xalisa⁷. The defendants in that matter averred that in bringing that application Xalisa was in breach of the agreement which led to the consolidation of the matters in the Twani case, and, on this basis alone, ought to have been dismissed. Dawood J proceeded to state the following:

"[iv] The Applicant disputed that such an agreement was made.

[v] There is a dispute of fact on this issue.

[vi] I do not deem it prudent to deal with the issue of whether or not there was an agreement which would effectively preclude the Plaintiff from pursuing his claim further.

[vii] The Defendant would be free to raise this as a point in limine in the main action.

⁷ She also dealt the Sibozo application in this judgment as that judgment was of equal application to that matter.

[viii] This is not a point, considering the need for oral evidence, that can and should be dealt with in an application for leave to amend.

[ix] I accordingly make no findings on this issue."

[91] It seems to me that the question raised by the plaintiffs is more a question of issue estoppel. In this regard, where the decision set up as *res judicata* involved a judicial determination of some question of law or issue of fact in the sense that the decision could not have been legitimately or rationally pronounced by the previous court without determining that question in a particular way, the party to the previous litigation against whom that question was decided cannot in later proceedings dispute that issue⁸.

[92] It is abundantly clear from the portion of the judgment of Dawood J quoted above that she did not decide this issue at all. Furthermore, despite her not making a finding on this issue in favour of the defendants, she found in favour of the defendants for other reasons and dismissed the applications for amendment brought by Xalisa and Sibozo, with costs. There is, accordingly, absolutely no substance whatsoever in this contention by the plaintiffs.

THE LAW

[93] There has been no real challenge by Mr. Tshiki to the contention that where a true compromise has been reached by the parties to an

⁸ Liley v Johannesburg Turf Club 1983 (4) SA 548 (W) at 551 – 552

action, this has the effect of *res judicata*⁹. As indicated earlier, it appears that his final submission in this regard, despite denials of the existence of the agreement in the answering affidavit, is that the plaintiffs do not agree with the interpretation placed on the agreement by the applicants.

[94] The effect of a compromise agreement was dealt with in the matter of **Hlobo v Multilateral Motor Vehicle Accidents Fund**¹⁰ as follows:

“A compromise (or transactio) arrived at between litigants is a well-established measure. Our courts encourage parties to deal with their disputes in this way and the rules decree that compromises must be sought. When concluded such a compromise disposes of the proceedings. Estate Erasmus v Church 1927 TPD 20 at 23. What is more, in this country (as in England) the conduct of a party's case at the trial of an action is in the entire control of the party's counsel. Counsel has authority to compromise the action or any matter in it unless he has received instructions to the contrary. In England his apparent authority to compromise cannot be limited by instructions unknown to the other party. Halsbury's Law of England 4th ed vol 37 para 511. Counsel's general authority in South Africa is similar. R v Matonsi 1958 (2) SA 450 (A) per Schreiner JA at 456A - H and Benjamin v Gurewitz 1973 (1) SA 418 (A) at 428E - F. At the stages prior to the assumption of control by counsel the attorney of record stands in the same position.”

⁹ Gollach & Gomperts (1967) (PTY) Ltd. v Universal Mills & Produce Co, (PTY) Ltd 1978 (1) SA 914 (A)

¹⁰ 2001 (2) SA 59 (SCA) at paragraph 10

[95] In **MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga and Another**¹¹ the following was stated in this regard:

"Admissions of fact made at a rule 37 conference, constitute sufficient proof of those facts. The minutes of a pre-trial conference may be signed either by a party or his or her representative. Rule 37 is thus of critical importance in the litigation process. This is why this court has held that in the absence of any special circumstances a party is not entitled to resile from an agreement deliberately reached at a rule 37 conference. And when, as in this case, the agreements are confirmed by counsel in open court, and are then made a judgment or order of a court, the principle applies with even more force."

[96] And later, with regard to the prejudice where an attempt is made to resile from a compromise¹²:

"The respondents and their counsel prepared for trial on the basis of the concessions and on the issues which remained in dispute - not on the merits or on the heads of damages which were agreed upon. Moreover, the appellant has after all this time not even established a defence. To allow the appellant to resile from these agreements, made over a period spanning 18 months, would defeat the purpose of rule 37, which encourages settlements, and severely hamper the conduct of civil trials. It would mean practically that attorneys can no longer assume that their colleagues are authorised to make important decisions in the course of litigation without the

¹¹ 2010 (4) SA 122 (SCA) at paragraph 6

¹² Kruizinga (supra, footnote 11) at paragraph 21

principal's independent confirmation. This cannot be countenanced."

[97] Likewise, as I understood the argument by Mr. Tshiki, he did not seek to argue that the High Court does not have the power to order a stay of proceedings in appropriate circumstances. Indeed, the Constitution itself in the form of section 173 impliedly recognizes this. Section 173 states:

"Inherent power.-The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[98] A component of this power is the High Court's inherent jurisdiction to prevent an abuse of its process by staying proceedings in certain circumstances. This power should clearly be exercised in a circumscribed manner and only in exceptional circumstances¹³. It should be exercised with great caution and in clear cases as the courts are open to all and will only be closed in exceptional circumstances¹⁴. Due regard must also be had to section 34 of the Constitution which provides for the right to access to the courts.

[99] In *Hudson v Hudson*¹⁵ De Villiers JA stated the position thus:

"That every court has the inherent power to prevent an abuse of the machinery provided for the purpose of expediting the business of the Court admits of no doubt. That was laid down

¹³ *Western Assurance Co v Caldwell's Trustee* 1918 AD 262 at 274

¹⁴ *Fisheries Development Corporation of SA Limited v Jorgensen & Another; Fisheries Development Corporation of SA Limited v AWJ Investments ((PTY) Limited & Others* 1979 (3) SA 1331 (W) at 1338

¹⁵ 1927 A.D. 259 at 267

by BOWEN, L.J in *Willis v Earl Beauchamp*, 11 P.D at page 63 where he says: -

"I think this action ought to be stayed as being a vexatious action within the meaning attached to that word by the Courts, because it can really lead to no possible good. It does not fall under the rule as the LORD JUSTICE has said, but the rules, as we have pointed out more than once, do not, and that particular rule does not, deprive the Court in any way of the inherent power which every Court has, to prevent the abuse of legal machinery which would occur, if for no possible benefit the defendants are to be dragged through litigation which must be long and expensive.""

[100] What constitutes an abuse of the process of court and found sufficient ground for the stay of an action within the ambit of the principles which I have already dealt with, falls to be determined by the circumstances of each case¹⁶. Proceedings will be stayed when they are frivolous or vexatious or when their continuance amounts to an injustice or a serious embarrassment to one or other of the parties and the case will be regarded as vexatious when the action is hopeless or success thereon becomes impossible¹⁷.

[101] Furthermore, as submitted by Mr. Smuts:

"If a litigant repeatedly and persistently brings proceedings against the same person on the same cause of action and in respect to the same subject matter, it would be inequitable to force the defendant to file repeated pleas of *res judicata* or to

¹⁶ *Beinash v Wixley* 1997 (3) SA 721 at 734D – 735 A

¹⁷ *Western Assurance Co v Caldwell's Trustee* (supra, footnote 13) at 274; *Ravden v Beeten* 1935 CPD 269 at 275

make a succession of applications to stay proceedings when the costs of the previous proceedings have not been paid. A defendant is entitled to more effectual protection against continued unsuccessful onslaughts in respect of the same dispute. That protection may take the form of a general order curtailing in some respects the plaintiff's ordinary rights of litigation in the matter."¹⁸

[102] An attempt to retry an issue which has already been decided by merely altering the form of action, amounts to an abuse of the process of court and is vexatious¹⁹. Carlisle J articulated this principle as follows:

"In his statement of defence the appellant set up the same case as that on which he had been defeated in the action in which he was the plaintiff. The Court exercised its inherent jurisdiction to strike out a statement of defence as frivolous and vexatious, and an abuse of the process of the Court, upon the ground that the appellant could not raise the very same question which the Court had already decided in a separate action.

Mr. Knox, for the respondent, argued that the present claim was different from the claim made in the previous case. No doubt that is true in the sense that the relief asked for is different because the parties are different. But the claims and defences in each case flow from one main issue, viz., whether the original agreement was an agreement of sale or not, and they depend upon one and the same set of facts, upon which, as I have said, the decision of an experienced Judge has been obtained.

¹⁸ *Cordery v Union Government (Minister of Finance)* 1918 A.D. 512 at 518

¹⁹ *Burnham v Fakheer* 1938 NPD 63; *Niksch v van Niekerk & Another* 1958 (4) SA 435 (E)

For the respondent to attempt to retry an issue which has already been decided merely by changing the form of his action is an abuse of the processes of the Court, and is vexatious;"²⁰

[103] It is also so that the principle of finality in litigation should generally be preserved rather than eroded – *interest reipublicae ut sit finis litium*²¹. In this context, Nugent JA described the importance of this principle in the following manner:

"The defence of *lis alibi pendens* shares features in common with the defence of *res judicata* because they have a common underlying principle, which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it, the suit must generally be brought to its conclusion before that tribunal and should not be replicated (*lis alibi pendens*). By the same token the suit will not be permitted to be revived once it has been brought to its proper conclusion (*res judicata*). The same suit, between the same parties, should be brought only once and finally."²²

[104] The Rules of the High Court themselves clearly countenance what can only amount to, in most circumstances, either a stay of proceedings or judgment in favour of a party without a hearing. A clear example of this is Rule 30A (1) which states:

"Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, any other party may notify the defaulting party that he or she intends, after the

²⁰ Burnham's case (*supra*) at 67

²¹ Firestone South Africa (PTY) Limited v Genticuro AG 1977 (4) SA 298 (A) at 309

²² Nestle (South Africa) (PTY) Limited v Mars Inc. 2001 (4) SA 542 (SCA) at paragraph 16

lapse of 10 days, to apply for an order that such rule, notice or request be complied with or that the claim or defence be struck out." (My emphasis)

[105] Furthermore, this court has inherent power to dismiss an action on account of a delay in its prosecution by the plaintiff. The circumstances under which the court may do so depend on the period of the delay, the reasons therefor and the prejudice suffered by the other party²³.

[106] Finally, it is not an essential pre-requisite for the court to find that the relevant proceedings are vexatious before it may grant a stay thereof, the demands of equity are the decisive factor²⁴. I would venture to add that in view of the provisions of section 173 of the Constitution as quoted above, the deciding factor, in considering all the aforementioned principles as to whether to grant a stay, should be whether it is in the interests of justice to do so.

INTERPRETATION OF THE AGREEMENT

[107] As stated in paragraph 32 above, the plaintiffs' attorney (Mr. Tshiki), in his founding affidavit in the application for a consolidation order pursuant to the agreement reached by the parties prior to the Tiwani trial, stated thus:

"10. I respectfully submit that it is in the interests of all concerned, including the interests of the administration of justice that an order be granted in terms of the Notice of

²³ Molala v Minister of Law and the Order 1993 (1) SA 673 (W); Gopaul v Subbamah 2002 (6) SA 551 (D & CLD) at 558 A –B.

²⁴ Hurter v Hough en 'n Ander 1989 (3) SA 545 (C) at 553C

Motion. A decision on a representative sample has every prospect of avoiding or at least curtailing, further litigation."

(My underlining)

[108] The plaintiffs, in their answering affidavit in this matter, stated that they had given instructions to their attorney to the effect that he should attempt to reach an agreement in terms of which the 28 matters referred to trial would be regarded effectively as a test case and that this would result in finality. In the deponent's words as quoted above which bear repeating:

"We agreed to this expansion with the hope that the consolidated case would then be a test case such that if it succeeds, the rest of the matters would succeed and if it fails, the rest of the matters would be withdrawn. The consolidation of twenty matters was expanded, by means of a court order by consent, to twenty-eight matters. This was in 2002." (My emphasis)

[109] In view of this coupled with the denial in the papers that any agreement as alleged by the respondents was concluded (although Mr. Tshiki in argument appeared to shift his ground in this regard), and in view furthermore the fact that Kroon J dealt with every possible defence thoroughly and fully in his judgment, one can only but conclude that the intent of this agreement was indeed to reach finality in this plethora of litigation. In view of the principle that finality should be reached in litigation, as expressed above, and which would have been present in the mind of the lawyers in concluding this agreement on behalf of their clients, it seems to me that it is disingenuous of the plaintiffs to subsequently argue that the intent of the agreement was effectively to

obtain an opinion which would serve to provide further grounds for continued litigation. Whilst the agreement could obviously not have countenanced a restriction on the right of the plaintiffs to appeal, once every avenue of relief available to them in the appeal process had been refused, it must, surely, have been countenanced that that would have been an end to all these matters, including all those that were not consolidated in the Twani trial.

STAY OF PROCEEDINGS?

[110] Even if I am wrong in my interpretation of the agreement as applied to the facts of this matter that is certainly not the end of the matter. There can be little doubt but that the agreement itself must fall into the mix of factors which should be considered in deciding whether or not there are "exceptional circumstances" in this matter and whether it is in the interests of justice to grant a stay of these proceedings as moved for by the applicants.

[111] In my view, the very existence of the agreement together with the meticulous and thorough judgment of Kroon J which dealt with all possible defences raised by the plaintiffs during the course of the extended Twani trial (even if the agreement did not specifically state that this was a test case which would result in finality one way or the other) are very strong factors pointing towards the very existence of "exceptional circumstances" in considering whether or not to grant a stay. When one adds into the mix the fact that the plaintiffs have, subsequent to the delivery of that judgment, attempted on a number of occasions to amended their particulars of claim to introduce a new cause, or new

causes, of action, which attempts have repeatedly been found wanting by the courts, such exceptional circumstances must surely exist.

[112] As submitted by Mr Smuts in this regard, Mr Tshiki's argument on behalf of the plaintiff's amounts to:

"-that there is no merit in the case we advance because we haven't responded to a case which isn't before court which is an unanswerable case without any evidence to support it"

[113] What has also become clear from the history of this matter is that over a period of some 13 years an extraordinary amount of time, money and effort has been spent in resisting claims which were repeatedly and resoundingly found to be entirely without merit. When such was spelled out to the plaintiffs by way of the aforementioned judgment by Kroon J, further repeated attempts were made to follow a new purported cause which had not been raised before and in regard to which there appears to be no evidence to support it, and which attempts have time and again been shown to be lacking in merit.

[114] In summary, the factors which I believe compel me to conclude that this is a matter where a stay of proceedings would be in the interests of justice are the following:

- (a) The fact that there were 41 interlocutory applications preceding the commencement of the trial in the Twani matter all of which were almost exclusively occasioned by the inability of the plaintiffs to formulate their cases appropriately;

- (b) The fact of the agreement which preceded the commencement of the Twani matter and on the basis of which that matter was commenced and conducted, as interpreted above;
- (c) The failure of every claim advanced by the plaintiffs in the Twani matter and, in particular, the finding that the discharge forms signed by all of the Tracor plaintiffs constituted a waiver of their rights to pursue the actions instituted by them in consequence of the promulgation of Proclamation 10 of 1997;
- (d) The failure of the application for leave to appeal the Twani matter at the High Court, Supreme Court of Appeal and Constitutional Court levels;
- (e) The fact that the current particulars of claim are in all material respects reflective of the claims pursued with a singular lack of success in the Twani matter;
- (f) The fact of the repeatedly failed attempts pursued in the name of certain plaintiffs, but apparently on behalf of all the plaintiffs, to plead an entirely new case on behalf of the plaintiffs many years after the institution of their actions;

- (g) The inability of the plaintiffs some thirteen years after the institution of their actions to plead a different case which is sustainable at law;
- (h) The failure of the plaintiffs to honour the multiplicity of costs orders granted against them;
- (i) The question of prejudice occasioned to the applicants as a consequence of the extensive delay in prosecuting the plaintiffs' cases over a period of some 13 years.

[115] In all these circumstances, I am satisfied that the applicants have made out a strong case establishing that the continuation of these matters is nothing short of vexatious and amounts to an abuse of the process of this court. There are clearly exceptional circumstances present in this matter and, in my view, it is in the interests of justice, and indeed my duty, to prevent a furtherance of such abuse.

[116] Finally, as has been alluded to a number of times during the course of this judgment, many of the actions of the plaintiff's attorney, Mr. Tshiki, during the course of this litigation may well amount to unprofessional conduct on his part and ought to be referred to the Law Society for further consideration. Without restricting the list of potential infractions the following come to mind:

- (a) In the Twani judgment, which was delivered on 3 March 2005, Kroon J ordered Mr. Tshiki to pay the costs of three days of the hearing *de bonis*

propriis. It has been alleged by the applicants that a writ of execution was issued against Mr. Tshiki pursuant thereto which writ was not satisfied and consequently office furniture at the offices of Tshiki and Sons Incorporated was placed under attachment. In response thereto, Mr. Tshiki penned a letter dated 29 February 2008 to the Deputy Sheriff, Mthatha, claiming that the company of Tshiki and Sons Incorporated does not own any assets and that the goods under attachment were the property of his wife. At the outset of the argument in this matter, I asked Mr. Tshiki to explain this conduct and his response was to the effect that these costs were only taxed during 2010 and that there are review proceedings pending in respect thereof. Apart from the fact that the applicants appear not to know anything about such review proceedings, the statement that the costs were taxed during 2010 does not square with the fact that he wrote a letter in February 2008 making the statement set out above. Furthermore, one gains the distinct impression that he is attempting to evade his responsibilities in this regard;

- (b) During the Twani trial, the plaintiffs in that trial were represented by an advocate on Mr. Tshiki's instructions. During the course of that trial, Mr. Tshiki was called to testify as a witness on behalf of the plaintiffs. He has subsequently continued to

appear in court on behalf of the remaining plaintiffs despite the fact that he was effectively a witness in their cause. In the instant application, the deponent to the answering affidavit made numerous references to the actions of their attorney, Mr. Tshiki, and yet no confirmatory affidavit was filed by him. Of importance in this regard is the fact that this deponent denied the existence of the agreement alleged to have been concluded with the applicants by Mr. Tshiki acting on behalf of the plaintiffs as dealt with above. Even though he did not file a confirmatory affidavit, it is clear that he was instrumental in drafting this affidavit and, accordingly, this denial. This smacks of unprofessional conduct in that he was clearly aware of the earlier agreement which he had recorded in an affidavit placed before court;

- (c) There are further allegations made by the plaintiffs in their replying affidavit pointing to falsities in the answering affidavit the facts of which were clearly known to Mr. Tshiki who drafted this affidavit. An example of this is set out in paragraph 85 at page 1830 of the replying affidavit which deals with the written waivers;
- (d) Doubt was clearly raised as to the authority of Mr. Tshiki to persist in this litigation on behalf of all the plaintiffs. Despite various challenges in this

regard, no clear proof of such authority was provided, especially in some cases where it appears that the plaintiffs have died;

(e) This opposed motion was set down to be argued over a period of two days. Reasonable and sufficient notice was given to the plaintiffs' attorney of this and of the set down of the matter. Despite this, on the first morning of the hearing Mr. Tshiki intimated to me that he was not available on the following day as he had an appeal in the SCA. I ordered that the matter proceed nonetheless. As it turned out, argument in the matter finished at approximately 4pm on the first day. However, shortly after 3:30pm and whilst Mr Smuts was on his feet in reply, Mr Tshiki rose and informed the court that he was leaving as he was *"rushing for the flight in East London..."*. He then left court despite my protestations leaving Mr Smuts to finalize his reply in Mr Tshiki's absence.

[117] Accordingly, I make the following order:

- 1. The actions instituted in this court by the first respondent and those respondents cited in annexure "NoM 1" to the notice of motion as plaintiffs against the Premier for the Province of the Eastern Cape and the Member of the Executive Council for Agriculture and Land**

Affairs, Eastern Cape, as defendants, under case number 107/99 in respect of the first respondent and those case numbers set out in annexure "NoM 1" to the notice of motion in respect of the further respondents, are hereby permanently stayed;

- 2. The respondents are to pay the costs of this application jointly and severally, the one paying the other to be absolved, which costs are to include the cost of two counsel;**
- 3. The Registrar of this court is directed to ensure that a copy of this judgment is transmitted to the Law Society for their consideration.**

JUDGE OF THE HIGH COURT

DELIVERED ON : 08 AUGUST 2013

**COUNSEL FOR APPLICANTS : Mr Smuts SC with
: Mr Msiwa**

INSTRUCTED BY : State Attorney

COUNSEL FOR RESPONDENTS : Mr Tshiki

INSTRUCTED BY : Tshiki & Sons

