



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA**

Case No: 37875/2011

Reportable: No
Of interest to other Judges: No
Revised: No

SIGNATURE

Date: 21 January 2025

In the matter between:

MUZIWENKOSI JOHANNES RADEBE

1st Applicant

AMAHLUBI ROYAL COUNCIL

2nd Applicant

and

COMMISSION ON TRADITIONAL LEADERSHIP
AND DISPUTES

1st Respondent

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

2nd Respondent

KING GOODWILL ZWELITHINI ZULU

3rd Respondent

ZULU ROYAL COUNCIL

4th Respondent

MINISTER OF CO-OPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS

5th Respondent

JUDGEMENT

Mooki J

- 1 This application is for the review of the finding by the first respondent (the Commission) concerning a claim for the restoration of the kingship of the amaHlubi.¹ The Commission considered the claim pursuant to sections 25(4) and 25(2)(a)(vi) of the Traditional Leadership and Governance Framework Act, 41 of 2003 (The Framework Act).
- 2 The commission framed the issue as follows regarding the claim:

DETERMINATION

7.1 Issues to be determined

7.1.1 The issues are:

- (a) Whether in the course of the history of amaHlubi, a kingship was established;
- (b) How and when was the kingship lost;
- (c) Can such kingship be restored?

- 3 The Commission concluded as follows:

CONCLUSION

¹ The applicants abandoned several other prayers detailed in the notice of motion.

10.1 In Conclusion:

10.1.1 In terms of the Framework Act, amaHlubi do not have [a] kingship.

10.1.2 Thus, there is no kingship to be restored.

10.1.3 Therefore, the claim by Muziwenkosi Johannes Radebe is unsuccessful.

- 4 The first, second and fifth respondents are the only respondents who oppose the application. I refer to them as “the respondents” for ease of reference.
- 5 The Commission made its findings on 21 January 2010. The then President (the second respondent), Mr Jacob Zuma, made a public statement about the outcome of the Commission’s findings on 29 July 2010. The applicants instituted review proceedings on 7 October 2011. The applicants accept that the review was brought late, for which they seek condonation. The respondents oppose the granting of condonation. They also oppose the application on the merits.
- 6 The applicants filed their supplementary founding affidavit and the replying affidavits late. They seek condonation for the delay. The respondents oppose granting condonation.
- 7 I first address the condonation applications, taking each pleading in turn. Mr Radebe, the first applicant, deposed to all affidavits in the application.

In the condonation application for the late filing of the review application

8 The applicants say they received the Commission's report in October 2010 and that they should have filed their review application by April 2011. They give the following as the reasons for the delay in filing the application:

- (1) They had meetings and discussions, on receipt of the report, on possible steps. No clear agreement was reached as of December 2010. They held further meetings, including on 5 April 2011. The meetings were under the guidance of Bekithemba.
- (2) The applicants were dissatisfied with the guidance of Bekithemba, who resigned on 7 May 2011. A new national working committee was formed on that date.
- (3) The national working committee then embarked on efforts to raise funds for the review and to obtain legal advice.
- (4) The applicants engaged the services of Mahodi attorneys. The attorneys instructed counsel on the way forward and prospects of success in the review. The applicants consulted with counsel on 17 May 2011, with counsel sent instructions a week after that meeting.
- (5) The deponent, the legal representatives, together with Amos and Beauty, consulted on 8 August 2011 and 12 August 2011 respectively, to finalise the review application.
- (6) The applicants requested an extension of the 180-day period. The respondents did not object to the request.

- 9 The applicants say they “...have reasonable prospects of success in the review application as would more fully appear from the grounds for review elsewhere above and further set out below.” They also contend that there is no material prejudice to the respondents because the respondents did not object to the request for an extension, and that any prejudice may be compensated by an appropriate order as to costs.
- 10 The respondents raised the following as the bases for opposing condonation.
- 11 The respondents say the applicants do not meet the requirements for condonation, including failing to explain the entire period of the delay. They point out that the Commission’s decision was made on 21 January 2010 and that the President made a public statement on 29 July 2010.
- 12 The respondents further contend that the review lacks prospects of success. That was because the “Historical Background” in the report shows that the amaHlubi were disintegrated before the colonial intrusion and that they were further depleted by not surviving the Mfecance wars and their own internal succession disputes.
- 13 The respondents, with further reference to the prospects of success, contend that there was no evidence that Langalibalele I succeeded in restoring the amaHlubi kingship; that the Amahlubi could not claim any area of jurisdiction or claim senior traditional leaders under the authority and jurisdiction of Mr Radebe; that the claim before the Commission was based on a number of traditional leaders who owed allegiance to Mr

Radebe, not a claim for kingship based on what the applicants say was Hlubi land. The respondents further contend that the Commission gave due weight to all evidence.

In the condonation application for the late filing of the supplementary founding affidavit

- 14 The applicants instituted the review on 7 October 2011. They delivered their supplementary founding affidavit on 15 December 2021. The applicants say they requested a record of proceedings, which had to have been despatched by November 2011; they or their attorneys were not notified of the filing of the record; their current attorneys of record, which services were obtained “in 2021”, sought and obtained the record from attorneys for the Commission on 1 July 2021.
- 15 The applicants say the delay was also due to the applicants having brought a Rule 30 application after the respondents delivered their answering affidavit before the applicants had supplemented their papers. That application was dismissed on 3 February 2020, with the applicants mulcted with costs. The applicants then pended the review application to raise funds to pay both their legal representatives and the costs ordered against them.
- 16 The applicants say they obtained a copy of the record on 1 July 2021; that their attorneys wrote to the respondents’ attorneys on 19 August 2021 about outstanding material. They further say that they briefed counsel for

advice on supplementing the papers, and that they had retained new counsel, who required time to get on top of the matter.

- 17 The applicants contend that the respondents are not prejudiced by the late delivery of the supplementary affidavit. That is because the respondents could oppose the amended papers and answer to the supplementary affidavit.
- 18 The respondents say the applicants were advised on 26 January 2012 that the record had been delivered to the Registrar, and that the supplementary affidavit was due on 9 February 2012. The respondents also say that they delivered their main answering affidavit on 31 March 2014 when it appeared that the applicants had no intention of filing a supplementary affidavit.
- 19 The respondents filed a Rule 30 application on receipt of the supplementary affidavit, having taken a view that the supplementary affidavit was filed nine years late. The application was to have the supplementary affidavit set aside. The application was heard on 6 September 2022. It was dismissed with costs on 21 November 2022. The applicants agreed that the respondents would file their further answering affidavit by 28 February 2023.
- 20 The respondents deny giving the applicants an incomplete record. The applicants and their erstwhile attorneys were notified of the delivery of the record after the record was filed with the Registrar. The respondents contend that Seanego Attorneys may have received the record on 1 July

2021, but that the record had been delivered to the previous attorneys in January 2012.

21 The respondents pointed out that the applicants did not explain what they did with the record and that the applicants did not explain what happened during the period 26 January 2012 and 1 July 2021.

22 The respondents informed the applicants on 4 June 2012 that the respondents intended to file their answering affidavit because there was no supplementary affidavit. The applicants filed their supplementary affidavit more than nine years of being furnished with the record.

In the condonation application for the late filing of the replying affidavit

23 The replying affidavit was due on 15 March 2023. The respondents agreed that the applicants could file by 31 March 2023. The applicants sought a further indulgence to deliver the affidavit by 15 April 2023. The respondents did not agree to this request. The applicants filed the reply on 2 June 2023. They say the affidavit is late by two months. They explained the delay as detailed below.

24 The applicants say their lead counsel was engaged in a pre-existing matter of national and public importance and could only settle the draft replying affidavit on 12 May 2023. The other bases for the delay are that confirmatory affidavits had to be sought and despatched and collated from various amakhosi of the Amahlubi; that the applicants reside far from their attorneys; that the deponent signed the affidavit on 17 May 2023, and instructed his aides to send the affidavit to the attorneys for filing; that the

attorneys advised on 23 May 2023 that the affidavit was defective because the commissioner of oaths did not 'initialise' each page. The applicants say they were advised to have the commissioner initialise each page or that the applicants should "re-commission" the affidavit before a different commissioner of oaths. Mr Radebe deposed to a new affidavit before a different commissioner of oaths on 31 May 2023.

- 25 The applicants say the delay was not excessive and that the respondents are not prejudiced.

Analysis in relation to the condonation application for the late filing of the review application

- 26 The grant or otherwise of condonation entails the exercise of a discretion by the Court. The law was stated long ago in *Melane v Santam Insurance Co. Ltd.*,² namely that:

"[...] Among the facts usually relevant, are the degree of lateness, the explanation thereof, the prospects of success and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation.[...]What is needed is an objective conspectus of all the facts. Thus a slight delay and a good

² (1962) (4) SA 531 (A), 532 C - E

explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked [...]."

- 27 The Constitutional Court, in *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others*,³ referenced 'the interest of justice' as the prism for considering the grant or otherwise of condonation:

*"...an application [for condonation] should be granted if that is in the interests of justice and refused if it is not. The interests of justice must be determined by reference to all relevant factors including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect."*⁴

- 28 *Brummer* can be taken as an elaboration on *Melane*, with the distinction that *Melane* does not mention 'the interests of justice'. The concept is, however, embedded in the various considerations detailed in *Melane*. The "interests of justice" is not a stand-alone criterion with its own attributes. It

³ 2000 (2) SA 837 (CC)

⁴ *Brummer*, para 3

does not operate as a *shibboleth* to gain passage. It is a qualitative measure, taking into account the various considerations mentioned in *Brummer*.

- 29 The applicants obtained a copy the report which they seek to review in October 2010. They launched review proceedings on 7 October 2011. They are required to have instituted review proceedings within 180 days of October 2010, save with the consent of the respondents to extend the period. The respondents say there was no agreement to extend the period.
- 30 The applicants say their review application is late “by almost 6 months”, counting 180 days from receipt of the report from October 2010, and that the delay is neither inordinate nor deliberate. The delay from October 2010 to 6 October 2011 is clearly not “almost 6 months.”
- 31 The applicants say meetings and discussions were held following their obtaining a copy of the report, and that “no clear agreement could be reached as of December 2010.” There is no indication of when meetings and discussions occurred between October 2010 and December 2010; there are no minutes of what was discussed in those meetings and discussions; the applicants do not identify persons who attended meetings and discussions during this period. There is no confirmation of any such meetings and discussions having taken place. There is no evidentiary support for anything having taken place in the two months to December 2010 since the applicants obtained a copy of the report. There is thus no satisfactory explanation of what transpired during this period.

- 32 There is equally no satisfactory explanation for the period January 2011 to October 2011. There is a non-specific mention of meetings being held, including a meeting on 5 April 2011. There is the same absence of details and substantiation as in the two-month period already referred to. The applicants say they became dissatisfied with the guidance of Bekithemba, who resigned on 7 May 2011, with a new national working committee being formed on that date. The averments are not substantiated. No precise dates are given. There is no elaboration of what it is about Bekithemba that resulted in the dissatisfaction by the applicants.
- 33 There is no support that the applicants embarked on efforts to raise funds following the formation of a new national working committee. No details are given about such efforts. There is no substantiation, such as demonstration of whom was approached for funds and when the approach was made. There is no mention of when the applicants obtained the services of Mahodi Attorneys, other than a vague reference that their services were obtained “in 2021.” It is, in any event, untrue that those services were obtained “in 2021.” Mahodi Attorneys were the applicants’ attorneys of record long before 2021, as shown elsewhere in this judgement.
- 34 The applicants make several other unsubstantiated averments. They include that Mahodi Attorneys instructed counsel to advise on the prospects of success, and that meetings were held on 8 August 2011 and 12 August 2011 for “finalising the review application.” There are no confirmatory affidavits or documentation substantiating the averments.

- 35 The applicants also say that the delay was occasioned by their not having a legible copy of the Commission's report and that such a copy was sent by e-mail at the beginning of September 2011. I do not accept this account. The applicants do not say who sent the report in September 2011. The applicants obtained a copy of the report in October 2010 from the website of the fifth respondent (the Department). They do not say that the copy obtained at that time was illegible. They also do not say that the report was no longer available on the Department's website in 2011.
- 36 I do not accept that there was no delay because the respondents did not object to a request to extend the 180-day period. The letter requesting an extension is dated 22 August 2011. The letter stated, in part, that "On our consideration as to the time period for the review, it seems that the 180 day period has elapsed." There is no mention that there were impediments that led to expiry of the 180-day period. There is no mention of why the application could not have been made on time. The letter also stated that the applicants would assume that the respondents did not object to the extension if there was no response to the letter by Friday, 26 August 2011.
- 37 The following bear remarking about regarding the stated request for an extension: the applicants sought an extension to file their review application by 31 August 2011. They did not file their application on that date. The letter was transmitted to the first, fifth, sixth and seventh respondents on 22 August 2011, as shown by the respective facsimile transmission reports. It was not sent to the fourth respondent. The letter

was addressed to the second respondent on 13 September 2011.⁵ The transmission report records that the letter was faxed at 16:53 and that it was not delivered. The letter was faxed to the third respondent on 26 August 2011 at 16:27.⁶ There is thus no credit to the applicants' contention that the respondents did not object to extending the 180-day period.

38 The applicants say they consulted with Mr Mahodi, their attorney, on 8 October 2011, during which the application was finalised. There is no confirmation by Mr Mahodi.

39 The applicants have not explained the entire period of the delay. This is borne by the chronology as detailed in the previous paragraphs.

40 Mr Radebe's explanation for the delay in lodging the review application is based essentially on his say-so. The founding affidavit has a single confirmatory affidavit, by Sipho Shadrack Mnguni, who described himself as the national co-ordinator for the Amahlubi national working committee. He confirmed those averments by Mr Radebe as relates to him and the Amahlubi national working committee. Mr Radebe did not say anything about Mr Mnguni regarding the late filing of the review application. Mr Radebe made a passing reference to the Amahlubi national working committee being involved in efforts to secure funds. I do not consider Mr Mnguni's confirmatory affidavit to lend credence to the attempted explanation for the late filing of the review application.

⁵ The letter was faxed on 13 September 2011. The second respondent was invited to indicate his attitude to the request by 26 August 2011.

⁶ The letter was faxed after hours, on the very day when the third respondent was expected to have indicated his attitude.

- 41 The applicants say they “...have reasonable prospects of success in the review application as would more fully appear from the grounds for review elsewhere above and further set out below.” An applicant for condonation is required to set forth briefly and succinctly such essential information as may enable the court to assess an applicant's prospects of success.⁷
- 42 The applicants do not say how they have reasonable prospects of success. They merely point to their grounds of review, with no elaboration as to how those grounds are indicative of prospects of success. The court does not perform an original assessment of whether the grounds of review are indicative of prospects of success: the court assesses such prospects with reference to claims advanced by a litigant, with the court considering the prospects with reference to such claims. A litigant is not permitted, as in here, to say they have “reasonable prospects of success” by merely pointing to the grounds of review. A litigant is required “to set forth briefly and succinctly such essential information as may enable the court to assess an applicant's prospects of success.” Every litigant will have shown “reasonable prospects of success” if all that a litigant had to do was to mention the grounds of review.
- 43 I conclude that the applicants have not addressed the requirement for a showing of “prospects of success” in a condonation application. This is fatal to their application. I am also persuaded by the respondents’ case that the applicants have no prospects in the review application. The respondents elaborated, in opposing the condonation application, as to the respects in

⁷ Rennie v Kamby Farms (Pty) Ltd 1989(2) SA 124 (A) at 131E

which the Commission considered the historical background that led to the Commission's conclusion that the amaHlubi were disintegrated before the colonial intrusion in 1843 and why the amaHlubi did not survive the Mfecane wars. The Commission also illustrated how the Commission gave due weight to all evidence, including the Proclamation of 1873, when the British colonial establishment deposed Langalibalele I.

44 I disagree that there is no material prejudice to respondents, or that any such prejudice may be compensated by an appropriate order as to costs. The respondents point out that the review was instituted in 2011, more than 10 years ago; that they filed their answering affidavit more than 9 years ago; that the applicants filed their supplementary founding affidavit many years after the date by when that should have been done. More fundamentally, the respondents say a new commission is in place, so too new legislation⁸ and that the relief sought under the Framework Act is no longer competent. The applicants did not address these considerations.

45 I conclude that the applicants failed to make out a case for the court to condone the late filing of their review application. The attempted explanation for the delay is half-hearted. There are multiple unexplained gaps in the period October 2010 to the filing of the application on 7 October 2021. The explanations for the delay themselves are not cogent. Mr Radebe's averments are not substantiated, be that by confirmatory affidavits or contemporaneous documentation.

⁸ The Traditional and Khoi-San Leadership Act 3 of 2019.

46 The administration of justice is ill-served by litigants who fail to institute proceedings timeously and prosecute matters with due haste. The legal regime for the complaints in the review application has changed. The Framework Act has since been repealed. The Traditional and Khoi-San Leadership Act 3 of 2019 is the governing statute. The proper administration of justice does not justify the court entertaining the application given the changed circumstances. This is a function of the applicants having been supine in relation to their complaint following the findings by the Commission.

Analysis in relation to the condonation application in the late filing of the supplementary founding affidavit

47 The applicants raised the issue of the record as part explanation for their late filing of the supplementary affidavit. Mr Radebe says that they received the record on 1 July 2021. This is false, and to the knowledge of Mr Radebe.

48 Mr Radebe deposed to the affidavit in support of a Rule 30 application. That application was premised, in part, on the applicants' claim that they were not given volume 3 of the record, which they said prevented them from supplementing their papers.

49 The applicants' Rule 30 application was preceded by various exchanges between the parties. The applicants do not mention these exchanges in their review application. These exchanges are important, more so in relation to the applicants' complaint that they were not furnished with the

record before 1 July 2021. The exchanges show the applicants to have been economical with the truth.

50 The applicants failed to relay the following important facts to the court. These facts are gleaned from the applicants' Rule 30 application. The applicants served the respondents with a Rule 30 notice on 12 July 2016. Their grounds of complaint included not having been furnished with volume 3 of the record. Mr Radebe deposed to the affidavit in support of the Rule 30 application on 23 August 2016. Mr Radebe, in his affidavit, referenced the record having been filed with the Registrar on 26 January 2012. He now says, in this application, that the applicants received the record on 1 July 2021.

51 It is manifest that Mr Radebe was aware on 23 August 2016 that the respondents had delivered the record by 26 January 2012. Mr Radebe now says, on oath, that the applicants received the record on 1 July 2021. It is a grave matter when a deponent lies on oath. This is more so when such a deponent has had the benefit of advice by attorneys throughout the litigation.

52 The applicants' Rule 30 application was not a *bona fide* complaint. This is borne by the following uncontested background as relayed by the respondents in their answer to the applicants' Rule 30 application. This background illustrates that the applicants are not being frank with the court in seeking to rely on their Rule 30 application as a basis for not delivering their supplementary affidavit on time.

- 53 The respondents produced the record, made up of five volumes, on 26 January 2012. The record included volume 3. The record was delivered to the applicants' attorneys and filed with the Registrar. The applicants and their attorneys acknowledged receipt of the record at the time.
- 54 There is no obligation on an applicant to supplement their founding affidavit in review proceedings. The applicants, if so minded, had to supplement their papers within 10 days of 26 January 2012. The *dies* for the delivery of a supplementary affidavit expired on 9 February 2012, without the applicants supplementing their affidavit. The applicants had not, by the time of expiry of the *dies*, raised any concerns about the record. The applicants were assisted by attorneys throughout. The decision not to supplement was therefore well-considered.
- 55 The respondents served their answering affidavit on 27 March 2014, and filed the affidavit in court on 31 March 2014. This was more than two years from when the applicants should have supplemented their papers. The respondents then set the review application down for a hearing on 11 August 2015.
- 56 The applicants, represented by Mahodi Attorneys, appeared in court on 11 August 2015. They sought a postponement in order to file a supplementary affidavit. The hearing was postponed, with the applicants ordered to pay costs on a punitive scale.
- 57 Mahodi Attorneys, on 15 September 2015, requested further copies of the record from Commission's attorneys. This was given to them. The

respondents made an error and did not include volume 3, a book by Soga entitled '*The South Eastern Bantu*'. Mahodi Attorneys were advised of the omission on 15 September 2015 and were invited to collect the material, which they never did.

58 Attorneys for the respondents wrote several letters to Mahodi Attorneys following the postponement on 11 August 2015, enquiring about the filing of the supplementary affidavit. This included an enquiry on 16 October 2015, to which Mahodi Attorneys replied on 26 October 2015 that the supplementary affidavit was ready for signature by the client and would be delivered on Friday of the same week. The applicants did not deliver the affidavit as promised. Attorneys for the respondents wrote several more letters enquiring about when to expect the supplementary affidavit. This includes an enquiry on 5 November 2015, to which Mahodi Attorneys replied that the affidavit will be filed by the second week of December 2015. This too was not done. Mahodi Attorneys later advised that the affidavit will be filed by 8 February 2016. This was not done.

59 Attorneys for the respondents advised Mahodi Attorneys on 10 February 2016 that the respondents will set the review application down because there was no supplementary affidavit. Mahodi Attorneys did not respond to this letter. The respondents then set the review down for a hearing on 25 July 2016. It bears pointing out that 25 July 2016 was almost a year from 11 August 2015, when the applicants sought a postponement to file a supplementary affidavit. That affidavit remained outstanding.

- 60 Mahodi Attorneys wrote to the respondents' attorneys on 16 May 2016, taking issue with the respondents having set the review down for a hearing. They complained that the applicants had no opportunity to file a supplementary affidavit. They mentioned the absence of volume 3 of the record as one of the reasons for the stated inability to file a supplementary affidavit. The respondents pointed out that Mahodi Attorneys were offered a copy of volume 3 of the record as far back as September 2015.
- 61 The applicants, following exchanges referred to above, then served the respondents with a Rule 30 notice on 12 July 2016. This was 9 days before the scheduled hearing of the review application on 25 July 2016. BC Phoswa Inc. were the applicants' attorneys of record in the Rule 30 application. There is no mention why Mahodi Attorneys were no longer on record.
- 62 It is manifest that: the applicants received the record in January 2012. The record entailed five volumes; the applicants were represented by attorneys when the record was delivered; the applicants did not complain that the record was incomplete. The applicants complained about the record for the first time in their Rule 30 notice, on 12 July 2016.
- 63 The applicants never complained about the record between 26 January 2012 and 11 July 2016, a period of more than four years. The respondents gave a chapter and verse account that the applicants received a complete record, including that the applicants requested and received a further copy of the record in September 2015. The respondents explained their error in

relation to volume 3 of the record and invited the applicants to collect the document in September 2015. The applicants did not collect the document.

64 It is a grave misrepresentation by Mr Radebe to say on oath that the applicants and their attorneys never received nor were notified of the record before 1 July 2021. Mr Radebe knew this to be false. He deposed to an affidavit on 23 August 2016, in which he mentioned that the respondents had filed the record with the Registrar on 26 January 2012.

65 Apart from seeking to mislead the court, there is simply no cogent reason why the applicants did not file a supplementary affidavit once the record was made available on 26 January 2012. It is unacceptable for the applicants to also say that they could not file a supplementary affidavit because of their Rule 30 application in relation to the answering affidavit by the respondents: they served the Rule 30 notice on 12 July 2016. The applicants did not complain about the record before 12 July 2016.

66 The Rule 30 application was dismissed on 3 February 2020. Mr Radebe deposed to the supplementary founding affidavit on 14 December 2021. There is no proper accounting of what happened between 3 February 2020 and 14 December 2021, a period of almost two years.

67 The respondents filed their initial answering affidavit because the applicants were not supplementing their papers. The applicants had, in any event, lost their right to supplement their founding affidavit after expiry of the 10-day period following delivery of the record on 26 January 2012. The

applicants could file a supplementary affidavit after that period not as a matter of right, but only on the court having granted them leave to do so.

68 The applicants are required to have explained the whole period of the delay.⁹ They did not. This is apart from the applicants misleading the court by not placing relevant facts before the court. They served a Rule 30 notice within days of the scheduled hearing of the review application which the respondents had set down. This notice was given some two months after Mahodi Attorneys' half-hearted complaint, with nothing done in the interim. It is not a surprise that that application was dismissed, with the applicants mulcted with costs.

69 The applicants are required, in seeking condonation, to address the prospects of success.¹⁰ The condonation application for the late filing of the supplementary affidavit does not address the prospects of success. The omission is fatal to the application.

Analysis in relation to the condonation application in the late filing of the replying affidavit

70 The applicants' case for condonation is wholly unsatisfactory. They sought an indulgence to file their replying affidavit by 31 March 2023. This deadline must have been determined with counsel's diary in mind. The applicants do not say why they could not meet this deadline. The applicants do not explain why they sought a further indulgence to file on 15 April 2023 if lead counsel could only settle the papers on 12 May 2023. The date

⁹ *Van Wyk v Unitas Hospital and Another* 2008 (2) SA 472 (CC), para 22

¹⁰ *Brummer*, para 3

of 15 April 2023 must also have been considered with counsel's diary in mind.

71 The Court is invited to accept the delay in part because the applicants' lead counsel is said to have been engaged in "a pre-existing matter of national and public importance." The applicants thus briefed counsel knowing that counsel had a pre-existing matter. The court is also expected to accept the explanation with no details of the stated matter. There is no confirmation, in any event, that counsel was so involved. The attorney would be expected to confirm on oath as to the unavailability of counsel. That is because counsel is ordinarily excused from deposing to affidavits.

72 There is no explanation why lead counsel was only able to settle the papers on 12 May 2023. The request for an extension on 14 March 2023 for the applicants to file their reply on 31 March 2024 does not mention the unavailability of counsel as the reason for an extension. On the contrary. The applicants' attorneys stated in the 14 March 2023 request that "Please note that our counsel team is still working on the replying affidavit. We hereby request you (sic) indulgence to file our clients' replying affidavit on Friday, 31 March 2023."

73 The applicants' request to file on 15 April 2023, made on 31 March 2023, similarly did not mention counsel's unavailability as a reason for not filing a replying affidavit on time. The attorneys wrote that "Unfortunately, our Counsel team is still working on the replying affidavit and same will not be ready for filing today. We hereby request a further extension until 15 April 2023 to file our clients' replying affidavit." It follows on this

correspondence that counsel were available to consider the papers and for the replying affidavit to be filed by 15 April 2023. Contemporaneous documents do not support the averment that the reply could not be filed on time because counsel were unavailable.

74 There is no confirmation that Mr Radebe was advised that the affidavit of 17 May 2023 was defective. There is no explanation for the lack of any confirmatory affidavit to the replying affidavit. The applicants have been represented by attorneys, who are well-aware of the law on hearsay evidence, and the need for confirmatory affidavits in that regard.

75 I do not accept that the obtaining of confirmatory affidavits from the amakhosi contributed to the delay in the filing of the replying affidavit. Those confirmatory affidavits have nothing to do with the replying affidavit. That is because the deponents to those affidavits say they confirm the averment in paragraph 41.6 of the "supplementary founding affidavit" regarding payment of allegiance to the king.

76 I should also point out that there is, in fact, no confirmatory affidavit to the replying affidavit. That is because Mr Radebe disavowed the affidavit of 17 May 2023 for the affidavit deposed to on 31 May 2023. The affidavit of 31 May 2023 has no confirmatory affidavits.

77 The applicants' explanation for the delay in filing their replying affidavit is, as stated above, unsatisfactory. The applicants do not deal with the prospects of success. A condonation application that does not address the prospects of success is fatally defective.

Conclusion:

- 78 The applicants launched the review application on 7 October 2011. The application was heard on 18 October 2024, more than 13 years later. The application is to review a decision by the first respondent. The first respondent no longer existed in law when the review was heard. The legislation in terms of which the applicants premised their case had been repealed when the matter was argued.
- 79 The delay by the applicants is egregious. The applicants were not frank with the court as regards the history of the litigation. Mr Radebe told untruths on oath. The administration of justice will be ill-served if the court were to entertain the application, given the various short-comings as detailed above. I therefore refuse the application for the late filing of the review, as already indicated above.
- 80 I refused condonation for the late filing of the review application. It was therefore, strictly considered, unnecessary to address the condonation applications in relation to the supplementary founding affidavit and the replying affidavit. That was done for the sake of completeness.
- 81 I make the following order:
- (1) The application is dismissed.
 - (2) The applicants are ordered to pay costs, including the costs of two senior counsel, on scale C.


O Mooki

Judge of the High Court
Gauteng Division, Pretoria

Counsel for the applicants: B Shabalala (together with S Mohapi)

Instructed by: Seanego Attorneys Inc.

Counsel for the first,
second and fifth respondents: N Arendse SC (together with ZZ Matebese SC)

Instructed by: Bhadrish Daya Attorneys

Date heard: 18 October 2024

Date of judgement: 21 January 2025