

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NUMBER: 12970/2022

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
.....	
.....	
DATE 30 June 2025	SIGNATURE.....

In the matter between:

LETUANA JOSEPH RATAU

1ST APPLICANT

BAROKA BA RATAU TRADITIONAL COUNCIL

2ND APPLICANT

BAROKA BA RATAU ROYAL FAMILY

3RD APPLICANT

-and-

PREMIER: LIMPOPO PROVINCE

1ST RESPONDENT

**MEMBER OF THE EXECUTIVE COUNCIL CO-
OPERATIVE GOVERNANCE, HUMAN SETTLEMENT
AND TRADITIONAL AFFAIRS**

2ND RESPONDENT

THE COMMISSION ON TRADITIONAL LEADERSHIP
DISPUTES AND CLAIMS (CTLDC)

3RD RESPONDENT

THE LIMPOPO PROVINCIAL COMMITTEE ON
TRADITIONAL LEADERSHIP DISPUTES AND CLAIMS

4TH RESPONDENT

THE NATIONAL MINISTER OF CO-OPERATIVE
GOVERNANCE AND TRADITIONAL AFFAIRS

5TH RESPONDENT

LIMPOPO HOUSE OF TRADITIONAL LEADERS

6TH RESPONDENT

Delivered : **30 June 2025**

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand down of the judgment is deemed to be **30 June 2025** at **10:00 am**.

Date heard : **4 April 2025**

Coram : **Bresler AJ**

JUDGMENT

BRESLER AJ:

Introduction:

- [1] The Applicants apply for the review and setting aside of the decision of the Premier, Limpopo (the First Respondent) not to recognise the First Applicant as Traditional Leader and the Second Applicant as Traditional community. The impugned decision was made on or about the 13th of October 2015.
- [2] The Applicants submit that the failure by the First Respondent is reviewable on the following grounds:
- 2.1 The failure to recognise the First Applicant must be reviewed and set aside as the Applicants have now complied with the findings and recommendations and procured a resolution from the Third Applicant.
- 2.2 Likewise, the Applicants have now provided the resolution from the Third Applicant which was the outstanding requirement for recognition as a traditional community.
- [3] The Applicants also apply for condonation for the late delivery of their amended Notice of motion and Supplementary affidavit. Same was delivered some 20 (twenty) days out of time and after receipt of the record from the Respondents.
- [4] It is apposite to note that the initial Notice of Motion referred to the First Respondent's decision to decline the First Applicant's claim for recognition of the senior traditional leader titled 'L/19/59'. This Notice of Motion also applies for a substitution of the decision with a decision to the effect that both the Traditional

Community and the Traditional Leader is recognised accordingly. The Founding affidavit makes it clear that the review is launched under the auspices of the Section 33 of the **Constitution**, 1996, and Section 6 of the **Promotion of Administrative Justice Act**, Act 3 of 2000 (PAJA).

- [5] The amended Notice of Motion provides for declaratory relief and the substitution of the Respondents' failure to issue a certificate of recognition with an order directing the issuing of the said certificate in accordance with the resolution taken by the Third Applicant on the 20th of September 2020. The Supplementary affidavit states that the Applicants do not solely rely on **PAJA** but furthermore submit that the Respondents' failure to issue the certificate is reviewable on the principle of legality. The Supplementary affidavit also deals extensively with the First Applicant's right to be recognised having regard to his familial history.
- [6] The First to Sixth Respondents opposed the application. The Respondents stated that the impugned decision was already taken on the 13th of October 2015. The said impugned decision was therefore not challenged within a reasonable time, or more specifically, within 180 days as contemplated in **PAJA**. No explanation was provided for the delay in instituting the proceedings.
- [7] This purported delay of approximately 7 (seven) years is deemed to be fatal to the Applicants' case, according to the Respondent.

Factual synopsis:

- [8] The facts insofar as they may be relevant to the current proceedings, are common cause between the parties.
- [9] On the 4th of October 2011, the First Applicant applied for recognition of the Baroka Ba Ratau Community as a Traditional Community and for himself to be recognised as their senior traditional in terms of Section 3(2) of the **Limpopo Traditional Leadership and Institutions Act**, Act 6 of 2005.
- [10] Upon finalisation of the investigation, the Commission (the Third Respondent) made the following findings:
- 10.1 There appears to be a *prima facie* case for the existence of the chieftainship of Baroka Ba Ratau.
- 10.2 That the commission is unable to make a finding of the existence of the dispute since there is no evidence of any opposition.
- 10.3 That it is not within the competence of the Commission to recognise or promote any person to the position of traditional leadership since this power resides with the Councillors' discretion.
- [11] It was furthermore recommended that:

6.1 The *status quo ante* be maintained as the position of the incumbent Chief Letuwana Joseph Ratau III is uncontested; and

6.2 It is unnecessary to issue a certificate of recognition of his status since, traditionally speaking, such certificate is not a pre-condition for chieftainship.

[12] On the 13th of October 2015, the First Applicant was informed by the office of the First Respondent that the application for recognition as traditional leader and traditional community was declined. The reason submitted for the refusal of the application was the absence of a resolution from the Royal Family (the Third Respondent).

[13] On or about the 9th of September 2020, the Third Respondent took a resolution and identified the First Applicant as a senior traditional leader. The resolution was received by the First Respondent on the 23rd of April 2021.

Issues that require determination:

[14] This Court is only called upon to determine if the relief, as contemplated in the amended Notice of Motion, should be granted. In this Court's view, the two predominant aspects that stands to be determined is if a cause of action has been properly identified, and if so, if the delay in instituting the review proceedings is reasonable.

The Applicable Legal Principles:

- [15] As stated herein before, the Applicants have raised the issue in their initial Founding affidavit that the cause of action is premised on **PAJA**. The factual basis was stated to be the resolution taken by the Third Applicant on the 9th of September 2020.
- [16] The default pathway to review is **PAJA**. Very few cases for review involves a direct application of the **Constitution**. **PAJA** was enacted specifically to give effect to the rights enshrined in Section 33 of the **Constitution**. In *Minister of Health v New Clicks South Africa (Pty) Ltd*¹, **PAJA** was described as ‘clearly intended to be, and in substance, a codification of these rights’. The common law is therefore displaced by **PAJA**.
- [17] In *Batho Star Fishing (Pty) Ltd v Minister of Environmental Affairs*² the Constitutional Court stated that the cause of action for judicial review of administrative action now ordinarily arises from **PAJA** and not from the common law as in the past. O’Regan J also remarked that the authority of **PAJA** to ground such causes of action rests squarely on the **Constitution**, but this does not presuppose that a party may circumvent the provisions of the Act by direct reliance on Section 33 of the **Constitution**.

¹ 2006 (2) SA 311 (CC) at para 96

² 2004 (4) SA 490 (CC) at para 25

- [18] In *Mazibuko v City of Johannesburg*³ the Constitutional Court reaffirmed the principle that, where legislation has been enacted to give effect to a right, a litigant should rely on that legislation to give effect to the right or alternatively challenge the legislation as being inconsistent with **PAJA**.
- [19] This Court is of the view that the principle of legality can only apply if the provisions of **PAJA** do not apply, for instance in cases where the conduct does not resort to administrative action or is not defined as administrative action in terms of **PAJA**. The principle is often applied where an administrator self-reviews its own decision. The Applicants' reliance on the principle of legality is thus misplaced.
- [20] It must further be borne in mind that lawfulness stands at the core of the principle of legality. The administrative action must therefore be compared to the empowering provision to determine if its lawful. *In casu* no case is made out that, once decision is made, the First Respondent may, or must, vary or withdraw its decision should new facts come to light. Under the common law, the issue arose within the context of the *functus officio* doctrine, which dictated when an administrator could vary a decision. In essence, an administrator can vary (self-review) their own decision if the administrator is authorised to do so in terms of the empowering legislation. An evident example is the right of a Magistrate to reconsider the issue of bail subject to new facts being presented.
- [21] The basis of the Applicants' review is the fact that the new facts were at hand (initial Founding affidavit) and that the First Respondent failed to vary its initial decision

³ 2010 (4) SA 1 (CC) at para 73

taken in 2015, premised on the new information. No case is however made out that the First Respondent had the authority and power to self-review under these circumstances and in terms of the empowering legislation. The First Respondent's purported refusal to issue the certificate was therefore lawful.

- [22] Insofar as the review is premised on the principle of legality, it cannot succeed for these reasons.
- [23] As to the allegation that the review is premised on **PAJA**, this Court finds it difficult to ascertain the extent of the reliance on the Act. The courts have reiterated that when applying **PAJA**, litigants should disclose their cause of action by specifying which provisions of the statute are being relied upon. While in *Batho Star supra* the Court was prepared to overlook a failure to properly disclose the cause of action with reference to **PAJA**, O'Reagan J emphasised that it is desirable for litigants who seek to review administrative action, to identify clearly both the facts upon which they base their cause of action and the legal basis of their cause of action.
- [24] The Applicants dismally fail in this regard. The initial Notice of Motion and Founding affidavit makes no mention of any specific provisions of **PAJA** relied upon. Likewise, the Amended Notice of Motion and the Supplementary affidavit, only makes general mention of the First Respondent's failure to take and implement a decision as contemplated in Section 6(2)(g) of **PAJA**. It must again be noted that no case is made out that the First Respondent has a duty to self-review when new facts are at hand. The empowering legislation simply does not contemplate such a power of self-review.

- [25] On these grounds, the application has no merit or prospect of success. The prospect of success is one of the factors that the court should consider in determining if the 180-day period, contemplated in Section 9 of **PAJA** should be extended.
- [26] The Respondents have dealt with the delay in instituting the proceedings, and the applicable authorities in that regard, in detail. The law pertaining to the launch of review proceedings within a reasonable time are trite. In the case of **Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others**⁴ the Supreme Court of Appeal reiterated that the prosecution of a review within a reasonable time is to avoid prejudice to the Respondents, and to promote public interest in reaching finality on the status of administrative acts, on grounds of pragmatism and practicality. In **Mostert NO v Registrar of Pension Funds and Others**⁵ it was held that the period of 180 days may be extended for a fixed period by agreement between the parties, or failing such agreement, by a court on application by the person or administrator concerned. Such application may be granted where the interests of justice so require.
- [27] In the absence of any prospect of success on the merits, it would serve no purpose to extend the period of 180 days. The delay in institution the proceedings is thus fatal to the Applicants case.
- [28] Safe for the aforesaid, the Applicants have also dismally failed to explain their delay with sufficient particularity for the Court to determine how it came about.

⁴ 2008 (2) SA 638 (SCA) at 650D - E

⁵ 2018 (2) SA 53 (SCA) at para 13

Costs:

[29] It is trite law that a private party should not be mulcted in costs where that party raises a genuine and substantive argument vindicating constitutional rights or where the party seeks to hold an organ of state accountable and compel such organ of state to fulfil its constitutional or statutory responsibilities. This rule is not inflexible, and a departure is warranted where litigation is frivolous or vexatious. The ultimate goal is to do that which is just having regard to the facts and circumstances of the case.⁶

[30] This matter is one where the well-known *Biowatch*⁷ principle ought to be applied. Although the Applicants are not successful in their review, their failure is a result of a misdirection in law. The Applicants were genuinely endeavouring to vindicate their constitutional right to just administrative action. On this basis, it would be just and equitable if each party is ordered to pay its own costs.

Order:

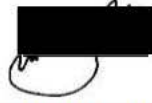
[31] **In the result the following order is made:**

31.1 The application is dismissed;

⁶ *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC)

⁷ *Biowatch v Registrar, Genetic Resources* 2009 (6) SA 232 (CC)

31.2 Each party is ordered to pay its own costs.



M BRESLER AJ

ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

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