



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
<i>2/11/2020</i>	

Case No: **23434/2006**

In the matter between:

DAVID MAEPA

Applicant

and

POLOKWANE MUNICIPALITY

First Respondent

MANANA SHEREEN BOGATSU

Second Respondent

JUDGMENT

F. DIEDERICKS, AJ

[1] In this opposed motion the Applicant seeks an order in the following terms:

[1.1] That the decision of the First Respondent dated 3rd of July 2006 to grant permission to the Second Respondent to exhume the body of Isaac Mmapho Maepa and to rebury same at Johannesburg as appears from **Annexure "A"** hereto, be reviewed and set aside;

[1.2] That pending the finalisation of this application for review the decision of the First Respondent referred to in prayer 1 be suspended and the Second Respondent and any other person acting in terms of the decision referred to in prayer 1 above be prohibited from acting in terms thereof;

[1.3] That the Second Respondent is ordered to pay the costs of this application.

[2] This Court notes that these papers were issued in 2006, indicating that this family feud is ongoing for the past fourteen years.

BACKGROUND:

- [3] On the 28th of June 2006 the Second Respondent caused her attorneys to direct a letter to the First Respondent's Department of Environment Section requesting approval for the exhumation of the body of her husband who was buried at Ga-Mothiba in May 2005.

Important features of this letter are the following:

- [3.1] *"The family (my emphasis) requires the deceased to be reburied at Fourways Memorial Park in Johannesburg where his wife, children and family live. The deceased also lived and spent his entire life in Johannesburg.*
- [3.2] *When the deceased passed on, the widow was persuaded by the deceased's brothers to bury him at Ga-Mothiba. At the time the bereaved widow did not anticipate the difficulties that the family would endure in burying the beloved at the current graveyard.*
- [3.3] *Due to the distance it is becoming difficult for the wife and children to visit the grave to perform cultural rituals (my emphasis) when it is necessary.*
- [3.4] *It has also been revealed by traditional leaders (my emphasis) that the deceased had not rest in peace and he wants to be buried at his home place.*

- [3.5] *It is some time now that the widow has been experiencing sleepless nights due to the deceased's complaint about his resting place.* (my emphasis).

On account of the above, the letter goes on to request the exhumation of the deceased, as it is said:

"... to fulfil the deceased and his family's wishes that would eradicate the predicament faced herein."

- [4] On account of the above letter, the Second Respondent addressed a letter to the "Maepa family" informing them of the result of the letter addressed to First Respondent on instructions of Second Respondent, Me. Manana Shereen Bogatsu.

The Maepa family was informed as follows according to this letter:

"With reference to your (my emphasis) letter dated 6/6/2006, received on the 3rd of July 2006, permission is hereby granted for exhumation of the body of Isaac Mmapho Maepa who was buried at Ga-Mothiba in order to rebury the remains of the body of Isaac Mmapho Maepa at Fourways Memorial Park in Johannesburg.

The following conditions apply for exhumation of bodies and re-opening of graves:

No person shall exhume or cause any body to be exhumed or removed without the written consent of the council (manager environmental management and the manager, community health services):

- *Such permission shall be submitted to the caretaker (council) at least two days before exhumation of such body;*
-
-
-
-
-
- *Any relative of such deceased person, resident within the municipal area, shall be notified of the exhumation of the body."*

[5] From the above the following is clear:

[5.1] The exhumation of the body of Isaac Mmapho Maepa was granted solely on account of the contents of the letter requesting same by the "family" of the deceased;

[5.2] The deceased's "blood family" (the Maepa family) was merely informed of the decision after it had already been made;

[5.3] Although the letter requesting the exhumation indicated that the request is made by the "family", the Maepa portion of the "family" (the "blood family") apparently had no knowledge of the said request and it is clear from the procedure that they were not consulted during the decision-making process;

[5.4] The Maepa family was only informed of the decision to exhume, after it was made and only as a condition that they should be notified of the exhumation.

The aspects mentioned in [5.2], [5.3] and [5.4] will become evident from the summary of the evidence dealt with *infra*.

THE APPLICANT'S APPROACH TO THE LETTER RECEIVED FROM FIRST RESPONDENT:

[6] Of importance is the reaction of the Maepa "blood family", by the words of the Applicant, Simon Maepa, who, of significance, places facts on record that, to my mind, places the disputes and the whole family feud

within the realm of African culture, tradition and also the indigenous / customary law.

[7] The Applicant mentions the following facts in his Founding Affidavit:

- [7.1] *"In our tradition if my father dies I take over as the head of the family and therefore have all traditional rights if my father passed away and we are a family of seven children, four brothers and three sisters and I am the eldest. Isaac Maepa (hereinafter 'the deceased') was the youngest of all the children and he passed away last year in the month of May.*
- [7.2] *He was buried at our ancestral place at Maepa Graveyard in Makwareng Village.*
- [7.3] *It is common knowledge in our family and the sisters-in-law knew well that if any of our family members dies, he or she will be buried at home, more specifically Makwareng Village. This also applied to the late Isaac Maepa.*
- [7.4] *The deceased has several times during his life intimated that he wishes to be buried in the ancestral burial place, the last time being a week before his death."*

[7.5] In further labouring the point that the Maepa family is a family living by their deep rooted African customs and traditions, the Applicant revealed that the deceased, during his lifetime, was involved in three customary unions with his wives being Agnes Masenga, his first customary wife with whom he had one child who was eighteen years old; Manana Shereen Bogatsu, Second Respondent, his second customary wife with whom he had five children and Khanyisele Malabi, the third customary wife, with whom he has a baby boy.

It is, however, noted that Second Respondent disputes the fact that the deceased had three wives, with her being the second wife. She in fact confirms that she is the only wife of the deceased, married to him in a customary marriage. I will deal with the significance of this fact later.

[7.6] He mentioned that he in fact accompanied his brother to "knock" (apparently a traditional term) as his brother had the intention to marry these wives in the traditional sense.

[7.7] After his brother's death and before the burial the whole family, including Manana Shereen Bogatsu (Second Respondent), the second customary wife, agreed and gave their consent to bury Isaac Maepa at Makwareng Village.

[7.8] *"The whole family carried on with their lives and during November 2005 I performed cleansing rituals on all Isaac's children, being seven daughters and a son."*

[8] The above "backdrop" is mentioned to enable this Court to understand the context of the words "the Maepa family" used in the letter addressed to the First Respondent and also to ultimately ask the question whether First Respondent should not have consulted "the blood family" before granting the permission to exhume the body of the late Isaac Maepa.

[9] The Applicant now approaches this Court to review the granting of the exhumation and to set it aside in terms of the Promotion of Administrative Justice Act, Act 3 of 2000 ("PAJA")¹ on the grounds that:

[9.1] the decision was procedurally unfair;

[9.2] the decision was irrational;

[9.3] the decisionmaker failed to take relevant considerations into account in making the decision;

[9.4] the decision was based on material mistakes of fact; and

¹ Promotion of Administrative Justice Act, Act 3 of 2000 ("PAJA")

[9.5] the decision was arbitrary, irrational or otherwise unconstitutional.

THE PARTIES:

[10] The only parties participating in this application is the Applicant and Second Respondent, who filed papers, Heads of Argument and in fact argued before this Court by way of virtual means, i.e. Zoom conference, due to the Covid-19 pandemic and in terms of the directive issued by the Judge-President of this Division with regard to procedures to be followed in the case of opposed motions.

The First Respondent did not only refrain from participating in this application, but also failed to file the record and/or the reasons for the decisions in terms of Rule 53(1)(b) of the Uniform Rules of Court, thereby depriving this Court from being privy to the content of the record of proceedings and the reasons for the decisions made.

[11] The Second Respondent's First point of opposition to Applicant's application is to dispute the Applicant's *locus standi*.

Second Respondent's Second point is that she denies that the decision that was taken falls to be reviewed under the PAJA Act by virtue of the

fact that the decision as such, as I understand the argument, is not an Administrative Action capable of being reviewed in terms of the PAJA Act.

[12] [12.1] Before dealing with the grounds of review in terms of the PAJA Act, I deem it necessary to consider certain aspects of the indigenous law and its possible impact on this case.

[12.2] I will also thereafter deal with Second Respondent's approach in this regard in this application.

INDIGENOUS LAW:

SUCCESSION:

[13] S.M. Seymore: *Bantu Law in South Africa*² mentions the following regarding succession in indigenous law on page 153 of the above work:

"Finally the Bantu Law of Succession should be viewed against the background, or perhaps it is better said it is set up on the foundation, of two ideas: these are the desire for the perpetuation of a kraal head's name and the concept of collective right and responsibility within a family group. In

² S.M. Seymore: *Bantu Law in South Africa*, 3rd Edition

sympathy with these ideas, not only is it right and proper for a kraal head's relatives to endeavour to raise seed for him, where necessary, by all legitimate means, but the heir succeeds to a position entailing rights and liabilities in respect of which he was potentially interested and responsible before the death of his predecessor.

Thus the kraal head lives on in his heir, and while the latter has the benefit of claims, present positions, and potential rights, due or belonging to his inheritance, he is unable to avoid the past, present and future debts and obligations (my emphasis) attaching to his position."

Seymore goes on to say on page 253, paragraph A that:

"The following table of succession, which lays down the rules applying in the case of deceased kraal head leaving one wife and only legitimate children, forms the basis of succession in Bantu Law.

- (i) The heir of the kraal head is his eldest son;*
- (ii) When the eldest son has predeceased the kraal head leaving no male issue, the second son is the heir; and if*

he, too, has predeceased the kraal head without male issue, the third son is the heir, and so on through all the sons of the kraal head."

BURIAL:

- [14] It is well-known that burial rituals, as does marriage and several other rituals, plays a significant role in the indigenous law and African (black) culture.

Not only should the burial ritual as such be observed, but one cannot lose sight of the significance of the role of ancestors, the choice of the burial site, the cleansing of the burial site, the cleansing of the children of the deceased and many other factors.

- [15] Amongst the Zulus, for example, Eileen Jensen Krige, *The Social System of the Zulus*³ mentions the following important aspects pertaining to the burial of a Zulu corpse (pages 160 to 170):

- [15.1] After a death the first thought of those left behind is to get rid of the corpse, which is a source of pollution;

³ Eileen Jensen Krige, *The Social System of the Zulus*, 7th Edition, 1977

- [15.2] The body is prepared for burial by having the face washed with preparations of leaves of a smelling shrub ("dippa asperi-folia") and the head is shaved, the hair being buried with the body;
- [15.3] Burial places differ from one locality to another, and Zulus are usually very secretive of their burial places, suspecting of witchcraft by anyone who makes enquiries as to where they are;
- [15.4] The grave is dug by the closest relative, usually brothers of the deceased;
- [15.5] No sacramental rites are performed on the ground, though in many cases it is "doctored" and made proof against wizards, especially if foul play is suspected;
- [15.6] For the deceased these burial rites are in the nature of separation rites, and after burial he enters upon a marginal period before being aggregated into a group of his ancestors by means of the "*ukubuyisa*" or "*bringing home*" of the spirit, which during this time is thought to be wandering around the veld or near the grave.

[16] The above are mere examples of the rituals in case of burials and the role of spirits and ancestors found amongst the Zulu. There is, in my view, no reason to believe that these same or very similar rituals or beliefs exists in other tribes.

[17] The Applicant mentioned some of these in his Founding Affidavit and the Second Respondent mentioned in her letter to the First Respondent that she consulted "traditional healers" regarding her problems and the fact that her husband's "spirit" apparently causes her sleepless nights, complaining about his resting place.

The above citing is, to my mind, indicative that these spiritual beliefs also exists in the family of the Applicant as well as the Second Respondent.

THE WIDOW:

[18] I. Shapera, ***A Handbook of Tswana Law and Custom***⁴, describes the fate of a Tswana widow as follows on page 164 and further on:

"A woman's dependence upon her husband and his family is not severed when she becomes a widow. It is her duty to remain with her late husband's family, and normally she does so. If she is an older woman or has adult children, she

⁴ See for instance I. Shapera, ***A Handbook of Tswana Law and Custom***, page 164

continues to live in her own homestead under the guardianship of her husband's heir, who must provide for her."

- [19] The above extracts from portions of the African Indigenous Law, with specific reference to certain aspects in a family which surfaces in this application, are mentioned to indicate the intricacy of facts and disputes that can arise in a case involving facts such as those *in casu*.

I am hesitant, and in fact abstain, from making a finding on the law between the parties pertaining to these issues, save to say that they are real disputes and cannot be ignored by a person in the process of considering a very important issue such as the exhumation of a body of an African (black) deceased person.

- [20] In the matter of ***Fosi v. Road Accident Fund & Another***⁵ the Honourable Dladlo J held as follows on page 570 paragraph G – J regarding the adherence of customary law by the administrators of justice:

"The position presently is that Section 211(3) of the Constitution of the Republic of South Africa, 1996, determines that all courts in South Africa must apply customary law where appropriate, subject to the Constitution and legislation that deals in particular

⁵ ***Fosi v. Road Accident Fund & Another***, 2008(3) SA 560 (CPD)

with customary law. The Constitution is the supreme law of the country. Finally, full recognition has been given to customary law. The courts are obliged to apply it in disputes where applicable. Full recognition and the obligatory application of customary law in instances where it is indeed applicable, comes with an added obligation to the administrators of justice (magistrates and judges) to actively engage in the development of customary law. I am thus constitutionally enjoined to develop customary law and bring it to the same level reached by common law. The Plaintiff in this matter is an African (black) person. The deceased was a black person. I fail to see why I should not apply customary law that governed them."

- [21] In the same vein as mentioned above, I have observed that the customary law runs like a golden thread through all the disputes between the parties *in casu* who are all African (black) persons.

I fail to see why I should not insist that the administrator who had to make a decision to exhume the body of an African (black) man, should not at the very least have noted the presence of this golden thread of the customary law. To my mind, he should have, at the very least, engaged with all family members on such an important issue like the exhumation of an African (black) body amidst all the customs, traditions, rituals and beliefs that are intertwined in such a decision. To my mind, ignoring

these principles, can be regarded as a serious failure of appreciation of the core values that African (black) people holds in very high regard pertaining to their ancestors.

SECOND RESPONDENT'S APPROACH IN HER OPPOSITION OF THE APPLICATION AND THE RELIEF SOUGHT BY APPLICANT IN HIS NOTICE OF MOTION:

[22] The Second Respondent, in my view, makes out a case that she was married to the deceased in accordance with African customary law. She says explicitly that:

"The deceased was married to the Respondent in a customary marriage. This fact is admitted by the Applicant and further supported by an abridged marriage certificate, constituting prima facie proof of the marriage, which is attached hereto marked Annexure 'MSB2'."

[23] In perusing **Annexure 'MSB2'** it is obvious that Second Respondent was married to the deceased on the 25th of August 2002.

This certificate, however, does not certify that the marriage was a so-called "civil marriage" as opposed to a "customary marriage (union)".

The Second Respondent, however, confirms that the marriage was a customary marriage which, in my view, would then, according to indigenous law, be regulated by all principles applicable to indigenous law.

[24] Without going into every detail of the Second Respondent's Opposing Affidavit, she is quite clear in her approach regarding the following:

[24.1] She was married to the deceased in a customary marriage;

[24.2] She denies that her husband had a first and third wife and avers that she was not the second wife;

[24.3] She in fact insist that she was the "first wife" in her customary marriage;

[24.4] She mentioned that she is a sophisticated woman who is educated and holds a tertiary diploma in food technology;

[24.5] She is also from a principled and religious family;

[24.6] She denounces that the Applicant, this would include the substituted Applicant, is in a position over her as claimed by him;

[24.7] She denounces that Applicant (which would, as I understand it, include the substituted Applicant,) has *locus standi* in this matter by virtue of the operation of customary law, i.e. that he / they stepped into the proverbial shoes of their father;

[24.8] She claims that she is the only heir of her deceased husband, and to that end attached his Last Will and Testament to prove same.

The above aspects most certainly must not be seen as a *numerous clausus* of reasons why the Applicant avers that she has the only rights pertaining to her deceased husband and subsequently the exclusive right to apply for his exhumation and re-burial.

[25] It is well-known that the younger generation tends to lean over in the direction of western (colonial) customs in a modern society, thereby neglecting or abandoning their heritage and in particular the customary law.

It seems that, especially with the women, they are having a change of heart due to a feeling of emancipation, that they are no longer willing to adhere to the stringent rules and customs of the indigenous customs and law, especially those rights that infringe on their general rights of freedom

in particular of choice that the common law, as opposed to indigenous law, would confer on them.

It seems to me that the Second Respondent finds herself in this very unfortunate situation and holds the above views.

[26] At the very same time, this Court gets the impression that second Respondent wants to sit on two chairs when it comes to this issue, especially if one reads the following extracts from the letter written on her behalf to the First Respondent, i.e.

[26.1] *"... It is becoming difficult for the wife and children to visit the grave to perform cultural rituals ...";*

[26.2] *"It has also been revealed by traditional healers that the deceased had not rest in peace ...";*

[26.3] *"... widow has been experiencing sleepless nights due to the deceased's complaint about his resting place ...".*

[27] The above is underlined due to the fact that this Court must stress the fact that the issues that are in dispute in this case, due to the nature of this application, is not the disputed issues that the Applicant and Second

Respondent placed before this Court, regarding the applicability of the indigenous law and its legal consequences.

The facts and disputes that Applicant and Second Respondent places before Court in fact, to my mind, underlines the issues that the First Respondent should have attended to at the time when it made the decision that it did. This would include the operation of indigenous law, especially pertaining to the widow's position in the family where she finds herself in a Customary Marriage as apposed to a so- called Civil Marriage.

The reason for the above is that:

"A customary marriage is described as a marriage of families rather than only of the respective spouses. While the two parties are important, there is a broader goal of forging an alliance between two families, which may have a community-wide significance. The communal nature of a customary marriage offers individuals significant family support and alternative dispute resolution mechanisms not provided for in the formal law".⁶

⁶ F. Osman, *Potchefstroom Electronic Law Journal*; [2019] par 25; "The Million Rand Question: Does a Civil Marriage Automatically Dissolve the Parties' Customary Marriage?" par 3.2.1.

[28] It is furthermore clear from the facts that the First Respondent knew, alternatively ought to have known / foreseen, that these type of disputes would / could arise in an application of this nature before him due to the following:

[28.1] In the letter purported to be written "*on behalf of the Maepa family*" it clearly refers to the Maepa family and also indicates that the "Maepa family" apparently "persuaded her" to bury the deceased at the burial site. This sentence can by no stretch of imagination exclude the blood related Maepa family such as the Applicants;

[28.2] The letter, in at least three instances (as mentioned above), must have drawn the First Respondent's attention to the potential relevance of indigenous law, which would involve (according to tradition) the "whole Maepa family", especially siblings of the deceased;

[28.3] In light of the above, First Respondent knew, alternatively ought to have known that the "Maepa family" (Applicants) must have had the right to be heard on the issue of exhumation of their deceased brother. It is clear that they were not heard in this regard and the *audi alteram partem* rule was not adhered to by First Respondent.

[28.4] First Respondent had the opportunity to put the record straight and file the record of the proceedings in terms of Rule 53(1)(b), but failed to do so.

[29] Under the circumstances, this Court can come to no other conclusion that:

[29.1] the procedures before First Respondent was procedurally unfair in that the Maepa blood-family was not afforded the opportunity to be heard:

[29.2] the First Respondent failed to take relevant considerations into account in making the decision. In this instance it failed to take the Maepa blood family's interest into consideration;

[29.3] The decision was based on material mistakes of fact, which facts pertain to the Maepa blood family's interest in the matter before First Respondent;

[29.4] The decision was arbitrary and/or unconstitutionally, specifically in the last instance for failure to consider the impact of indigenous law on the facts and/or to endeavour to at least take

note of the indigenous law under circumstances that the facts clearly justifies that same should have been considered.

Ignoring the principles of the Indigenous Law, inclusive of the underlying facts prompting the decisionmaker to take note of the Indigenous Law, together with the decisionmakers subsequent failure to apply the Indigenous Law and/or the facts underlying the principles of Indigenous Law, is to my mind tantamount to failure to take all relevant facts into account.

LOCUS STANDI:

[30] Regarding *locus standi*, I apply the principles of the indigenous law without having any doubt that it is applicable on the issues before this Court and find that the Applicant has *locus standi* to bring this application for review to this Court.

THE ARGUMENT THAT THE PURPORTED ACTION DOES NOT FALL WITHIN THE SUBJECT MATTER OF ADMINISTRATIVE ACTION IN TERMS OF THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT, 2000, ACT 3 OF 2000 ("PAJA"):

[31] It was argued on behalf of the Second Respondent that the purported administrative action (by First Respondent) does not fall within the subject matter of administrative action in terms of PAJA.

[32] The reasons advanced for the above submission are as follows:

[32.1] It does not affect the rights of any person;

[32.2] It has no direct external effect; and

[32.3] It relates to executive powers of the municipality and, as such, is excluded.

[33] Regarding the first two reasons, I have elaborated extensively in what regard and to what extent the decision made by the First Respondent not only has an effect on the rights of the Maepa blood family in terms of the indigenous law, but also the fact that for the very same reason it has a direct external effect.

It has an external legal effect on the Maepa blood family regarding their participation in a decision that a family member of theirs, i.e. their blood brother, should or should not be exhumed.

It has a direct legal effect on their rights and beliefs in the role their ancestors play or would play in the event that a deceased person would have to be exhumed, leaving the sacred allocated burial ground where

his spirit, together with the spirits of other ancestors, roams, according to the African (black) customary beliefs.

[34] In view of the above, I am not satisfied that the first two reasons i.e. [32.1] and [32.2] above, advanced by Mr. Dobie on behalf of Second Respondent, are convincing and find that as far as these aspects are concerned, the PAJA Act does apply.

[35] In terms of Section 1 of PAJA:

“ ‘Administrative Action’ means any decision taken, or any failure to take a decision by:

(a) an organ of state, when –

(i) Exercising a power in terms of the Constitution or a provincial Constitution; or

(ii) Exercising a public power or performing a public function in terms of any legislation (my emphasis); or

(b)

of any person and which has a direct external effect ...”

- [36] In reading the definition of Administrative Action up to this point, the facts before me, in my view, falls in all fours with the grounds of review that I already found to be present in paragraph 29 *supra*. Those grounds were proven as found above.

**THE DECISION RELATES TO EXECUTIVE POWERS OF THE MUNICIPALITY
AND AS SUCH IS EXCLUDED FROM REVIEW:**

- [37] The only aspect that remains to be decided is the question whether Second Respondent's argument that the decision relates to executive powers of the municipality and as such is excluded from review in terms of the PAJA Act, is a valid argument.

I will now deal with this argument which was advanced on behalf of Second Respondent under the heading "Executive Decision".

EXECUTIVE DECISION:

- [38] The third reason why the PAJA Act would not apply, so it was argued by Mr. Dobie, was due to the fact that the First Respondent made a decision which relates to executive powers of the municipality and as such is excluded.

[39] For this argument Mr. Dobie relies on Section 1(cc) of the definition of administrative action, which reads as follows:

"1. In terms of Section 1 of PAJA:

'administrative' action means

(a)

(i)

(ii)

(b) which adversely affects rights of any person ...,
but does not include (my emphasis):

(aa) ...

(bb) ...

(cc) the executive powers or functions (my
emphasis) of a municipal council."

[40] In support of the argument, this Court was referred to Section 156 of the Constitution in terms whereof a municipality has an executive authority over the matters listed in in Part B of Schedules 4 and 5, which includes cemeteries, funeral parlours and crematoria.

With reference to the decision of *Diggers Development (Pty) Ltd v. City of Matlasana*⁷ it was argued that these executive functions even on a broad reading thereof, does not fall to be reviewed under PAJA.

- [41] It was submitted by Mr. Dobie that the entire premise of the Applicant's application must accordingly fail as the First Respondent's obligations were not in relation to the family members or other parties, but merely in relation to health and safety in relation to exhumation and to ensure compliance with the By-Laws and payment of the necessary fees.

In this regard reference was made to "*certain By-Laws*" which merely gave First Respondent pure mechanical powers to give permission to exhume once there was compliance with these By-Laws.

- [42] I must pause here to deal with the particular By-Law that Second Respondent is relying on.

The Second Respondent referred this Court to the "*Pietersburg Municipality: Cemetery By-Laws*", [promulgated by Administrator's Notice 1952 dated 30 October 1974.]⁸ This specific By-Law was published in terms of Section 101 of the Local Government Ordinance, 1939, as can

⁷ *Diggers Development (Pty) Ltd v. City of Matlasana*, [2010] ZAGPPC 15 (9th March 2010) paragraph 38.

⁸ "*Pietersburg Municipality: Cemetery By-Laws*", [promulgated by Administrator's Notice 1952 dated 30 October 1974.]

be seen from the pre-ambles of the Pietersburg Municipality Cemetery By-Laws.

[43] Insofar as it was argued that First Respondent's executive power was to ensure that this specific By-Law is adhered to, reference was made to Section 36 of the said Cemetery By-Law, which deals with exhumation.

[44] In reading the whole Cemetery By-Law, the following is found:

44(a) In the definitions section, one finds the following definitions:

'Bantu' means a person who in fact is or is generally accepted as a member of any aboriginal race or tribe in Africa;

'Coloured' means any person other than a white or a black or a Bantu;

'White' means any person who:

(a) *in appearance obviously [sic] is a white person and who is not generally accepted as a coloured person; or*

- (b) *is generally accepted as a white person and is not in appearance obviously not a white person, but does not include a person who, for purpose of his classification in terms of the Population Registration Act, 1950, freely and willingly admits that he is a Bantu or Coloured in appearance, unless it is proved that the admission is not based on fact.*

'Cemetery' means any piece of ground duly set apart by the council as a public cemetery.

- 44(b) *In the body of the cemetery By-Law, the following is found:*

- (i) *Establishment of cemeteries:*

Section 2.1:

The council may from time to time set apart any ground for the purpose of a cemetery and no person shall inter or cause any body to be interred in any other place in the municipality;

Section 2.2:

The council may reserve any cemetery or part of any cemetery for the burial of persons of a particular race, sect, denomination or creed only.

"44(c) The following sections are also found.

(ii) Non-whites:

Section 7.

No non-white person shall enter or be in the section for whites of any cemetery without the permission of the caretaker."

(iii) In terms of Section 16(2) the following applies in respect of an application for and purchase of the use of a grave:

16(2) 'Subject to the provisions of section 19, the council may, on payment of the applicable charges as determined from time to time, and after having been requested thereto, sell to Whites (my emphasis) the use of any grave in a

section of the cemetery reserved for them."

It needs to be mentioned that in reading the By-Law, it is not clear how a "Bantu" or "Coloured" person could buy or secure a grave in a cemetery in the portion reserved for them in terms of the above Cemetery By-Law.

[45] I specifically mentioned the above to draw the attention of first Respondent and in particular the Municipality of Polokwane, to the fact that the above content, *inter alia*, of the Cemetery By-Law is, to my mind, totally unacceptable in a modern democracy which we now have in South Africa and, in my view, this By-Law will most certainly not pass constitutional muster. First Respondent should consider reviewing this By-Law.

[46] I now return to the submission that First Respondent was merely exercising an executive power bestowed on it in terms of Section 36 of the said By-Law and that the exercising of such executive power does not constitute an "administrative action" as contemplated by the PAJA Act.

In doing so, I note that Mr Dobie did not refer me to the following dictum of the Honourable Murphy J to be found in par 32 of the **Diggers Development (PTY) LTD** decision referred to by him, which reads as follows: "And while courts and many administrative lawyers have

expressed legitimate reservations about the usefulness of classifying functions in administrative law, it would seem to me that the express provisions of PAJA render categorisation inescapable.....The constitutional principles of legality, the *rechtstaat* and proportionality will in any event operate to constrain exercises of executive power and function by municipal councils. A municipal council may not act *mala fide*; nor may it misconstrue its powers or act arbitrarily."

[47] Having listened carefully to the argument of Mr. Dobie, I also considered the submissions of Adv. Emma Webber, for the Applicant, whose argument goes along the following lines:

[47.1] The courts have set out a number of principles to guide the inquiry over whether a power is executive or administrative in nature. These principles include the following:

[47.1.1] First, the focus of the inquiry should be the nature of the power exercised, not the identity of the actor. This is established in the **SARFU** case.⁹ Therefore, it does not matter whether a member of the municipal council exercises the power. The critical issue is whether the power to grant an exhumation is executive or administrative in nature.

⁹ *President of the Republic of South Africa v. South African Rugby Football Union*, 2000(1) SA 1 (CC) par. 141 ("SARFU").

[47.1.2] Secondly, executive powers are, by their nature, high-policy or direction-giving powers. The formulation of policy is an example of a function that is executive in nature.¹⁰

[47.2] By contrast, administrative action is *"the conduct of the bureaucracy ... in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation in to law"*.¹¹ Hence, administrative powers are generally *"low-level powers"* that occur after the formulation of policy. Their exercise usually involves *"the application of formulated policy to particular factual circumstances"* and *"policy brought into effect rather than its creation"*.¹²

[47.3] The decision by the municipal officials to grant permission for the exhumation of the deceased is clearly administrative in nature. It does not involve the creation of policy. It involves the application of policy in particular factual circumstances. It is one of the decisions that the bureaucracy is called upon to make in carrying out the daily functions of the State.

¹⁰ *Minister of Defense and Military Veterans v. Motau*, 2014(5) SA 69 (CC), par. 37 ("*Motau*").

¹¹ *Grey's Marine v. Minister of Public Works*, 2005(6) SA 313 (SCA) at par. 24.

¹² *Minister of Defense and Military Veterans v. Motau*, 2014(5) SA 69 (CC), par. 37.

I must add that in the event that the abovementioned Cemetery By-Law constitutes the policy of the Municipality of Polokwane, such policy is clearly misplaced in a modern democracy. The said Cemetery By-Law, to my mind, does not meet the special particular factual circumstances that exists *in casu* pertaining to any possible distinction between a public cemetery and an ancestral graveyard where, according to the evidence, the deceased was buried by his family in accordance with the traditions as found in the indigenous law.

[47.4] I therefore find that the exhumation decision constitutes administrative action and is subject to the requirements of PAJA and Section 33 of the Constitution. These principles include that the decision must be rational, reasonable, lawful and procedurally fair.

Section 33 of the Constitution of the Republic of South Africa¹³, provides as follows:

"33(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair."

¹³ Section 33 of the Constitution of the Republic of South Africa, No. 108 of 1996.

In my view an exhumation decision therefore constitutes administrative action and is subject to the requirements of PAJA and Section 33 of the Constitution. These include that the decision must be rational, reasonable, lawful and procedurally fair.

[48] I have already dealt with the rationality, reasonableness and procedurally fairness in paragraph 29 above.

[49] The question also arises in this case whether the decision was lawful, with particular reference to the following facts:

[49.1] According to the evidence of Simon Maepa, the deceased was buried in the "ancestral graveyard" of the Maepa family in the village called Makwareng;

[49.2] According to the Pietersburg Municipality Cemetery By-Laws referred to above, First Respondent has executive powers over cemeteries as defined in the specific By-Law, i.e. *"a piece of ground duly set apart by the council as a public cemetery"*;

[49.3] This *"piece of ground"* on a proper interpretation of the By-Law would obviously be in the municipal district of Pietersburg (now Polokwane);

- [49.4] There is no evidence whatsoever indicating the location of the village known as Makwareng, more specifically that this village falls within the municipal area of Pietersburg (Polokwane);
- [49.5] There is also no evidence to the effect that the *"ancestral graveyard"* of the Maepa family was in fact a *"piece of ground duly set apart by the council as a public cemetery"*;
- [49.6] If the above was not the case, the authority of the First Respondent to entertain an application for exhumation in terms of Section 36 of its Cemetery By-Laws must be questioned by this Court;
- [49.7] In not being privy to those facts, this Court frowns upon the lawfulness of the First Respondent's decision, but cannot hold that it was unlawful by virtue of a lack of jurisdiction although *prima facie* this seems to be the case.
- [49.8] On the other hand, in reading the First Respondent's Cemetery By-Laws, it is clear that this By-Law does not provide for the setting aside of a piece of ground to be occupied by African (black) citizens for the use of ancestral graveyards. These

Cemetery By-Laws still appears on the website¹⁴ of the Polokwane Municipality.

The above not being the case, I fail to understand that under the circumstances the First Respondent would have had jurisdiction to grant an exhumation order in terms of Section 36 of the Cemetery By-Laws and in the absence of any evidence to the contrary, this Court can make no other finding than that the exhumation order was unlawful.

[50] In view of all the above facts and factors, this Court do not find Second Respondent's argument convincing and this Court finds that under the circumstances and having regard to all the facts, that the action taken by the First Respondent constitutes an administrative action as contemplated in the PAJA Act and subsequently is reviewable in terms of the PAJA Act.

REVIEW ON THE GROUNDS OF LEGALITY:

[51] In the event that I am wrong to review the actions of First Respondent in terms of the provisions of the PAJA Act, I now attend to the question whether First Respondent's actions are not reviewable under the well-established principles of legality.

¹⁴ www.polokwane.gov.za

- [52] In my view the decision to exhume a corpse of a deceased person is clearly a decision made in the exercise of public power, which public power in this instance was bestowed on First Respondent by its own By-Laws, i.e. the Pietersburg Municipality By-Laws, referred to above.

In such instance I am of the view that this Court has the power to review the First Respondent's exercising of its public power on the principle of legality.

- [53] It was submitted and argued on behalf of the Applicant by Adv. Webber that the standards of review under the principle of legality have largely been developed to reflect the standards of review under PAJA. These, so it was argued, are in particular the following:

[53.1] Mistake of fact: The principle of legality includes the review ground of "*mistake of fact*",¹⁵

[53.2] Procedural fairness: The principle of legality requires "*procedural rationality*". It requires that the relevant persons are consulted and the full range of relevant information is placed before the decision-maker. In the absence of the relevant

¹⁵ *Pepkor Retirement Fund & Another v. Financial Service Board & Another* [2003] 3 All SA 21 (SCA) (30 May 2003) at par. 47.

information, a decision-maker cannot make a rational decision;¹⁶

[53.3] Relevant considerations ignored or irrelevant considerations taken into account: In *Democratic Alliance v, President of South Africa & Others*¹⁷ the Constitutional Court held that a decision-maker's failure to take into account relevant considerations is relevant to rationality;

[53.4] Rationality: the principle of legality requires that all exercises of public power must be rational.¹⁸

[54] Having considered the above principles, and having regard to the facts before this Court, I am of the view that the decision by First Respondent should on review be set aside under the principle of legality for the following reasons:

[54.1] The family members of the deceased were not consulted regarding the exhumation. They were simply "notified" or informed of the decision. This falls short of the standard of procedural fairness (under PAJA) and procedural rationality (under the principle of legality);

¹⁶ *Albutt v. Centre for the Study of Violence and Reconciliation & Others*, 2010(3) SA 293 (CC).

¹⁷ *Democratic Alliance v, President of South Africa & Others*, 2013(1) SA 248 (CC) ("*Democratic Alliance*").

¹⁸ *Minister of Defense and Military Veterans v. Motau*, 2014(5) SA 69 (CC), par. 69.

[54.2] The letter seeking permission to exhume the deceased's body (written by Second Respondent) was misleading and omitted critical information. It is on face value pretending to be addressed to First Respondent on behalf of the "Maepa" family, but clearly, on my findings as stated before, did not include the "Maepa blood family". As such, the exhumation decision was based on a mistake of fact and failed to take relevant consideration into account, *inter alia*, the interest of the Maepa blood family. I find that these are grounds for review under PAJA and the principle of legality;

[54.3] The municipality's letter granting permission to exhume the deceased's body did not contain reasons. The municipality has since confirmed that the letter constitutes the full record of the decision. In the circumstances, it is clear that the municipal official failed to properly apply his mind to the matter and that the decision is arbitrary and irrational and on account of that, reviewable under PAJA and the principle of legality.

[55] I therefore stand by the reasons already outlined above why this Court should review the decision (in this context the execution of executive power) of the First Respondent. This review and setting aside of the

decision is on the grounds as set out in paragraphs [53.1], [53.2], [53.3] and [53.4] above.

[56] Under the circumstances this Court has reviewed the decision of First Respondent and finds that the decision should be set aside.

COSTS:

[57] As mentioned above, First Respondent did not oppose this application. Second Respondent did however oppose the application without success. It is trite that a cost order should follow against the unsuccessful party, Second Respondent.

THE FOLLOWING ORDER IS THEREFORE MADE:

1. The decision of the First Respondent dated 3rd July 2006 to grant permission to the Second Respondent to exhume the body of **Isaac Mmapho Maepa** and to reburial same at Johannesburg as appears from **Annexure "A"** to the Notice of Motion, is set aside;
2. The Second Respondent is ordered to pay the costs of this application.

SIGNED AT PRETORIA ON THIS THE 2nd DAY OF November 2020.



F. DIEDERICKS AJ
ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

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/MH

EXTRACT OF LAW REFERRED TO:

Constitution of the Republic of South Africa, No, 108 of 1996.

Population Registration Act, 1950

Promotion of Administrative Justice Act, Act 3 of 2000 ("PAJA")

"Pietersburg Municipality: Cemetery By-Laws", promulgated by Administrator's Notice 1952 dated 30 October 1974

EXTRACT OF CASE LAW REFERRED TO:

***Albutt v. Centre for the Study of Violence and Reconciliation & Others*, 2010(3) SA 293 (CC).**

***Democratic Alliance v, President of South Africa & Others*, 2013(1) SA 248 (CC)**

***Diggers Development (Pty) Ltd v. City of Matlasana*, [2010] ZAGPPC 15 (9th March 2010) paragraph 38.**

***Fosi v. Road Accident Fund & Another*, 2008(3) SA 560 (CPD)**

***Grey's Marine v. Minister of Public Works*, 2005(6) SA 313 (SCA) at par. 24.**

***Minister of Defense and Military Veterans v. Motau*, 2014(5) SA 69 (CC).**

***Pepkor Retirement Fund & Another v. Financial Service Board & Another* [2003] 3 All SA 21 (SCA) (30 May 2003) at par. 47.**

***President of the Republic of South Africa v. South African Rugby Football Union*, 2000(1) SA 1 (CC) par. 141 ("SARFU").**

EXTRACTS FROM ACADEMIC WORKS REFERRED TO:

Eileen Jensen Krige, *The Social System of the Zulus*, 7th Edition, 1977

F. Osman, *Potchefstroom Electronic Law Journal*, [2019]

S.M. Seymore: *Bantu Law in South Africa*, 3rd Edition

I. Shapera, *A Handbook of Tswana Law and Custom*, page 163.