IN THE HIGH COURT OF SOUTH AFRICA, MPUMALANGA DIVISION,
(MBOMBELA MAIN SEAT)

Case No.: 2784/2020

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED **YES/NO**

16-5-2025
DATE

FOURIE AJ
SIGNATURE

In the application between:

STEPHEN MAKOE CHAANE	**APPLICANT**
and	
EDWARD PHOPOLO CHAANE	**FIRST RESPONDENT**
CHAANE ROYAL FAMILY	**SECOND RESPONDENT**
PREMIER OF THE MPUMALANGA PROVINCE	**THIRD RESPONDENT**
MEC FOR LOCAL GOVERNANCE AND TRADITIONAL AFFAIRS	**FOURTH RESPONDENT**
CHAIRPERSON OF THE HOUSE OF TRADITIONAL LEADERS, MPUMALANGA	**FIFTH RESPONDENT**
MPUMALANGA COMMISSION ON TRADITIONAL LEADERSHIP DISPUTES AND CLAIMS	**SIXTH RESPONDENT**

JUDGMENT

FOURIE AJ

INTRODUCTION:

[1] The Applicant in the current application makes an application under the auspices of the Promotion of Administrative Justice Act, 3 of 2000 (hereinafter "PAJA") to review and set aside certain decisions made by the Third and Sixth Respondents.

[2] Ancillary to the relief sought under PAJA, the Applicant seeks the reinstatement of certain financial benefits, and an order for the First Respondents and his staff to vacate certain traditional administrative offices together with costs of the application.

[3] The matter was initially opposed by all six Respondents, but when the matter was ultimately heard, the Court was only faced with the Answering Affidavit of the First and Second Respondents, grouped together, and the Third and Fourth Respondents grouped together. The Respondents oppose the application and simply seek it to be dismissed with costs.

[4] The matter, at its core, relates to the leadership and the recognition of leadership of the Bakgatla Ba Seabe Traditional community.

[5] The ultimate dispute in respect of the matter relates to which of the Applicant, Stephen Makoe Chaane, or the First Respondent, Edward Phopolo Chaane, ought to be recognised as the Kgosi of the Bakgatla Ba Seabe Traditional Community.

[6] The relief this Court is requested to grant is, however, vested in Public Law and not Customary Law, and although the facts of the matter are derived from Customary Law, the relief sought is to be granted in Public and Administrative Law.

[7] In the current matter, the Court accordingly cautioned itself throughout not to attempt to usurp the functions of administrative agencies, all of the Third, Fourth, Fifth and Sixth Respondents have important duties to fulfil and no doubt they all have the required knowledge and expertise to fulfil such duties with the necessary diligence required. The role of this Court is never to attempt to step into the shoes of any of the Third, Fourth, Fifth and Sixth Respondents and to make expert decisions on their behalf, the same would not be appropriate, and it can never be expected of any Court to have this level of expertise. If either Applicants or Respondents wish for the Courts to fulfil this role, they are mistaken.

[8] The first and primary task of the Court is to ensure that the decisions taken by administrative agencies fall within the balance of reasonableness as required by the Constitution. Only after and if the Court finds that it does not, will the Court need to evaluate whether it is best placed to make an ultimate decision on the matter at hand or whether it would be just for the decision to be referred back to the administrative bodies in order to reconsider the matter.

[9] In the matter of **BATO STAR FISHING (PTY) LTD v MINISTER OF ENVIRONMENTAL AFFAIRS AND OTHERS [1]** the Constitutional Court emphasised that a Court should be careful not to attribute to itself superior

wisdom in relation to matters entrusted to other branches of Government and that a Court should take care not to assert functions of administrative agencies.

[10] Accordingly, the task of this Court faced with a review application ought to be significantly easier if the Court remains within the confines of a review application.

[11] The role of this Court in these current proceedings is to determine whether the actions or decisions taken by the Third, Fourth, Fifth and Sixth Respondents constitute administrative action and flowing therefrom whether such administrative actions stand to be set aside or not. Flowing therefrom and if the Court finds that a setting aside is necessary, the Court is then granted a wide discretion to grant an order that is just and equitable in terms of Section 8 of PAJA.

GENEALOGICAL HISTORY:

[12] The Applicant, as well as the First and Second Respondents, offer a genealogical history of the Royal Family of Chaane of the Bakgatla Ba Seabe Community. The Court has evaluated the genealogical history preferred by the respective parties purely to receive background information for the matter at hand. The genealogical history cannot move the Court to make any specific order in respect of this matter, specifically in motion proceedings as the contrasting views of the respective parties in as far as they may differ on the royal bloodlines and claims to the respective position of authority amount to nothing less than a dispute of fact. Similarly, upon evaluation of the respective factual proposition by the respective parties, I find no reason not to believe that each respective version as offered by the respective parties is advanced in a *bona fide* manner on a factual proposition such party believes to be the truth.

[13] In dealing with disputes of fact in motion proceedings, Conradie J in **CULLEN HAUPT** 1988 (4) SA 39 (C) at 40 F-H said:

> "*I have consulted some of the better-known decisions concerning the referral of applications to evidence or to trial. The leading decision in this regard is of course* ***Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 T at 1162****, where Murray AJP said that if a dispute cannot properly be determined it may either be referred to evidence or to trial, or it may be dismissed with costs, particularly when the Applicants should have realised when launching his application that a serious dispute of fact was bound to develop. The next of better-known cases on this topic is that of* ***Conradie v Kleingeld 1950 (2) SA 594 (O) at 597****, where Horwithz J said that a petition may be refused where the Applicant at the commencement of the application should have realised that a serious dispute of fact would develop."*

[14] Motion proceedings were really designed for the resolution of legal disputes based on common cause facts **[2]**.

[15] The general rule when dealing with disputes of fact in motion proceedings is as set out in **PLASCON EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD** [1984] ZASCA 51; 1984 (3) SA 623 (A), where the court referred to Stellenbosch Farmers' Winery (Pty) Ltd 1957 (4) SA 234 (C) at 235 E-G, held as follows:

> *"..... Where there is a dispute as to the facts, a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondent, together with the admitted facts in the applicant's affidavits, justify such an order ..... In certain instances the denial by the Respondent of a fact alleged by the Applicant may not be such as to raise a real, genuine or bona fide dispute of fact (Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3 SA 1155 (T) at pp 1163-5. If in such a case the respondent has not availed himself of his right to apply for the deponents concemed to be called for cross-*

examination under rule 6(5)(g) of the uniform rules of court and the court is satisfied as to the inherent credibility of the applications factual averments, it may proceed on the basis of the correctness thereof an include this fact amongst those upon which it determines whether the applicant is entitled to the final relief which it seeks ..... Moreover, there may be exceptions to this general rule, as for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers."

Our courts are required to robustly approach deputes of fact in ***Soffiantini V Mould 1956 (4) SA 160 (E)****, the court outlined this approach and stated as follows:*

"In the case of Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 T at 1165 Murray, then AJP said: "A bare denial of the applicant's material averments cannot be regarded as sufficient to defeat the applicant's right to secure relief by motion proceedings in appropriate cases. Enough must be stated by respondents to enable the Court to conduct a preliminary examination ....and to ascertain whether denials are not fictitious, intended merely to delay the hearing. Soffiantini v Mould, at 154 E-H."

[16] In evaluating whether a dispute in respect of the aforesaid issue indeed exists, the Court is mindful further of that which the Court needs to pronounce upon, within which the Court is confined, and aspects which the Court ought not to deal with.

[17] This Court is not tasked with ordering an outcome in respect of the Applicant, the First Respondent and the Second Respondent to finally decide who ought to be the Kgosi of the Bakgatla Ba Seabe Community.

[18] This Court simply does not have all the relevant facts to assume the powers of the relevant administrators that ought to deal with this question ultimately. As

such, the Third to Sixth Respondents are, as they have always been, in a better position than this Court to come to an ultimate conclusion on the matter at hand.

[19] In this regard, the starting point of the matter would be, although out of sequence, that the Court immediately find that it will not substitute or vary any administrative action or decision of any of the decision-makers or administrators. Dealing specifically with issues of Customary Law, the specific administrators, as in the current matter, the Third to Sixth Respondents, are best suited to deal with matters such as this.

[20] The Constitutional Court has comprehensively dealt with the question of whether a substation order ought to be made in the matter of **TRENCON CONSTRUCTION (PTY) LTD v INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA LIMITED AND ANOTHER [3],** where the Court held as follows:

> ""*(1) Exceptional circumstances test*
>
> *[34] Pursuant to administrative review under section 6 of PAJA and once administrative action is set aside, section 8(1) affords courts a wide discretion to grant "any order that is just and equitable".**[4]** In exceptional circumstances section 8(1)(c)(ii)(aa) affords a court the discretion to make a substitution order.*
>
> *[35] Section 8(1)(c)(ii)(aa) must be read in the context of section 8(1). Simply put, an exceptional circumstances enquiry must take place in the context of what is just and equitable in the circumstances. In effect, even where there are exceptional circumstances, a court must be satisfied that it would be just and equitable to grant an order of substitution.*

[36] *Long before the advent of PAJA, courts were called upon to determine circumstances in which granting an order of substitution would be appropriate. Those courts almost invariably considered the notion of fairness as enunciated in Livestock and the guidelines laid down in Johannesburg City Council.*

[37] *In Livestock, the Court percipiently held that –*

> *'the Court has a discretion, to be exercised judicially upon consideration of the facts of each case, and . . . although the matter will be sent back if there is no reason for not doing so, in essence it is a question of fairness to both sides.'* ***[5]***

[38] *In Johannesburg City Council, the Court acknowledged that the usual course in administrative review proceedings is to remit the matter to the administrator for proper consideration. However, it recognised that courts will depart from the usual course in two circumstances:*

> *"(i) Where the end result is in any event a foregone conclusion, and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter. This applies more particularly where much time has already unjustifiably been lost by an applicant to whom time is in the circumstances valuable, and the further delay which would be caused by reference back is significant in the context.*

(ii) *Where the tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again."**[6]***

*[39] On a plain interpretation of Johannesburg City Council, the factors under the exceptional circumstances enquiry – like foregone conclusion, bias or incompetence – are independent. That is, if any factor is established on its own, it would be sufficient to justify an order of substitution. Indeed, this interpretation is also supported by subsequent case law.**[7]***

*[40] The Supreme Court of Appeal in Gauteng Gambling Board seems to have added another consideration, whether the court was in as good a position as the administrator to make the decision.**[8]** For this, it noted that the administrator is "best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision".**[9]** The Court also considered the broader notion of fairness in accordance with Livestock.**[10]** This notion seemed to colour the Court's analysis of whether, after the Court was satisfied that it was in as good a position as the administrator and a foregone conclusion was established, an order of substitution was the appropriate remedy.**[11]** In applying the notion, the Court's findings were also informed by how a party is prejudiced by delay and potential bias or the incompetence of an administrator if the matter were remitted.**[12]***

[41] *It is instructive that cases applying section 8(1)(c)(ii)(aa) of PAJA have embraced a similar approach to those that ordered substitution under the common law. However, because the section does not provide guidelines on what exceptional circumstances entail, it is of great import that the test for exceptional circumstances be revisited.*

[42] *The administrative review context of section 8(1) of PAJA and the wording under subsection (1)(c)(ii)(aa) make it perspicuous that substitution remains an extraordinary remedy.**[13]** Remittal is still almost always the prudent and proper course.*

[43] *In our constitutional framework, a court considering what constitutes exceptional circumstances must be guided by an approach that is consonant with the Constitution. This approach should entail affording appropriate deference to the administrator. Indeed, the idea that courts ought to recognise their own limitations still rings true. It is informed not only by the deference courts have to afford an administrator but also by the appreciation that courts are ordinarily not vested with the skills and expertise required of an administrator.*

[44] *It is unsurprising that this Court in Bato Star accepted Professor Hoexter's account of judicial deference as –*

> *'a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretations of fact and law due respect; and to be*

sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinise administrative action, but by a careful weighing up of the need for – and the consequences of – judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal.' ***[14]***

[45] *Judicial deference, within the doctrine of separation of powers, must also be understood in the light of the powers vested in the courts by the Constitution. In Allpay II, Froneman J stated that -*

> *'[t]here can be no doubt that the separation of powers attributes responsibility to the courts for ensuring that unconstitutional conduct is declared invalid and that constitutionally mandated remedies are afforded for violations of the Constitution. This means that the Court must provide effective relief for infringements of constitutional rights.*
>
> . . .
>
> *Hence, the answer to the separation-of-powers argument lies in the express provisions of section 172(1) of the Constitution. The corrective principle*

*embodied there allows correction to the extent of the constitutional inconsistency'.**[15]** (Footnote omitted.)*

*[46] A case implicating an order of substitution accordingly requires courts to be mindful of the need for judicial deference and their obligations under the Constitution. As already stated, earlier case law seemed to suggest that each factor in the exceptional circumstances enquiry may be sufficient on its own to justify substitution. **[16]** However, it is unclear from more recent case law whether these considerations are cumulative or discrete.**[17]***

*[47] To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight.**[18]** The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.*

[48] A court will not be in as good a position as the administrator where the application of the administrator's expertise is still required and a court does not have all the pertinent

*information before it. This would depend on the facts of each case. Generally, a court ought to evaluate the stage at which the administrator's process was situated when the impugned administrative action was taken. For example, the further along in the process, the greater the likelihood of the administrator having already exercised its specialised knowledge. In these circumstances, a court may very well be in the same position as the administrator to make a decision. In other instances, some matters may concern decisions that are judicial in nature; in those instances – if the court has all the relevant information before it – it may very well be in as good a position as the administrator to make the decision.**[19]***

[49] *Once a court has established that it is in as good a position as the administrator, it is competent to enquire into whether the decision of the administrator is a foregone conclusion. A foregone conclusion exists where there is only one proper outcome of the exercise of an administrator's discretion and "it would merely be a waste of time to order the [administrator] to reconsider the matter".**[20]** Indubitably, where the administrator has not adequately applied its unique expertise and experience to the matter, it may be difficult for a court to find that an administrator would have reached a particular decision and that the decision is a foregone conclusion. However, in instances where the decision of an administrator is not polycentric and is guided by particular rules or by legislation, it may still be possible for a court to conclude that the decision is a foregone conclusion.*

[50] *The distinction between the considerations in as good a position and foregone conclusion seems opaque as they are interrelated and interdependent. However, there can never be a foregone conclusion unless a court is in as good a position as the administrator. The distinction can be understood as follows: even where the administrator has applied its skills and expertise and a court has all the relevant information before it, the nature of the decision may dictate that a court defer to the administrator. This is typical in instances of policy-laden and polycentric decisions.* ***[21]***

[51] *A court must consider other relevant factors, including delay. Delay can cut both ways. In some instances, it may indicate the inappropriateness of a substitution order, especially where there is a drastic change of circumstances and a party is no longer in a position to meet the obligations arising from an order of substitution or where the needs of the administrator have fundamentally changed. In other instances, delay may weigh more towards granting an order of substitution. This may arise where a party is prepared to perform in terms of that order and has already suffered prejudice by reason of delay. In that instance, the delay occasioned by remittal may very well result in further prejudice to that party. Importantly, it may also negatively impact the public purse.*

[52] *What must be stressed is that delay occasioned by the litigation process should not easily cloud a court's decision in reaching a just and equitable remedy. Sight must not be lost that litigation is a time-consuming process. More so, an appeal should ordinarily be decided on the facts that*

*existed when the original decision was made.**[22]** Delay must be understood in the context of the facts that would have been laid in the court of first instance as that is the court that would have been tasked with deciding whether a substitution order constitutes a just and equitable remedy in the circumstances.*

*[53] There are important reasons for this approach. Where a matter is appealed, delay is inevitable. Thus, assessing delay with particular reference to the time between the original decision and when the appeal is heard could encourage parties to appeal cases. This, they would do, with the hope that the time that has lapsed in the litigation process would be a basis for not granting a substitution order. Where a litigant wishes to raise delay on the basis of new evidence, that evidence must be adduced and admitted in accordance with legal principles applicable to the introduction of new evidence on appeal.**[23]** Ultimately, the appropriateness of a substitution order must depend on the consideration of fairness to the implicated parties.*

[54] If the administrator is found to have been biased or grossly incompetent, it may be unfair to ask a party to resubmit itself to the administrator's jurisdiction. In those instances, bias or incompetence would weigh heavily in favour of a substitution order. However, having regard to the notion of fairness, a court may still substitute even where there is no instance of bias or incompetence.

[55] In my view, this approach to the exceptional circumstances test accords with the flexibility embedded in the notion of what is just and equitable. It is, therefore, consonant with the Constitution while at the same time giving proper deference and consideration to an administrator."

(FOOTNOTES INCLUDED AS IN QUOTED JUDGMENT)

[21] This Court has, as recently as in the matter of **MPILO AND ZEN HOLDINGS (PTY) LTD, (3985/2023) [2025] ZAMPMBHC 32 (5 May 2025),** emphasised the need to empower the administrators dealing with matters of a technical nature, where the Court found:

"Having regard to the facts of the matter, the need to empower the relevant administrators and the fact that the Court regards them to be experts in their field of law and best equipped to evaluate the history, underlying principles, and prevailing principles to the facts of the matter together with the fact that there exists a necessity for the current administrators in respect of the current matter to seriously grapple with the issues at hand before the legal conundrum is placed at the feet of the Court, this Court shall not pronouns finally on issues which it believes the administrators can and should resolve."

[22] The only issue the Court shall accordingly evaluate is whether an administrative action or administrative actions exist, whether the referral of such administrative action or administrative actions was made within the prescribed timeframes of PAJA and whether the matter needs to be referred back to any or all of the administrators to re-evaluate the matter to come to a final conclusion.

[23] The aforesaid is stated as a precursor for the parties to understand which aspects the Court concerned itself with in respect of the matter and which functions the Court believes the administrators are more suited to deal with.

BACKGROUND:

[24] Concerning the current Applicant and Respondents, the following are important background facts:

[25.1] On 3 October 2001, the Applicant was recognised by the then Premier of the Mpumalanga Province as the Kgosi for the Bakgatla Ba Seabe Traditional Community.

[25.2] The recognition of the Applicant emanated from the 1982 Bophuthatswana commission, identified as the commission of enquiry into the Chieftainship of the Bakgatla Ba Seabe Tribe.

[25.3] In 2014, the new provincial committee on Traditional Leadership Disputes Claims was established under the auspices of the "Tolo Commission".

[25.4] Flowing from the establishment of the Commission on 28 January 2015, the first administrative action which the Applicant wishes to review and set aside occurred. This administrative action was taken by the Sixth Respondent.

[25.5] On 6 July 2015, the second administrative action was taken, again by the Sixth Respondent, which refers to the reports drawn and decisions taken by the Sixth Respondent.

[25.6] Flowing from the aforesaid the administrative actions of the Sixth Respondent, amongst other facts were taken into regard by the Third Respondent which culminated in the Third Respondent on 9 October 2020 taking a decision to recognise the First Respondent as the Kgosi of the Bakgatla Ba Seabe Community which is the third administrative action the Applicants pray to review and set aside.

[25] Neither the papers filed by any of the parties nor the arguments advanced by the respective parties during the hearing of the matter contested that the three decisions which the Applicant wishes to review and set aside constitute anything else than administrative action which the Applicant wants to review and set aside under the auspices of PAJA.

[26] As such, each of these decisions needs to be evaluated individually to establish if the Applicant has made out a case for the relief he ultimately seeks.

[27] Administrative action is defined in the Act as follows:

> *"**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; or*

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect, but does not include—

(aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79(1) and (4), 84(2)(a), (b), (c), (d), (f), (g), (h), (i) and (k), 85(2)(b), (c), (d) and (e), 91(2), (3), (4) and (5), 92(3), 93, 97, 98, 99 and 100 of the Constitution;

(bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121(1) and (2), 125(2)(d), (e) and (f), 126, 127(2), 132(2), 133(3)(b), 137, 138, 139 and 145(1) of the Constitution;

(cc) the executive powers or functions of a municipal council;

(dd) the legislative functions of Parliament, a provincial legislature or a municipal council;

(ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;

(ff) a decision to institute or continue a prosecution;

(gg) a decision relating to any aspect regarding the nomination, selection or appointment of a judicial officer or any other person, by the Judicial Service Commission in terms of any law;

["administrative action" (gg) substituted by s 26 of Act 55 of 2003.]

(hh) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or

(ii) any decision taken, or failure to take a decision, in terms of section 4(1);"

[28] The standing of the Applicant has not seriously been opposed, and with good reason, as the founding papers of the Applicant set out clearly that the Applicant has the required *locus standi* to make the current application.

[29] Section 7 of PAJA sets out the procedure for Judicial review.

"Procedure for judicial review

(1) *Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date-*

(a) subject to subsection (2) (c) , on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2) (a) have been concluded; or

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

have become aware of the action and the reasons.

(2) *(a) Subject to paragraph (c) , no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.*

(b) Subject to paragraph (c) , a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.

(3) *The Rules Board for Courts of Law established by section 2 of the Rules Board for Courts of Law Act, 1985 (Act 107 of 1985), must, before 28 February 2009, subject to the approval of the Minister, make rules of procedure for judicial review.*

(4) *Until the rules of procedure referred to in subsection (3) come into operation, all proceedings for judicial review under this Act must be instituted in a High Court or another court having jurisdiction.*

(5) *Any rule made under subsection (3) must, before publication in the Gazette, be approved by Parliament."*

PRELIMINARY POINT: CONDONATION:

[30] The Respondents all take issue with the late filing of the Applicant's application.

[31] It is commonly accepted by the respective parties that the application of the Applicant was brought on or around the 11th of May 2021.

[32] The Applicant was informed of and received knowledge of the 9 October 2020 decision on 7 October 2020, two days before the decision was published in the Government Gazette 3197 on 2 October 2020.

[33] Insofar as the Court is guided by the 180-day period as set out in PAJA, the application is filed approximately 197 days after the Applicant received knowledge of the decision of 7 October 2020. Whether or not the delay is to be regarded as significant or not, the application is filed at the very least outside the 180-day period as provided for in PAJA by at least 17 days. The Court needs to evaluate whether condonation for the late filing of the application in respect of the latest decision ought to be granted.

[34] The Applicant attributes the time delay to financial difficulties in the bringing of the application.

[35] Section 9 of PAJA states that:

> "*Variation of time*
>
> (1) *The period of-*
>
> *(a) 90 days referred to in section 5 may be reduced; or*
>
> *(b) 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period,*

by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.

(2) *The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require."*

[36] In evaluating the condonation application brought in respect of the decision the Applicant seeks to review and set aside of 9 October 2020, it ought to be regarded that the institution of the application is not solely based on the 180-day principle. The application needs to be instituted **without unreasonable delay**.

[37] Having not complied at least with the 180-day requirement, the Applicant needs to persuade the Court that the interest of Justice requires that condonation ought to be granted.

[38] The cut-off period, as stated in PAJA, has significant importance as it has been in existence in respect of administrative actions of public bodies even before PAJA was enacted.

[39] In **GQWETHA V TRANSKEI DEVELOPMENT CORPORATION & OTHERS 2006 (2) SA 603 (SCA)**, the court found as follows in its majority decision at [22] – [23]:

"It is important for the efficient functioning of public bodies that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale of the longstanding rule – reiterated most recently by Brand JA in ***Associated Institutions Pension Fund and Others v Van Zyl and Others 2005 (2) SA 302 (SCA) at 321*** *–*

is twofold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view more importantly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions .... Underlying the latter aspect of the rationale is the inherent potential for prejudice, both to the effective functioning of the public body and to those who rely on its decisions, if the validity of its decision remains uncertain ...".

[40] In the matter of **OPPOSITION TO URBAN TOLLING ALLIANCE V SOUTH AFRICAN NATIONAL ROADS AGENCY LIMITED (OUTA) [2013] 4 ALL SA 639 SCA**, the Court stated at paragraph 26 that:

"*At common law, application of the undue delay rule required a two-stage enquiry. First, whether there was an undue delay and, second, if so, whether the delay should in all the circumstances be condoned ... Up to a point, I think, section 7(1) of PAJA requires the same two-stage approach. The difference lies, as I see it, in the Legislature's determination of a delay exceeding 180 days as per se unreasonable. Before the effluxion of 180 days, the first enquiry in applying section 7(1) is still whether the delay (if any) was unreasonable. But after the 180-day period, the issue of unreasonableness is predetermined by the Legislature: it is unreasonable per se*".

[41] If the Court does not grant the extension after the 180-day period has lapsed, the Court has no authority to entertain the review application at all, and whether or not the decision was unlawful no longer matters, as per the **OPPOSITION TO URBAN TOLLING ALLIANCE** matter *supra* at paragraph 26.

[42] Exact knowledge of the administrative action is irrelevant for purposes of calculating the starting date of the 180-day period. The starting date shall be

deemed to start when knowledge of the decision and reasons for it is acquired or "ought reasonably to have become known to the Applicant".

[43] This principle has been confirmed in the matter of **CITY OF CAPE TOWN v AURECON SA (PTY) LTD 2017 (4) SA 223 (CC).**

[44] The sole reason for the delay, as stated by the Applicant, is the unavailability of funds to pursue the review sooner. I was referred in their Heads of Argument by the First and Second Respondents to the matter of **KGOSI NGOAKE ISAAC LEBOGO AND ANOTHER v HEADMAN MATOME COBE AND OTHERS [2024] (ZASCA) 160**, which not only resembles a similar set of facts in respect of the challenge of a Kgosi by way of a PAJA application but also deals with the seeking of condonation for a delay premised upon the unavailability of funds.

[45] The matter of **KGOSI LEBOGO** *supra* further sets out all the applicable legal principles in respect of the matter at hand, and I align myself with them accordingly.

[46] Insofar as it relates to a lack of funds, the Court held in the matter of **DU PLESSIS v WITS HEALTH CONSORTIUM (PTY) LTD [2013] JOL 30060 (LC)** at paragraph 16 that:

> *"It is clear from the above and other judgments that a claim of lack of funds on its own cannot constitute a reasonable explanation for the delay, in other words, in pleading lack of funds as the cause of the delay, the Applicant needs to provide more than a mere claim that the reason for the delay is lack of funds. In this respect, the Applicant has to take the Court into his or her confidence in seeking its indulgence by explaining when, not only that he or she finally raised funds to conduct the case, but also how and when did he or she raised those funds. The*

"when" aspects of the explanation are important, as it provided the Court with information as to whether there was any further delay after raising the funds and whether an explanation has been provided for such delay."

[47] In applying the principles as set out in the **DU PLESSIS v WITS HEALTH CONSORTIUM** *supra,* the Applicant did not take the Court into its confidence to make any other submissions other than that he was financially strained due to the decisions taken by the Respondents, and that same caused the delay. The Applicant failed to explain when and how he then, later came into funds, failed to explain when he provided instructions to his legal representatives and failed to give a proper account of the full extent of the delay. Simply put, the Court is left to speculate as to whether the delay ought to be regarded as reasonable, as, barring the sweeping statement of financial hardship, the Court is simply not in a position to evaluate whether the delay is reasonable or not.

[48] The degree of lateness is, however, not the only consideration. The test is whether it is in the interest of justice for the court to nonetheless grant condonation. If the Applicant, for instance, has significant prospects of success, the Court would be inclined to, nonetheless, grant condonation for the late filing of the application. In order to receive an answer to the aforesaid conundrum, the Court needs to evaluate whether condonation is to be granted for the decisions of 28 January 2015 and 6 July 2015 to be reviewed and set aside. If the administrative decisions of the Sixth Respondent are not reviewed and set aside, the Applicant's prospects of success insofar as it relates to the decision of 9 October 2020 cannot be regarded as being significantly good.

[49] I say so, premised upon Section 25 of the Mpumalanga Traditional Leadership and Governance Act, 3 of 2005, which states the following:

"Implementation of decision of the commission

(1) The Premiers must, within 30 days of the receipt of a recission of the commission contemplated in Section 26 of the Framework Act, inform the Provincial House of the Traditional Leaders and the 11 local houses of Traditional Leaders of the decision and if such a decision relates to a dispute which affects a Traditional Community or Counsel, inform such Traditional Community or Counsel as the case may be.

(2) The Premier must, within a reasonable period implement the decision of the commission in so far as the implementation of the decision does not relate to the recognition or removal of an Ingwenyama or Indlovukati in terms of Sections 9 and 10 of the Framework Act."

[50] Whilst alternative issues might be brought into the fray by the Applicant in as far as it relates to the decision of 9 October 2020, if the decisions of 28 January 2015 and 6 July 2015 are not reviewed and set aside the Third Respondent would be bound to consider those decisions, and the prospects of the Third Respondent coming to a different view in respect of the decision of 9 October 2020 cannot be regarded in any other way than as slight.

[51] I deal with the decisions of 28 January 2015 and 6 July 2015 jointly. It can be accepted that the Applicant was informed of the decisions on 18 November 2018, and such was received by the Applicant on at least 19 January 2019.

[52] A loose calculation of the days after the decisions came to the knowledge of the Applicant to the date on which the application was made amounts to approximately 850 days and approximately 670 days after the 180-day provision as set out in PAJA.

[53] The Respondents contend that the application is filed more than 2 years out of time if regard is had to the bar imposed on the Applicant in PAJA and the 180-day provisions therein.

[54] The application for the Applicant is silent on the delay in making the application to review and set aside the decisions of 28 January 2015 and 6 July 2015.

[55] The Applicant did not indicate in his founding papers that the decisions of 28 January 2015 and 6 July 2015 ought to be dealt with in any other way than the decision of 9 October 2020. The request for condonation simply in no way deals with the decisions of 28 January 2015 and 6 July 2015.

[56] The Applicant was also still in office and receiving his salary up until October 2020, so the reasons advanced for the late filing of the application in respect of the decision of 9 October 2020 cannot similarly be applied by the Applicant in respect of the decisions of 28 January 2015 and 6 July 2015.

[57] During the argument, Advocate Ngwenya, appearing on behalf of the Applicant, stated that the Applicant needn't seek condonation in respect of the decisions of 28 January 2015 and 6 July 2015. He premised his argument on section 21 of the Traditional Leadership and Governance Framework Act, 41 of 2003, as amended by the Traditional Leadership and Governance Framework Amendment Act, 23 of 2009.

> *"Dispute and claim resolution*
>
> *(1) (a) Whenever a dispute or claim concerning customary law or customs arises between or within traditional communities or other customary institutions on a matter arising from the implementation of this Act, members of such a community and traditional leaders within the traditional community or customary institution*

concerned must seek to resolve the dispute or claim internally and in accordance with customs before such dispute or claim may be referred to the Commission.

(b) If a dispute or claim cannot be resolved in terms of paragraph (a), subsection (2) applies.

(2) (a) A dispute or claim referred to in subsection (1) that cannot be resolved as provided for in that subsection must be referred to the relevant provincial house of traditional leaders, which house must seek to resolve the dispute or claim in accordance with its internal rules and procedures.

(b) If a provincial house of traditional leaders is unable to resolve a dispute or claim as provided for in paragraph (a), the dispute or claim must be referred to the Premier of the province concerned, who must resolve the dispute or claim after having consulted-

(i) the parties to the dispute or claim;

(ii) the provincial house of traditional leaders concerned.

(c) A dispute or claim that cannot be resolved as provided for in paragraphs (a) and (b) must be referred to the Commission.

(3) Where a dispute or claim contemplated in subsection (1) has not been resolved as provided for in this section, the dispute or claim must be referred to the Commission."

[58] The argument by Advocate Ngwenya is that the decision of 28 January 2015 and 6 July 2015 constitute a dispute which ought to have been regarded as forming part of the dispute resolution mechanism embedded in Section 21, and that the dispute resolution could only be regarded as finalised when the premier made the decision on 9 October 2020.

[59] The argument by the Applicant in respect of the decision of 28 January 2015 and 6 July 2015 did not present itself in the Applicant's founding papers. After being confronted with the answering papers by the respective Respondents which specifically challenged the late filing of the application in respect of the decisions of 28 January 2015 and 6 July 2015 the Applicant had the opportunity to file a Replying Affidavit to those averments, yet, despite having such an opportunity and knowing the opposition advanced by the Respondents, the Applicant again elected not to advance the proposed case as was advanced during argument on his behalf.

[60] The legal principles pertaining to the content of affidavits filed on behalf of a party are trite, and a party that approach the Court for relief or opposes relief being granted against him needs to properly and thoroughly deal with all the issues at hand to advance his case as best he can for the Court's consideration but also to allow his opponent the benefit of knowing what the case is that he needs to meet when the matter is ultimately heard.

[61] The case advanced by the applicant, as well as the position thereof by the respective Respondents, all agree that all three of the complained-of decisions constitute administrative action and all of the three decisions ought to be evaluated under the same principles.

[62] Even in the event of the Court being persuaded to evaluate the argument of the Applicant premised on the statements of the Applicant during argument, which I am reluctant to do, I am not persuaded that Section 21 in any event finds application to the matter at hand. The Applicant has simply not made out a case in respect of the declaration of a dispute, internal dispute resolution mechanisms being followed and exhausted and the proposition that the decisions of 28 January 2015 and 6 July 2015 only becoming subject to the time barring provision of PAJA upon the decision of the Third Respondent on 9 October 2020.

[63] Even if a different Court was to accept the proposition as advanced by the Applicant from the bar in respect of the dispute resolution mechanism, the explanation for the delay at least since 7 October 2020 would still be regarded as inadequate premised on the same principles that I have found in respect of the decision of 9 October 2020.

[64] Having found the time delay in respect of the decision of 28 January 2015 and 6 July 2015, being unreasonable and exorbitant, the only other issue remains to evaluate whether, despite all of the aforesaid deficiencies in the Applicant's case, the interest of justice dictates that condonation nonetheless be granted.

[65] The Applicant consciously elected not to partake and lead evidence in respect of the decisions of 28 January 2015 and 6 July 2015.

[66] Having regard to same and the principles of disputes of fact, the evaluation of the underlying factual premise the Applicant wishes to advance *ex post facto* the reports of the respective commissions which he electively did not partake in, the Court is not satisfied that such allegations in respect of the underlying factual averments, not being tested by the respective commissions, hold substantial prospects of success for the application to nonetheless be heard.

[67] The only issue the Court can find to evaluate whether, despite the undue time delay, the Court ought to nonetheless hear the application is whether the commission that made the findings of 28 January 2015 and 6 July 2015 had the necessary jurisdiction to deal with the matter when and in the manner in which it did.

[68] In evaluation of the matter, I could find no uncontested proof that the issues pertaining to the leadership roles within the Bakgatla Ba Seahbe Tribe were ever

dealt with between the respective factions within the tribe to the degree that the dispute was resolved.

[69] The Applicant was appointed under the Bophuthatswana Traditional Authorities Act, 23 of 1978. The total of the Bophuthatswana Traditional Authorities Act, 23 of 1978 was repealed with the enactment of the Mpumalanga Traditional Leadership and Governance Act, 3 of 2005.

[70] The Mpumalanga Traditional Leadership and Governance Act, 3 of 2005, reflects the legislation contemplated in Section 22 of the Traditional Leadership and Governance Framework Act, 41 of 2003, culminating in the establishment of the Sixth Respondent.

[71] In respect of Section 25 of the Traditional Leadership and Governance Framework Act, 41 of 2003, the following is appropriate to be restated:

"25 Functions of Commission

(1) *The Commission operates nationally in plenary and provincially in committees and has authority to investigate and make recommendations on any traditional leadership dispute and claim contemplated in subsection (2).*

(2) *(a) The Commission has authority to investigate and make recommendations on-*

(i) *a case where there is doubt as to whether a kingship or, principal traditional leadership, senior traditional leadership or headmanship was established in accordance with customary law and customs;*

(ii) *a case where there is doubt as to whether a principal traditional leadership, senior traditional leadership or headmanship was established in accordance with customary law and customs;*

(iii) *a traditional leadership position where the title or right of the incumbent is contested;*

(iv) *claims by communities to be recognised as kingships, queenships, principal traditional communities, traditional communities, or headmanships;*

(v) *the legitimacy of the establishment or disestablishment of 'tribes'*

or headmanships;

(vi) *disputes resulting from the determination of traditional authority boundaries as a result of merging or division of 'tribes';*

(viii) *all traditional leadership claims and disputes dating from 1 September 1927 to the coming into operation of provincial legislation dealing with traditional leadership and governance matters; and*

(ix) *gender-related disputes relating to traditional leadership positions arising after 27 April 1994.*

(b) A dispute or claim may be lodged by any person and must be accompanied by information setting out the nature of the dispute or claim and any other relevant information.

(c) The Commission may decide not to consider a dispute or claim on the ground that the person who lodged the dispute or claim has not provided the Commission with relevant or sufficient information or the provisions of section 21 have not been complied with.

(3) *(a) When considering a dispute or claim, the Commission must consider and apply customary law and the customs of the relevant traditional community as they applied when the events occurred that gave rise to the dispute or claim.*

(b) The Commission must-

(i) *in respect of a kingship or queenship, be guided by the criteria set out in section[s] 2A (1) and 9 (1); and*

(ii) *in respect of a principal traditional leadership, senior traditional leadership or headmanship, be guided by the customary law and customs and criteria relevant to the establishment of a principal traditional leadership, senior traditional leadership or headmanship, as the case may be.*

(c) Where the Commission investigates disputes resulting from the determination of traditional authority boundaries and the merging or division of 'tribes', the Commission must, before making a recommendation in terms of section 26, consult with the Municipal Demarcation Board established by section 2 of the Local Government: Municipal Demarcation Act, 1998 (Act 27 of 1998) where the traditional council boundaries straddle municipal and or provincial boundaries.

(4) *Subject to subsection (5) the Commission-*

(a) may only investigate and make recommendations on those disputes and claims that were before the Commission on the date of coming into operation of this chapter; and

(b) must complete the matters contemplated in paragraph (a) within a period of five years, which period commences on the date of appointment of the members of the Commission in terms of section 23, or any such further period as the Minister may determine.

(5) *Any claim or dispute contemplated in this Chapter submitted after six months after the date of coming into operation of this chapter may not be dealt with by the Commission.*

(6) *The Commission-*

(a) may delegate any function contemplated in this section excluding a matter related to kingships or queenships to a committee referred to in section 26A; and

(b) must coordinate and advise on the work of the committees referred to in section 26A.

(7) *Sections 2, 3, 4, 5 and 6 of the Commissions Act, 1947 (Act 8 of 1947), apply, with the necessary changes, to the Commission.*

(8) *The Commission may adopt rules for the conduct of the business of the Commission as well as committees referred to in section 26A.*

(9) *Provincial legislation must provide for a mechanism to deal with disputes and claims related to traditional leadership: Provided that such a mechanism must not deal with matters to be dealt with by the Commission."*

[72] I find no reason why the Sixth Respondent would not have the authority to investigate and make recommendations on the issues at hand under the auspices of Section 25(2)(a).

[73] The reasoning for the establishment of a commission such as the Sixth Respondent is properly stated in the matter of **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA v SIGCAU AND OTHERS [2024] ZACC 21; 2025 (1) BCLR 26 (CC) (3 October 2024).**

> *"Section 22(1) of the unamended Framework Act provided for the establishment of the Commission. In terms of section 25(2) of the Framework Act, the Commission had the authority to investigate, either on request or of its own accord, any of the matters listed in section 25(2)(i) to (vi). Section 25(3)(a) of the Framework Act provided that when considering a dispute or claim, the Commission: "must consider and apply customary law and the customs of the relevant traditional community as they were when the events occurred that gave rise to the dispute or claim". Section 25(3)(b)(i) provided that the Commission must, in respect of a*

kingship, be guided by "the criteria set out in section 9(1)(b) and such other customary norms and criteria relevant to the establishment of a kingship".

Section 9(1)(a) provided for what had to be considered before someone is recognised as a king or queen. The Commission had powers to investigate and decide disputes of various kinds resulting from historical aberrations of customary law and customary law institutions under colonial and apartheid laws dating back to 1 September 1927 (when the Native Administration Act took effect), or earlier if good grounds existed. The mandate of the Commission was that it had to restore the integrity of the institution of traditional leadership and right the wrongs of the past by resolving traditional leadership disputes dating from as far back as 1 September 1927.

Importantly, the Commission, in terms of section 25(3)(a) of the Framework Act, had to consider and apply customary law and customs of the relevant traditional community as they were when events occurred that gave rise to the dispute or claim."

[77] The Commission could, accordingly, either by referral or of their own accord, institute an investigation and then make a recommendation.

[78] As such, the authority of the commission cannot seriously be challenged by the Applicant.

[79] Having regard to all the facts of the matter and the threshold the Applicant needed to meet in order to obtain the relief he seeks, which currently is to obtain the right from this Court for his claim to be heard, I am not satisfied that the Applicant has met such a threshold.

[80] A proper investigation into the underlying facts of the matter and the underlying disputes between the Applicant and the First Respondent has been undertaken by the Commission. They have made a report considering all the relevant facts that they believed to be appropriate to be taken into regard, and they have made certain recommendations which the Third Respondent, having properly evaluated, has implemented. I find no reason that could move me to believe that the actions of the respective administrative bodies were so inapt, misinformed or grossly negligent that this Court needs to intervene and overlook all the deficiencies in the Applicant's application for justice to be done.

[81] Having found that condonation ought not to be granted for the late filing of the review application in respect of the respective administrative decisions, the Court cannot deal with the matter, and for that reason, the application ought to be dismissed.

[82] The Applicant did not, for all the reasons stated herein, satisfy the requirements to extend the time within which the proceedings for judicial review must have been instituted under PAJA.

[83] The interest of justice in these circumstances militates against the granting of condonation, having regard to the facts of the matter, the extremely long time delay for which a sufficient explanation has not been provided, the need for finality and certainty in the matter and the lack of any other deserving overriding facts being presented by the applicant in presenting his case.

COSTS:

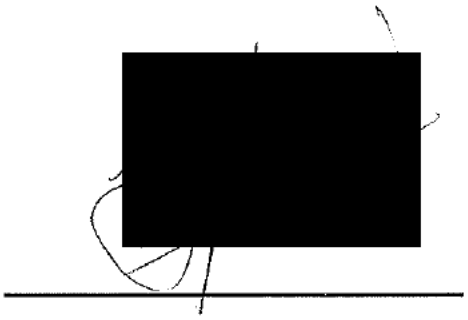
[84] I find no reason to deviate from the normal rule that costs ought to follow suit. Given the complexity of the matter and the volumes of documents applicable, I find that Scale B ought to apply.

ORDER:

[85] In the result and for all the reasons as stated, the following Order is made:

1. The application is dismissed.

2. The Applicant is ordered to pay the First to Fourth Respondents' costs on a Party and Party Scale, Scale B.



H F FOURIE AJ
ACTING JUDGE OF HIGH COURT, MBOMBELA

Counsel for the Applicant:	Adv TS Ngwenya
Instructed by:	**RK TSHOTLHANG ATTORNEYS** **C/O JF SHABANGU ATTORNEYS**
Counsel for the First – Second Respondents	Adv V Qithi
Instructed by:	**RANTHO & ASSOCIATES INC**
Counsel for the Third – Fourth Respondents:	Adv LH Makamu
Instructed by:	**OFFICE OF THE STATE ATTORNEY**
Judgment reserved on:	**9 May 2025**
Date of delivery:	**16 May 2025**

[1.] 2004 (4) SA 490 (CC)

[2.] National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) at 26

[3.] 2025 (5) SA 245 (CC)

[4.] See section 8(1) of PAJA .

[5.] Livestock above at 349G.

[6.] Johannesburg City Council at 76D-G.

[7.] Vukani Gaming Free State (Pty) Ltd v Chairperson of the Free State Gambling and Racing Board and Others [2010] ZAFSHC 33 at paras 53-4 and Erf One Six Seven Orchards CC v Greater Johannesburg Metropolitan Council (Johannesburg Administration) and Another [1998] ZASCA 91; 1999 (1) SA 104 (SCA) at para 109F.

[8.] Gauteng Gambling Board v Silver Star Development Limited and Others 2005 (4) SA 67 (SCA) (Gauteng Gambling Board) at para 39, where the Court held that—

"the court a quo was not merely in as good a position as the Board to reach a decision but was faced with the inevitability of a particular outcome if the Board were once again to be called upon fairly to decide the matter."

[9.] Id at para 29.

[10.] Id at para 28. See also Livestock above at 29 at 349G.

[11.] Gauteng Gambling Board above at paras 39 and 40.

[12.] Id at para 40.

[13.] Section 8(1) of PAJA above .

[14.] Bato Star above at para 46. See Hoexter "The Future of Judicial Review in South African Administrative Law" (2000) 117 SALJ 484 at 501-2.

[15.] Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) at paras 42 and 45.

[16.] See [36] to [39] of the quoted judgment.

[17.] Radjabu v Chairperson of the Standing Committee for Refugee Affairs and Others [2014] ZAWCHC 134; [2015] 1 All SA 100 (WCC) at paras 33-9; Media 24 Holdings (Pty) Ltd v Chairman of the Appeals Board of the Press Council of South Africa and Another [2014] ZAGPJHC 194 at para 25; Nucon Roads and

Civils (Pty) Ltd v MEC for Department of Public Works, Roads and Transport: N.W. Province and Others [2014] ZANWHC 19 at paras 32, 41 and 44; and Reizis NO v MEC for the Department of Sport, Arts, Culture and Recreation and Others [2013] ZAFSHC 20 at paras 33-4.

[18.] It should be emphasised that the exceptional circumstances enquiry only arises in the context of the appropriate remedy to be granted as per section 8(1) of PAJA. Thus, it is only after the unlawfulness of the award has been established pursuant to section 6 of PAJA that the remedy, and therefore the exceptional circumstances enquiry, arises.

[19.] Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere 1976 (2) SA 1 (A) and Hutchinson v Grobler NO and Others 1990 (2) SA 117 (T) at 157B-E.

[20.] Johannesburg City Council above at 76D-H.

[21.] Bato Star above at para 48.

[22.] Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others [2010] ZACC 3; 2010 (5) BCLR 422 (CC) at para 35, where it was held:

"In general, a court of appeal, when deciding whether the judgment appealed from is right or wrong, will do so according to the facts in existence at the time it was given and not according to new circumstances which came into existence afterwards."

[23.] Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at paras 42-3.