REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.

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DATE…… SIGNATURE:……

CASE NO: 1256/2016
29/4/2016

In the matter between:

MASIA TRADITIONAL COUNCIL	**FIRST APPLICANT**
TSHIKONELO TRADITIONAL COUNCIL	**SECOND APPLICANT**
TSHIMBUPFE TRADITIONAL COUNCIL	**THIRD APPLICANT**
DAVHANA TRADITIONAL COUNCIL	**FOURTH APPLICANT**
MULENZHE TRADITIONAL COUNCIL	**FIFTH APPLICANT**
MASHAU TRADITIONAL COUNCIL	**SIXTH APPLICANT**

MASAKONA TRADITIONAL COUNCIL	**SEVENTH APPLICANT**
VUWANI SERVICE DELIVERY AND DEVELOPMENT FORUM	**EIGHTH APPLICANT**
SINTHUMULE TRADITIONAL COUNCIL	**NINTH APPLICANT**

and

MUNICIPAL DEMARCATION BOARD	**FIRST RESPONDENT**
MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	**SECOND RESPONDENT**
PREMIER OF LIMPOPO PROVINCE	**THIRD RESPONDENT**
MEC CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS, LIMPOPO PROVINCE	**FOURTH RESPONDENT**
INDEPENDENT ELECTORAL COMMISSION	**FIFTH RESPONDENT**
VHEMBE DISTRICT MUNICIPALITY	**SIXTH RESPONDENT**

THULAMELA LOCAL MUNICIPALITY	**SEVENTH ESPONDENT**
MUTALE LOCAL MUNICIPALITY	**EIGHTH RESPONDENT**
MAKHADO LOCAL MUNICIPALITY	**NINTH RESPONDENT**
MUSINA LOCAL MUNICIPALITY	**TENTH RESPONDENT**

JUDGMENT

MAKGOBA JP

[1] The Applicants ask for an order reviewing, setting aside and referring back to the First Respondent, the Municipal Dermacation Board ("the MDB" or "the Board) for reconsideration its demarcation decision published in the Limpopo Provincial Gazette No.2586 of 25 August 2015 with reference number DEM 4519 pertaining to the demarcation of the local municipalities situated in the Vhembe District Municipality of the Limpopo Province.

[2] The Applicants, with the exception of the Eighth Applicant, are all traditional authorities, established in terms of the Limpopo Traditional Leadership and Institution Act 6 of 2005, being traditional communities recognized and institutionalised by the enactment of the Traditional Leadership and Governance Framework Act 41 of 2003, being legislation envisaged by section 212(1) of the Constitution to provide a role for traditional leadership as an institution at a local level on matters affecting local communities.

[3] In the review application the Applicants content that the demarcation decision should be set aside on procedural and substantive grounds. In particular the Applicants content that the MDB's decisions are invalid because the MDB:

3.1. followed an unfair procedure in that the map for the Makhado Local Municipality, attached to the Board's decision dated 2 July 2015, demonstrates that the Mashau and the Masakona traditional areas would remain within the municipal area of Makhado. These communities are represented by the sixth and seventh Applicants. The communities were

happy to remain with the Makhado Local Municipality and for that reason they did not submit any objections to the Board's decision; on 25 August 2015 the Board gazetted its final decision in the Provincial Gazette which varied the decision made on 2 July 2015, and amongst other things, the Mashau and Masakona traditional areas will be excised from the Makhado Local Municipality and will be incorporated into the area of the new Municipality. That the sixth and seventh Applicants were not given a hearing in respect of the variation in the Board's decision.

3.2 separated traditional villages and traditional communities in that (1) the village of Vhangani falls within the traditional jurisdiction of the ninth Applicant. The Board's decision means that the village of Vhangani will be removed from Makhado Local Municipality and included in the new municipality. The other villages falling under the jurisdiction of the ninth Applicant will remain in the Makhado Local Municipality, (2) the village of Mpheni falls within the traditional jurisdiction of the fourth Applicant.

The Board's decision means that the village of Mpheni will remain in the Makhado Local Municipality while the other villages falling under the traditional jurisdiction of the fourth Applicant will be included in the new municipality.

3.3. ignored relevant considerations in coming to its decision, and

3.4. made a decision that was not rationally connected to the factors that it had to consider in terms of the Demarcation Act 28 of 1998.

[4] The First Respondent, the Municipal Demarcation Board ("the MDB or "the Board") opposes the application for various reasons including the following:

4.1. The Board is a special body set up by the Constitution to perform a specific administrative function. It undertook extensive public consultation and considered the request received from the Minister against the criteria set out in section 25 of the Demarcation Act before making both its initial and final decisions.

4.2. The Board is entitled in terms of Section 21(5)(b) of the Demarcation Act to confirm, vary or withdraw its initial decision. After considering all of the objections received, the Board decided to vary its initial decision, and the reasons for this variation are fully articulated in the first respondent's answering affidavit.

4.3. The Board's mandate is limited by the Demarcation Act and the relevant factors to be considered are clearly listed in the Act. The Board took the areas of traditional rural communities into account as provided for in section 25(f) of the Demarcation Act. It is not, however, entitled to take into account the requirements, convenience or other needs of traditional rural communities when exercising its functions in terms of the Demarcation Act. The Board's specific function is to demarcate outer municipal boundaries which may or may not include areas of traditional rural communities.

4.4. The final decision slightly altered the municipal boundaries within the existing Vhembe District, a decision that is ultimately left to the Board to make in terms of the Demarcation Act.

4.5. The Applicants have not substantiated how their functions as the leadership of traditional communities would be affected where some of their subjects fall under one municipality and others fall under another municipality. That this assertion is not explained and it is unclear how the change in municipal boundaries affects their ability to perform their leadership functions.

[5] The Applicants do not seek any relief, against the Second Respondent, the Minister of Cooperative Governance and Traditional Affairs (“the Minister”) as well as the fourth Respondent, the MEC for Cooperative Governance and Traditional Affairs, Limpopo (“the MEC”) The Minister, however, opposes the application purely in relation to the remedy in the event that the application succeeds. To this effect the Minister has filed an

answering affidavit. The MEC opposes the application on limited grounds only, namely:

5.1. Lack of authority to act in respect of the Applicants and

5.2. No proper basis for urgency in the application.

All the above two grounds of opposition were abandoned by the MEC at the hearing of this matter. Therefore I need not persue these issues further in this judgment.

Factual Background

[6] The Limpopo Province presently comprises of the five District Municipalities, namely Mopani, Capricorn, Waterberg, Vhembe and Greater Sekhukhune. Each of these five District Municipalities comprises between 4 and 6 local municipalities. The Vhembe District Municipality is of concern to this application. It currently comprises of 4 local municipalities, namely Musina, Mutale, Thulamela and Makhado.

[7] The Board's demarcation decision sought to be reviewed and set aside in this application seeks to disestablish the Mutale Local Muncipality and establish a new municipality comprising of portions of the Thulamela Local Municipality and Makhado Local Municipality. If implemented, the demarcation decision will result in the disestablishment of the Mutale Local Municipality whilst retaining the four local municipality model for the Vhembe District Municipality.

[8] During 2014 the Minister and his department embarked on a review of the country's 278 municipalities. Their findings were set out in a document titled "Back to Basics Approach" which was subsequently presented at the Presidential Local Government Summit in September 2014. The 2014 review of municipalities revealed that certain municipalities were dysfunctional and needed urgent intervention to get them to function properly. They faced challenges of endemic corruption, dysfunctional councils and poor financial management among others. The Back to Basics approach considered a number of strategies to address the dysfuntionality of these municipalities, including whether some should be redemarcated in order to improve their functionality and

economic viability. This was outlined in a “Memorandum Framework for Municipal Demarcation Based on the Functionality, Viability and Sustainability of Municipalities” dated 7 January 2015 (“the Framework”).

[9] The Framework suggested that municipalities that are weak on sustainability and functionality are likely candidates for redemarcation. This could take the form amalgamation with other municipalities or being designated as District Management Areas.

[10] The Minister held a Minister and Members of Executive Council (MINMEC) meeting on 4 December 2014 where it was resolved that the provinces should provide a list of municipalities to be considered for determination or redetermination in order to make them more functional and viable. Responses were received from seven provinces, including Limpopo. The Minister took these responses into consideration when he submitted a request to the Demarcation Board on 13 January 2015 to consider the redetermination of the boundaries of a number of municipalities. The Minister’s request to the Demarcation Board was made in

terms of section 22 of the Local Government: Municipal Demarcation Act 28 of 1998 (“the Demarcation Act”).

[11] Section 22 of the Demarcation Act states that when the Demarcation Board determines a municipal boundry, it does so:

11.1. On its own initiative,

11.2. On request by the Minister or a MEC for local government, or

11.3. On request by a municipality with the concurrence of any other municipality affected by the proposed determination or redetermination.

Section 22(2) provides that the Minister may, after consultation with the MECs for local government and the Board, determine priorities and reasonable time-frames for determination and redetermination. On the 28 January 2015 the Minister sent a request in terms of section 22 for redetermination in relation to municipalities in Limpopo.

[12] On 4 February 2015 the Minister addressed a further letter (Annexure “MJM3” to Founding Affidavit) to the Demarcation Board and submitted a list of municipalities in terms of section 22(2) of the Demarcation Act “to determine or redetermine their boundaries before the 2016 local government elections with the view to optimising their financial viability.” The Minister’s request under “DEM4519” asked for the disestablishment of Mutale Local Municipality with a view to optimising the financial viability of all the municipalities in the Vhembe District Municipality.

[13] The Minister’s request did not specify a particular outcome from the Demarcation Board other than asking it to consider the disestablishment of the Mutale Municipality in order to optimise the financial viability of the Vhembe District Municipality. The dispute before this Court relates to this request of 4 February 2015.

[14] It needs to be stated at this stage that the Demarcation Board is an independent body that must perform its function without fear, favour, or prejudice in terms of section 3 of the Demarcation Act. The Minister has no influence over the Board’s decision and can

merely initiate a request in terms of section 22 of the Demarcation Act.

Issues for determination

[15] The following issues are for determination in this application:

15.1. Whether the alleged failure by the Demarcation Board to consult the applicants in respect of the delimitation of a new municipality and the failure to consult the applicants properly in respect of the decision to delimit the communities of Mashau and Masakona into a new municipality and out of Makhado Local Municipality constitutes a procedural unfairness which can result in the review and setting aside of the Board's demarcation decision.

15.2. Whether the Board made a decision that was not rationally connected to the factors that it had to consider in terms of the Demarcation Act.

The Process of Demarcation in general

[16] The work of the Demarcation Board in performing demarcations is prescribed by the Demarcation Act. The Board is empowered to determine municipal boundries in the Republic and is also empowered to redetermine any municipal boundry previously determined by it. In terms of section 22(1) of the Demarcation Act the Board determines or redetermines municipal boundries either (1) On its own initiative, (2) On request by the Minister of Local Government, (3) On request by an MEC for Local Government or (4) On request by a Municipality with the agreement of any other Municipality affected by the proposed determination or redetermination.

[17] Once the Board has made its determination or redetermination of a municipal boundry, which must be published in the relevant Provincial Gazette, it must, without delay, send the particulars to the Independent Electoral Commission (IEC). The IEC is obliged to make its views on the effect of the demarcation on representation of voters in the Council of any affected Municipality within 60 days of the particulars being referred to it.

[18] The procedure which the Board must observe is set out in sections 26 to 30 of the Demarcation Act. It entails the following requirements:

18.1. Before considering any determination of municipal boundry, the Board must publish a notice in a newspaper circulating in the area concerned stating the Board's intention to consider the matter and inviting written representations and views from the public within a specified period, not shorter than 21 days - section 26(1).

18.2. At the same time as publishing the newspaper notice the Board must convey by radio or other appropriate means of communication the contents of the notice in the area concerned – section 26(2).

18.3. The Board must also send a copy of the notice to the MEC for Local Government in that province, each municipality which will be affected by the consideration of the matter, the Magistrate concerned (if any Magisterial district is affected)

and the provincial House of Traditional Leaders if the boundry of a traditional authority is affected. They are also invited to submit written representations of their views within a period not shorter than 21 days – Section 26(3).

18.4. After the period for written representations and views has expired the Board must consider the representations and views, and may-

18.4.1. hold a public hearing or

18.4.2. conduct a formal investigation or

18.4.3. hold a public meeting and conduct an investigation, or

18.4.4. make a decision without holding a public meeting or conducting an investigation.

[19] In terms of section 28(1) if the Board decides to hold a public meeting, it must publish a notice in the newspaper circulating in the area concerned stating the time, date and place of the meeting

and inviting the public to attend the meeting. At the same time as publishing the notice in the newspaper, the Board must convey by radio or other means of communication, the contents of the notice in the area concerned. At the public meeting a representative of the Board must explain the issues that the Board has to consider, including any options open to the Board, allow members of the public attending the meeting to air their views on these issues, and answer relevant questions.

[20] If the Board decides to conduct an investigation, it may conduct the investigation itself or designate Board members, or other persons, as investigating committee to conduct the investigations on its behalf. The investigation committee must then report and make recommendations to the Board - Section 29.

Procedure followed in this case

[21] On 4 February 2015, the Second Respondent (“the Minister”) invoked the provisions of Section 22 of the Demarcation Act by having directed a request to the chairperson of the Board to investigate the possibility of disestablishing the Mutale Local

Municipality in the Vhembe district in order to optimize the financial viability of the three remaining local municipalities, being Thulamela, Musina and Makhado. The Minister's request reads:

> "*Disestablish Mutale LM with a view to optimising the financial viability of all the municipalities in the Vhembe District Municipality*"

[22] On 5 February 2015 a day after receiving the Minister's letter dated 4 February 2015, the Board distributed Circular No 2/2015 to the Minister, MEC, SALGA, Speakers and Municipal Managers of Municipalities, Magistrates, Provincial House of Traditional Leaders, Government departments and statutory bodies with an interest in the demarcation. The contents of the circular announced that the Minister had made a request to the Board and that the Board intended to publish a Notice as requested by section 26 of the Demarcation Act.

[23] The circular contained the factors which the Board intended to take into account in making the determinations. These include the independence of people, communities and economies; the need for cohesive, integrated and unfragmented areas including

metropolitan areas, the financial viability and administrative capacity of the municipality to perform municipal services efficiently and effectively; the need to share and distribute financial and administrative resources. These factors are as set out in section 25 of the Demarcation Act.

[24] The Board requested municipal managers to bring the notices to the attention of Councillors, Ward Committees, traditional leaders, community development workers, business and community organisations.

[25] The Section 26 Notice was published on 9 February 2015 in the Beeld and 10 February 2015 in the Sowetan. The Notice called on interested parties to submit representations within 21 days. Radio adverts ran between 23 February 2015 and 1 March 2015 on Phalaphala, Thobela, Munghana Lonene and SAFM.

[26] On 30 March 2015 the Board considered the submissions received and decided to consult members of society by holding meetings. It further decided to conduct an investigation by commissioning a study into the proposed redetermination.

[27] On 24 March 2015 the Board published circular 5/2015 indicating that a public meeting was to be held on 13 April 2015 at the Vhembe District Municipality. The meeting actually took place on 21 April 2015 at Thohoyandou Sports Centre. The venue, time and place for such meeting was published on 10 April 2015 in the Daily Sun, 10 April 2015 in the Star and 13 April 2015 in Sowetan. The public meeting was also announced on radio between 6 April 2015 and 10 April 2015.

[28] Over 1000 people attended the meeting. Most of them supported the Minister's request. One of the people present at the meeting was Chief Masia, the deponent to the founding affidavit in this application. It is appropriate and significant to refer to Chief Masia's contribution at the meeting. He said the following:

> "*Thank you Chair, I would like to thank the Chairperson. I will be short and say a few paragraphs. I am paramount Chief Masia and I speak on behalf of Masia Traditional Council. I had been sent here by Tshimpbufe Traditional Council, Nesengani, Davhana Traditional Council, Tshikonelo as well sent me and the Mulenzhe too sent me.*

There is no one who is supposed to speak on our behalf. The abovementioned communities, we want to remain in Makhado. The two referred communities who are under the area of Thulamela will always remain under Thulamela. We wrote a submission that we submitted in line with said criteria for demarcation. I will end there. There is no one in the Vuwani area who should represent us. We have not sent any person to speak on our behalf".

[29] One can deduce from the above quoted words of Chief Masia that almost all the applicants in this case took part in the consultations and deliberations leading to the final demarcation decision. The Chief talks also of the "submission that we submitted". It cannot be correct where the applicants allege in their papers that there was never any consultation when it was decided by the Demarcation Board that their areas be excised from Makhado Local Municipality to be included in the new municipality.

[30] The Board also commissioned a study from consultants, City Insight (Pty) Ltd ("City Insight") City Insight presented a comprehensive report on 15 June 2015 wherein they considered two possible options in relation to the disestablishment of Mutale Local Municipality, and these are:

1. A reallocation of the wards from Mutale to both Musina and Thulamela Local Municipalities, leaving only three Municipalities in the Vhember District, or

2. Disestablishing Mutale and creating a new municipality including wards from Thulamela, the old Mutale and Makhado (a four municipality option)

   The final report of City Insight proposed the four municipality option.

Evaluation by the Board and Decision of the Board

[31] The Board considered all the written and oral representations that it had received together with the City Insight report and decided to adopt the four municipality option.

On 2 July 2015 the Board published Circular 8/2015 which reflected its decision relating to the determination and called for objections to the initial decision within 30 days of the publication of the Notice in the Provincial Gazette. In this sense the Board was complying with the provisions of Section 21(3) and (4) of the

Demarcation Act. The Provincial Gazette was published on 7 July 2015 and reflected the determination.

[32] In the 30 day period the Board received numerous objections to the decision. In the midst of such objections the Board was obliged to act in terms of Section 21(5) of the Demarcation Act which section enjoins the Board to:

(a) consider any objections,

(b) either confirm, vary or withdraw its determination,

(c) publish its decision in paragraph (b) in the relevant Provincial Gazette.

[33] In Board meetings held on 17 and 18 August 2015 a decision was made to vary the determination referred to in Circular 8/2015. The decision had the effect of including two traditional communities, Mashau and Masakona in the Municipal area of the new municipality although this had not been indicated in Circular 8/2015.

[34] On 25 August 2015 the Board published its demarcation in the Provincial Gazette, which for the first time, revealed that the Mashau and Masakona traditional areas are to be excised from the Makhado Local Municipality and to be incorporated into the area of a newly established municipality.

[35] The First Respondent contends that the Board had the power to vary its published determination in terms of Section 21(5)(b) of the Demarcation Act. The First Respondent (the Board) submits that it is entitled to vary its initial decision in terms of Section 21(5)(b) and for the following reasons:

35.1. The new configuration of municipalities takes into account social cohesion,

35.2. Forced removals also took place between homelands and this divided people along ethnic lines. The new municipality brings the majority of these people back together, precisely because their linguistic and ethnic diversity had survived the apartheid legacy.

35.3. The Board found that there were strong ties between most communities in the Vuwani part of the new Municipality and decided that this rich history was worth preserving.

35.4. The Board attempted as far as it was possible, to consolidate traditional authorities in one municipality.

[36] I agree with the First Respondent's submission that Section 21(5)(b) of the Demarcation Act gives the Board the power to vary its initial decision after it has extended an opportunity for objections to be made. This is so because the Board is a specialist body armed with a legislative mandate to carry out a specific administrative function. It is in line with the principle of deference.

The Applicants grounds for Review

[37] It is apparent from the founding affidavit that the Applicants rely upon the following grounds of review:

37.1. an absence of procedural fairness,

37.2. a failure to take into account relevant considerations and

37.3. an absence of rationality.

[38] Although it is not clear from the application whether the applicants rely upon the provisions of the Promotions of Administrative Justice Act 3 of 2000 (“the PAJA”) or the principle of legality to set aside the Board’s decision, a Court considering the review of a decision of a public official is enjoined to consider whether the proceedings are governed by the PAJA or not.

See **Minister of Health and Another v. New Clicks South Africa (Pty) Ltd and Others 2006(6) SA 311 (CC) at paras 436 to 438 National Director of Public Prosecutions and Others v. Freedom Under Law 2014(4) SA 298 (SCA) at para 29.**

I shall therefore deal with this review application on the basis that the review is competent under either the PAJA or on the principle of legality.

[39] In the present case the Demarcation Act provides for certain procedures to be followed prior to a determination of a municipal boundry. The procedure is similar to that required in terms of Section 4 of the PAJA.

It is trite that in each case where administrative action occurs in terms of a statute, it is a question of construction whether the statute requires special procedures to be followed before the action is taken or not. If they do, the statute must be followed. Where the statute does not make such provisions, the administrative action must ordinarily be carried out consistently with the PAJA – **Minister of Home Affairs v. Eisenberg and Associates 2003 (5) SA 281 (CC) at para 59.**

[40] Section 4(3) of the PAJA provides for a notice and comment procedure. In this regard the subsection reads:

> "*If an administrator decides to follow a notice and comment procedure, the administrator must-*

(a) Take appropriate steps to communicate the administrative action to those likely to be materially and adversely affected by it and call for comments from them,

(b) Consider any comments received,

(c) Decide whether or not to take administrative action, with or without changes , and

(d) Comply with the procedures to be followed in connection with notice and comment procedures as prescribed.

The notice and comment procedure set up by the Demarcation Act requires that the information in the notice should be sufficient that members of the public may make meaningful comments. **(Doctors for Life International v. Speaker of the National Assembly 2006(6) SA 416 (CC); Minister of Education , Western Cape and Another v. Beauvallon Secondary School 2015(2)SA L54 (SCA).**

[41] The process which is to be engaged upon by the Demarcation Board is not an adversarial process, but a process of gathering information. The obligations of the Demarcation Board as far as the public's commentary is concerned was set out as follows in a

Court decision in **Hartebeespoort Plaaslike Raad v. Munisipale Afbakeningsraad en Andere [2002] 2 All SA 391 (T) at 396:**

> *" Die raad se plig is om inligting in te win en te oorweeg voor dit besluit. Die oorweging en besluitproses is nie 'n adversiewe proses nie. Die "luister na die ander party" reël is nie in sy volle omvang van toepassing nie. Die wet plaas die plig op die raad om insette en later besware aan te hoor en om dit te oorweeg maar behoudens die prosedere voorgeskryf met betrekking tot 'n vergadering wat die raad ten keuse mag hou, daar is geen plig ingevolge die Wet om die inhoud van 'n inset of beswaar aan ander belanghebbendes voor te lê en die geleentheid tot verdere insette daarop te verleen nie"*

[42] It is clear from the abovementioned court decision that the procedure to be followed by the Board is not adversarial and that the *audi alteram partem* rule does not apply to the fullest extent. In other words, in performing its functions the Board is subject to the requirements, criteria and reasons set out in the Demarcation Act and the reasons and motivations by the Minister in his request dated 4 February 2015 are technically irrelevant. Accordingly, the applicants had no right to be heard again when the Board was to vary its decision. The applicants are mistaken in believing that the

procedural rights afforded them under the Demarcation Act and the PAJA go further than the notice and comment procedure.

[43] In the present case there was an initial notification in terms of Section 26 of the Demarcation Act, and a public meeting – Section 28 .The Board met each of these requirements. In my view the complaint by the applicants that there was non-compliance with Section 26(2) and (3) and Section 28 has no basis and is thus rejected.

[44] The crux of the applicants' main complaints are the alleged failure to consult them in respect of the delimitation of a new municipality and the failure to consult them properly in respect of the decision to delimit the communities of Mashau and Masakona into the new municipality and out of the Makhado Local Municipality. This cannot be correct because at the public meeting the following issues were explained and discussed:

44.1. Whether to disestablished the Mutale Municipality, or not,

44.2. If so, what should be done with the former Municipality.

Two options were discussed:

44.2.1. Option one: subsuming Mutale into the other three municipalities,

44.2.2. Option two: Creating a fourth municipality from Mutale and the other municipalities.

The participants expressed views on all of the issues referred to above. After the Board considered the objections it varied the decision in the light of the objections. The Board is entitled and empowered to do so by section 21 of the Demarcation Act.

[45] The procedural rights of members of the public, including the applicants to notice and to comment were properly respected by the Board. Accordingly, there was no procedural irregularity or unfairness.

It is clear from the contribution of Chief Masia at the public meeting on 21 April 2015 that the applicants wanted to remain where they were. That view was considered by the Board. The complaint of unfair procedure and not being heard is therefore without merit.

[46] The 4th and 9th Applicants advance as a ground of review the fact that a number of their villages forming part of their traditional communities will be severed from the remainder of its communities should the demarcation decision be allowed to stand.

That the 7th Applicant's Masakona traditional communities will also be severed from other traditional communities in Makhado from which they share their common culture and heritage.

[47] It is a fact that the new municipality would take part of Makhado and part of Thulamela. The Board did take note that not less than twenty one traditional communities would be affected. In this regard the Board tested the establishment of the new municipality against four categories of the demarcation criteria, which are the following:

47.1. Interdependence of people, communities and economies,

47.2. Special development and planning,

47.3. Governance and functionality and

47.4. Financial and administrative factors.

[48] In cases where the decision –maker is confronted with a number of complex policy decisions (such as the Board was in the present case) the court should adopt a large measure of deference to the decision –maker.

In **Logbro Properties CC v. Bedderson N O and Others 2003(2) SA 460 (SCA) at para 51 Cameron JA** said:

> "….*the sort of deference we should be aspiring to consists of a judicial willingness to appreciate the legitimate and constitutionally ordained province of administrative agencies, to admit the expertise of these agencies in policy laden or polycentric issues, to accord the interpretation of fact and law due respect, to be sensitive in general to the interests legitimately persued 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 maladministration".*

See also: **Trencon Construction (Pty) Limited v. Industrial Development Corporation of SA Limited 2015(5) SA 245 (CC) at para 44**

[49] In my view the applicants have not been able to show that the decision of the Board is arbitrary or in any other way lacking in rationality. Furthermore, the applicants have also failed to show that there was some important legitimate consideration which ought to have been taken into account, but was ignored.

[50] In the result the applicants have failed to make out a proper case for relief and their application for review cannot succeed.

Costs

[51] Counsel for the Applicants argued that in the event of the application being unsuccessful the Applicants should not be ordered to pay the legal costs in view of the fact that this matter involves an issue of constitutional litigation. This was conceded by Counsel for the First Respondent.

The general principle in constitutional litigation was laid down in **Biowatch Trust v. Registrar Genetic Resources and Others 2009(6) SA 232 (CC)**. In that case the Constitutional Court found that the general rule in constitutional litigation between a private party and the State is that if the private party is successful,

it should have its costs paid by the State, while, if unsuccessful, each party should pay its own costs.

Order

[52] The application is dismissed and each party shall pay own legal costs.

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E M MAKGOBA JP
JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE

APPEARANCES

Heard on	**:**	**21 & 22 April 2016**
Judgment delivered on	**:**	**29 April 2016**
For Applicants	**:**	**A Liversage** **M Moleya**
Instructed by	**:**	**P N Ace Ndou Attorneys**

For First Respondent	**:**	**A Redding SC** **PM Mtshaulana SC**
Instructed by	**:**	**Cheadle Thompson & Haysom**
For Second Respondent	**:**	**M Sello** **U Jugroop**
Instructed by	**:**	**State Attorney**
For Fourth Respondent	**:**	**L. Nkosi-Thomas SC** **N. Manaka**
Instructed by	**:**	**State Attorney**