REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NUMBER: HCA37/2017

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

DATE: 4/03/2019 SIGNATURE:

In the matter between:

MALEPENG MOLATELO ELISA AND OTHERS **APPELLANTS**

And

KGOSHIGADI M.R. MANTHATA **FIRST RESPONDENT**

MANTHATA TRADITIONAL AUTHORITY **SECOND RESPNDENT**

MADIKELEDI RASHALAGA **THIRD RESPONDENT**

MEMBERS OF THE EXECUTIVE COUNCIL

DEPARTMENT OF COCHSTA, LIMPOPO PROVINCE **FOURTH RESPONDENT**

JUDGEMENT

KGANYAGO J

[1] This appeal is against the judgment and order of Magistrate Rambuda NK sitting at Bochum Magistrate Court. The appeal is against the decision of the court in dismissing the appellants' application.

[2] The appellants have launched an application in the court *a quo* seeking an order in the following terms:

> *"1. That an interlocutory interdict be granted interdicting the First to Third Respondents from denying the applicants and any member of the Motadi Community, as listed on Annexure 'MEM1' to the founding affidavit access to the Stettin graveyard or cemetery situated on the Stettin for as long as the interlocutory interdict is a valid court order;*
>
> *2. That the First to Third Respondent and anyone under instruction of the aforementioned Respondents, be interdicted from collecting or demanding any fees from any member of the Motadi Community for visiting Stettin graveyard or to demand a fee to unlock the gate to the graveyard;*
>
> *3. That the Applicants be ordered to formally and in writing engage the Fourth Respondent with the purpose of involving the Fourth Respondent to resolve the issue and amongst others to declare what the First to Third Respondents rights in respect of the Stettin graveyard are and to*

direct what the members of the Motadi Community's rights are in respect of the graveyard;

4. That the Applicants' obligation to engage the Fourth Respondent shall be exercised within one calendar month after the interlocutory interdict being granted. Should the Applicants fail to engage the Fourth Respondent in time and in the absence of an agreement in writing between the parties to extend the one month period, any party shall be entitled to apply for this interlocutory interdict to be set aside;

5. That any party to this agreement may, if the Fourth Respondent fails to resolve the dispute between the parties and further fails to make an official decision within 6(six) months after the Fourth Respondent has received the written letter from the Applicants, as set out in prayer 3 and 4 above, approach any High Court with jurisdiction with the intention to obtain a declaratory order or alternative applicable relief;

6. The right of the parties to approach the High Court, as set out in prayer 5 shall be exercised within 3(three) months after 6(six) period, referred to in prayer 5, has lapsed without a decision being made;

7. That if none of the parties approached a High Court as provided for in prayer 4, 5 and 6, any of the parties and specifically the Respondents shall be entitled to set the interlocutory interdict aside;

8. That this interdict (prayer 2 and 3) shall operate as an interim interdict and shall be of force from the moment it is granted up until the order is set aside by this Court or other competent court on any ground;

9. That only the respondent opposing this application be ordered to pay the costs of this application on party and party scale if opposed. The applicants shall seek no costs against the Respondents if this application is not opposed."

[3] The background facts are that the appellants are members of Motadi Community and they fall under the traditional jurisdiction of the first and second respondents. The dispute is about the members of Motadi Community accessing the graveyard. The community members used to pay R200.00 every time they enter the graveyard in order to bury their loved ones or to conduct any rituals on the gravesite of their loved ones. The amount for accessing the graveyard has been increased by the first and second respondents from R200.00 to R1500.00 with effect from May 2015. The first and second respondents have locked the gate of the graveyard and has appointed the third respondent as the gatekeeper.

[4] The community members of Motadi are disgruntled about the exorbitant increase in the fee payable to gain access to the graveyard. That led to the appellants approaching the Magistrate Court, Bochum during March 2017 for the relief as set in paragraph 2 *supra.*

[5] The first to the third respondents have opposed the appellants' application. However, they filed their notice of intention to oppose as well as their answering affidavit out of the prescribed time period. The respondents have failed to make a substantive application for condonation for late filling of their notice of intention to oppose as well as the answering affidavit. The fourth respondent did not oppose the appellants' application.

[6] The Court *a quo* granted the respondents condonation for late filling of their notice to oppose as well as the answering affidavit. The court *a quo* proceeded to dismiss the appellants' application on the basis that the appellants had an alternative remedy of approaching the High Court for a declaratory order. Aggrieved by the dismissal of their application the appellants appealed against the judgment and order of the court *a quo*.

[7] In this court counsel for the respondents' correctly conceded that their notice of intention to oppose as well as answering affidavit were filed out of time without filing a substantive application for condonation for late filing. They further conceded that in the absence of a substantive application for condonation for late filing of their notice to oppose as well as answering affidavit, the court *a quo* had no jurisdiction to *mero motu* or on oral application from the bar, to condone the late filing of the documents. In their view the court *a quo* should have disregarded the answering affidavit as well as the replying affidavit and considered the application based on the appellants founding affidavit. Counsel for the respondents contends that despite the concession he had made, the court *a quo* was correct on the facts of the case to dismiss the appellants' application.

[8] The question which this court must determine is whether the appellants as per their founding affidavit were entitled to be granted the interim relief, and also whether the court *a quo* was correct in dismissing the appellants' application.

[9] The applicable test for granting of an interim relief were set out in **Setlogelo v Setlogelo**[1]being (i) a prima facie right; (ii) a well-grounded apprehension of

[1] 1914 AD 221 at 227

irreparable harm; (iii) balance of convenience; and (iv) the absence of any other satisfactory remedy.

[10] It is trite that the granting of an interim relief is an extraordinary remedy which is within the discretion of the court to either grant or withhold. In **Knox D'Arcy LTD and Others v Jamieson and Others**[2] the court said:

" ... *Thus in* ***Messina (Transvaal) Development CO LTD v South African Railways and Harbours 1929 AD 195 at 215-16 Curlewis JA*** *said:*

> 'In an application for an interim interdict pending action, the court has a large discretion in granting or withholding an interdict. Where there is merely a possibility, not practical certainty, of inference or injury, as in the present case, the Court will be reluctant to grant an interdict, especially if the party seeking the interdict will have other means of redress and will not suffer irreparable damage. And the Court is entitled to and must regard the possible consequences, both to the applicant and the respondent which will ensure if the interdict be granted or withheld"

[11] The first requirement which the appellants must meet in order to obtain an interim relief is a *prima facie* right. The appellants rely on the constitutional rights of the members of the Motadi Community which is infringed by the imposition of an exorbitant levy. It is trite that the right is only required to be *prima facie,* though open to some doubts. The right need not be clear. Section 31 of the Constitution protects the enjoyment of culture, linguistic or religious right of the community and its members provided the right is consistent with the Bill of Rights. Not every community member will be able to afford to pay R1500.00 every time they wanted to access the graveyard in order to conduct

[2] 1996(4) SA 348(A) at 360 H-J

their rituals or to bury their loved ones. The members of Motadi community have a right to use the graveyard like any other subjects of the first and second respondents. For that reason, the court is satisfied that the appellants have established a *prima facie* right.

[12] The second requirement for granting of an interim relief is for the appellants to show that there is a reasonable apprehension of irreparable and imminent harm eventuating should the order not be granted. The harm must be anticipated or ongoing. It must not have taken place already (**See Tshwane City v Afriforum 2016 (6) SA 279 (CC) at 360 B-C**).

[13] The appellants in their founding affidavit have stated that the members of Motadi Community's rights were infringed and that it will continue in the foreseeable future to be infringed if the application is not granted. They have further stated that they are having a clear right and it may not even be necessary for them to establish irreparable harm as required. Meeting the requirement of a reasonable apprehension of irreparable and imminent harm is crucial in the granting of an interim interdict. In this case except that the alleged harm is still ongoing, the alleged harm has already taken place and they have been aware of it for almost two years before they took action.

[14] The purpose of the interim interdict is to prevent the future harm. In this case it is almost two years since the levies were increased. If there is any harm, the harm has been ongoing for the past two years. Since the increased levies have long been implemented, there is no imminent harm that will occur. In my view the appellants have failed to meet the requirement of a reasonable apprehension of irreparable and imminent harm.

[15] The third requirement which the appellants are required to establish for the granting of an interim interdict is the balance of convenience. With regard to this requirement there are two competing interests. Those interests are inextricably linked to the harm a respondent is likely to suffer in the event the order is being granted and the harm likely to be suffered by an applicant if the relief sought is not granted. (**See Tshwane City v Afriforum *supra*, at 302 B-C**).

[16] In the present case there is no doubt that the exorbitant increase of the levies had an impact on the appellants, and will cause serious hardship on them. It is within the powers of the first and second respondents to regulate the levies in relation to the graveyard. The first and second respondents are performing a public function, and therefore their action amount to an administrative action. The first and second respondents are empowered to raise their revenue through levies, of which increasing the graveyard levies will be one of them.

[17] The question now is whether by granting the interim interdict, will the court not be preventing the first and second respondent from raising revenue, and in turn trespassing upon their sole terrain. In **National Treasury v Opposition to Urban Tolling Alliance**[3] the court said:

> *"A court must be astute not to stop dead the exercise of executive or legislative power before the exercise has been successfully and finally impugned on review"*

[18] In terms of **Section 6 of the Promotion of Administrative Justice (PAJA)**[4] any person aggrieved by the decision of an administrative organ may take

[3] 2012 (6) SA 223 (CC) at 231 E to F
[4] Act 3 of 2000

such decision on review in a court of competent jurisdiction or tribunal established for that purpose. The proper route for the appellants to follow was to take the decision of the first and second respondents on review. The community of Motadi seems to be alive to the review procedure as in their resolution dated 2nd January 2017 they have mandated their initial attorneys to launch an application for review of the decision taken by Manthata Tribunal Authority during 2014. It is common cause that a Magistrate Court does not have review powers.

[19] The appellants are not seeking the interim relief pending the review of the first and second respondents' decision to increase the levies. They wanted the court to *a quo* to order them to engage with the fourth respondent in order to resolve their issues. That order the court *a quo* was not competent to grant it.

[20] The first and second respondents have powers to run its affairs independently and without any interference. In performing their functions they needed to be given space. There was no basis for the court *a quo* to have interfered with the operations the first and second respondents. The community's resolution was to take the decision of the first and second respondents on review. That was the best approach which the appellants should have followed in vindicating their rights. In my view, the appellants have failed to meet the third requirement.

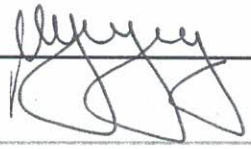
[21] The fourth requirement which the appellants are required to meet is the absence of any other remedy. The appellants in the founding affidavit have stated that they did everything to find an alternative solution and were unsuccessful and that the interim relief will assist the community until such time that certainty is obtained. As I have already pointed out above the first

and second respondents were performing public function and that their action amounted to an administrative action. It follows that their decision to increase the levies is susceptible to review under (PAJA). The appellants did not follow that route as mandated by the community members of Motadi. Review process was an alternative remedy for the appellants'. In my view, the appellants have failed to meet the fourth requirement.

[22] In **National Treasury v Opposition to Urban Tolling Alliance *supra*, at 236 E-F** the court held that the common law annotation to the Setlogelo test is that courts grant temporary restraining orders against the exercise of statutory power only in exceptional cases and when a strong case for that relief has been made out. In the present case taking into account that the increased levies have already been implemented, and the time period that have lapsed since the implementation date before the appellants took action, in my view, there is nothing exceptional. Therefore, the court *a quo* was correct in dismissing the appellant's application and the appeal stand to fail.

[23] In the result the following order is made

23.1 The appeal is dismissed with costs.



MF KGANYAGO

JUDGE OF THE HIGH COURT, POLOKWANE,

LIMPOPO DIVISION

I AGREE

EM MAKGOBA

JUDGE PRESIDENT OF THE HIGH COURT

LIMPOPO DIVISION

APPEARANCE:

COUNSEL FOR THE PLAINTIFF	:	**Adv NEMUKULA**
INSTRUCTED BY	:	**BALOYI SHIHARE ATTORNEYS**
COUNSEL FOR DEFENDANT	:	**Adv SIBIYA**
INSTRUCTED BY	:	**MAKGOBA KGOMO AND MAKGALENG ATTORNEYS**
DATE OF HEARING	:	**22ND FEBRUARY 2019**
DATE OF JUDGEMENT	:	14th March 2019