IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 20830/22

In the matter between

RASHID MAKHUBELA APPLICANT

AND

STELLENBOSCH DISTRICT MUNICIPALITY RESPONDENT

Heard: 14 April 2023

JUDGMENT ON APPLICATION FOR LEAVE T APPEAL

THULARE J

[1] This is an opposed application for leave to appeal against the decision wherein the court granted an order mandating the respondent to grant unrestricted and uninterrupted access for the principal, parents, care-givers and medical personnel which included traditional healers and herbs-persons to initiates then underway at Idas Valley in Stellenbosch. The grounds of appeal are dealt with in this judgment.

[2] The issue is whether leave should be granted.

[3] The first ground related to the attestation of the respondent's answering affidavit. The respondent said the issue was not raised, and if it was, it could have been rectified by calling the commissioner of oaths to testify on the issue. Firstly, the judgment clearly

dealt with the contents of the statement made on behalf of the respondent, and in my view, no prejudice was suffered as the matter did not end, as it could have, in that there was technically in law no answer from the respondent. It is necessary to note that before the court was an application procedure where courts decide the cases upon the record presented and after considering the written and oral arguments presented to it. Ordinarily, unless the court exercise its discretion in the interests of justice, witnesses do not appear before the court. In fact parties need not even be present before the court during the hearing of the matter. A lackadaisical attitude towards court papers, especially an answering affidavit, may be acceptable to the respondent, but that does not mean that it is acceptable to the court and the court is well within its duty to record its displeasure.

[4] Secondly, this was a mandament van spolie and the law in relation thereto was set out and applied. The court provided full reasons for its decision, including its rejection of the respondent's denial that the applicant and others were in possession of the property and that they were unlawfully deprived of such possession and the denial that the applicant was a principal. Speculative irrelevant opinions that found an answering affidavit, in my view, can be rejected out of hand, without recourse to oral evidence. They amount to uncreditworthy denials that a court is justified in rejecting them merely on the papers [*Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at para 55].

[5] Thirdly, the matter before the court did not deal with admission of initiates to an initiation school and child protection. It dealt specifically, from the applicant's point of departure as I understood it, with issues of access to initiates, their training, monitoring, evaluation and assessment. These, in my view, went beyond an initiate who was a child. The question of who should be allowed for such access, training, monitoring and evaluation was central. It seemed to me that some of the definitions in the Act were more inclined towards the admission to the school as well as child protection, and not access to initiates, their training, monitoring, evaluation and assessment. The definition of 'customary guardian' is a classic example in the Act. It defines 'customary guardian' as meaning any person other than a parent or legal guardian who, in terms of the

customs of a particular community, accepted parental responsibility for a child, including the responsibilities referred to in section 18 of the Children's Act. The arm of the definitions in the Customary Initiation Act did not stretch far enough to reach the parents, family members and care-givers as well as medical personnel as understood by Africans in the context of an initiation school.

[6] Lastly, there is nothing in my analysis, including my views on the conduct of the Acting Municipal Manager, Ms de Beer, which went beyond the facts as I understood them. It is simply dishonest for the Stellenbosch Municipality to claim to show *Ubuntu* in its papers, and for it to support De Beer to be a commanding official of armed forces that annihilate *ntu* from its jurisdiction. It is unfortunate that the Municipality did not recognize that its quest to obliterate the initiation of young African men, a cultural practice of Blacks, amounts to a betrayal of dividends which Blacks thought a democratic and constitutional South Africa was going to bring about, to wit, restoration of their dignity. Respect for another and their dignity are material conditions for a common good.

[7] I am not of the opinion that the appeal would have reasonable prospects of success. For these reasons I make the following order:

The application is dismissed with costs.

DM THULARE
JUDGE OF THE HIGH COURT