CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 176/21

In the matter between:

MADIDIMALO KISLON MAMADI	First Applicant
BABIRWA BAGA MAMADI ROYAL FAMILY	Second Applicant
and	
PREMIER OF LIMPOPO PROVINCE	First Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR THE DEPARMENT OF COOPERATIVE GOVERNANCE, HUMAN SETTLEMENTS AND TRADITIONAL AFFAIRS	Second Respondent
LIMPOPO HOUSE OF TRADITIONAL LEADERS	Third Respondent
COMMISSION ON TRADITIONAL LEADERSHIP DISPUTES AND CLAIMS	Fourth Respondent
ABOREKWE THOMAS MAMADI	Fifth Respondent
BABIRWA BA MAMADI ROYAL COUNCIL	Sixth Respondent

Neutral citation:	*Mamadi and Another v Premier of Limpopo Province and Others* [2022] ZACC 26
Coram:	Zondo ACJ, Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Mlambo AJ, Theron J, Tshiqi J and Unterhalter AJ
Judgment:	Theron J (unanimous)

Heard on: 10 March 2022

Decided on: 6 July 2022

Summary: Jurisdiction — Just administrative action — right of access to courts

Rule 6(5)(g) — Rule 53 — res judicata

Plascon Evans rule — reasonably foreseeable disputes of fact irresoluble on the papers — referral to oral evidence or trial

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ORDER

On appeal from the High Court of South Africa, Limpopo Division, Polokwane:

1. Leave to appeal is granted.
2. The appeal is upheld and the order of the High Court is set aside.
3. The matter is remitted to the High Court for trial before a different Judge.
4. The applicants' supplementary notice of motion is to stand as a simple summons.
5. The applicants are directed to deliver their declaration 15 days following the date of this Court's order.
6. The rules as set out in the Uniform Rules of Court for the filing of further pleadings will thereafter apply.
7. The costs incurred to date in the High Court, save in respect of the application for leave to appeal, are to stand over for determination in the trial proceedings.
8. The first, second, third, fifth and sixth respondents must pay the applicants' costs in the applications for leave to appeal in the High Court and the Supreme Court of Appeal.
9. The first, second, third, fifth and sixth respondents must pay the applicants' costs in this Court.

JUDGMENT

THERON J (Zondo ACJ, Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Mlambo AJ, Tshiqi J and Unterhalter AJ concurring):

Introduction

[1] This application has its genesis in a protracted dispute about the recognition of the Kgoshi (Traditional Leader) of the Babirwa BaGa Mamadi traditional community (Mamadi Community). Mr Madidimalo Kislon Mamadi (first applicant) and the Mamadi Royal Family (second applicant) applied in the High Court of South Africa, Limpopo Division, Polokwane (High Court) to review and set aside a decision of the Premier of the Limpopo Province to recognise Mr Aborekwe Thomas Mamadi, the fifth respondent, as acting Kgoshi of the Mamadi Community.[1] They also applied to review and set aside the recommendations of the Commission on Traditional Leadership Disputes and Claims, which found that the first applicant did not have a claim to the position of Kgoshi.

[2] The High Court dismissed the application with costs.[2] It is against this decision that the applicants seek leave to appeal to this Court. The essential basis of the High Court's decision was this: the matter involves disputes of fact, irresoluble on the papers;[3] these disputes of fact were reasonably foreseeable and the application should therefore have been brought as an action,[4] and, in any event, the applicants failed

[1] *Mamadi v Premier Limpopo Province* [2020] ZALMPPHC 97.

[2] Id at paras 55-6.

[3] Id at para 10.

[4] Id at para 54.

timeously to apply for a referral to oral evidence;[5] and no referral was warranted, because oral evidence was unlikely to disturb the balance of probabilities in favour of the applicants.[6] Leave to appeal was refused by the Supreme Court of Appeal.

[3] The application raises a crisp question of procedure: where disputes of fact, irresoluble on the papers, arise in a review application, what approach should a court adopt? More specifically, how does rule 6(5)(g) of the Uniform Rules of Court – which vests a court with a wide discretion in applications in which disputes of fact arise[7] – interact with rule 53, which regulates review proceedings?

Background

[4] The first applicant is Mr Madidimalo Kislon Mamadi and the second applicant is identified as the Mamadi Royal Family. Whether the second applicant is entitled to that appellation is in dispute. The first respondent is the Premier of the Limpopo Province (Premier) and the second and third respondents, respectively, are the Member of the Executive Council (MEC) for the Department of Cooperative Governance, Human Settlements and Traditional Affairs (Department), and the Limpopo House of Traditional Leaders. I refer to the first, second and third respondents collectively as the State respondents. The fourth respondent is the Commission on Traditional Leadership Disputes and Claims (Kgatla Commission), which did not participate in these proceedings. The fifth respondent is Mr Aborekwe Thomas Mamadi, who was recognised as the acting Traditional Leader of the Mamadi Community by the Premier on 20 September 2018 and the sixth respondent is the Babirwa Ba Mamadi Royal Council. I refer to the State respondents and the fifth and sixth respondents collectively as the opposing respondents.

[5] Id at para 48.

[6] Id at para 53.

[7] *Lombaard v Droprop CC* [2010] ZASCA 86; 2010 (5) SA 1 (SCA) at para 25.

[5] The dispute revolves, in large measure, around competing accounts of the genealogy of the Mamadi Community. I detail briefly these opposing accounts for purposes of context. Madidimalo Kislon Mamadi (Madidimalo I), the former Kgoshi of the Mamadi Community and namesake of the first applicant, and Ndiyeng, his principal wife or masechaba, had two sons: Ramphefu, their eldest, and Maphula.[8] Ramphefu had two sons: Ramotshabi, his eldest, and Mabetha. Ramotshabi became Kgoshi but then left the Community for the erstwhile Rhodesia.

[6] What then transpired is a matter of dispute. On the applicants' version, Mabetha was identified as "seed raiser" for Ramotshabi's children. That is, he was to conceive a child who would be Ramotshabi's heir to the position of Kgoshi. The applicants aver, however, that Mabetha died before the child was conceived and Masetha Frank Mamadi, a grandson of Matshopo, Madidimalo I's third wife, was thus nominated as Ramotshabi's "seed raiser". The applicants contend further that one Mabu Dorothy was identified as the "candle wife" who, together with Masetha Frank Mamadi, was to conceive Ramotshabi's heir. Eight children were born of this relationship including Warick Molatelo Mamadi, the eldest, and, Madidimalo Kislon Mamadi, the first applicant. The applicants contend that Warick Molatelo Mamadi ascended to the position of Kgoshi but was displaced from this position by the incumbent government, because he was a member of AZAPO.[9] They say that Lucas Moraka Mamadi, the brother of the fifth respondent, was then appointed as acting Kgoshi. The applicants claim that Warick Molatelo Mamadi has since died, and that the first applicant, as Masetha Frank Mamadi and Mabu Dorothy's eldest surviving son, is the rightful Kgoshi.

[7] The opposing respondents claim that Masetha Frank Mamadi was not identified as Ramotshabi's "seed raiser" and that Mabu Dorothy was not identified as a "candle wife". They contend that after Ramotshabi, Mabetha became Kgoshi, and the

[8] The Kgatla Commission report indicates that they had a third son, though this is immaterial for purposes of this application.

[9] The Azanian People's Organisation.

only male born of Mabetha's marriage with his first wife died before he was eligible to assume the position of Kgoshi. As a result, the first-born male of Mabetha's marriage with his second wife, Joel Thokampe, became heir to the throne. He assumed the position of Kgoshi, and had two sons: Lucas Moraka Mamadi and the fifth respondent. After Joel Thokampe died, Lucas Moraka Mamadi became Kgoshi. The latter died in 2010, leaving a single minor daughter as his heir. As a result, the fifth respondent was appointed as acting Kgoshi.

[8] Prior to that appointment, two commissions of inquiry were established to provide recommendations on the disputed claims to the position of Kgoshi. The first was established in 1997 at the instance of Premier Ngoako Ramahlodi (Ralushayi Commission). In its report delivered in 2004, the Ralushayi Commission did not reach a definitive conclusion. This was primarily because Lucas Moraka Mamadi had refused to give evidence before that Commission, and it was consequently unable to adequately test the competing genealogies. It therefore recommended that the erstwhile Department of Provincial and Local Government not entangle itself in the dispute, and the Premier "either shelve the matter for future official investigation or refer the matter back to the [R]oyal [C]ouncil of Babirwa [B]a[G]a Mamadi for reconsideration". By the time of the delivery of this report Warick Molatelo Mamadi had died.

[9] On 19 August 2009, the Office of the Premier identified Mr Lucas Moraka Mamadi as Kgoshi of the Mamadi Community.

[10] The first applicant subsequently referred a recognition claim to the Kgatla Commission. The Commission notified the first applicant by letter that it would investigate and make recommendations regarding his claim to the position of Kgoshi and undertook to finalise the inquiry before the expiry of its term of office in December 2015.

[11] In June 2017, the Kgatla Commission delivered its report. It rejected the first applicant's account of the Mamadi Community's genealogy. It noted, in addition, that

the first applicant was not a credible witness, that his evidence was "characterised by flaws", and that the genealogy he had presented was "very shallow, wanting and misleading compared to the [evidence] submitted by the [fifth respondent], which [was] comprehensive and elaborate". It recommended that the first applicant's claim for the restoration of the Mamadi senior traditional leadership title be declined.

[12] The first applicant alleges that on 17 November 2017, the Mamadi Royal Family resolved to appoint him as Kgoshi, and addressed a request to the Premier, the MEC for the Department, and the Limpopo Department of Traditional Affairs, that he be recognised as such. The purported resolution of the Mamadi Royal Family was subsequently amended in 2018 to request, amongst others, that the first applicant be appointed as acting Kgoshi of the Mamadi Community. On 1 June 2018, the Premier rejected this request by letter, on the basis that the Kgatla Commission had previously rejected the first applicant's claim. The Premier's letter referred only to the request that the first applicant be recognised as Kgoshi. However, the applicants contended that this letter also constituted a rejection of the request that the first applicant be appointed as acting Kgoshi, and this understanding was not disputed by the State respondents in the High Court. On 20 September 2018, the Premier recognised the fifth respondent as acting Kgoshi of the Mamadi Community.

[13] On 4 July 2018, the applicants instituted a review application in the High Court in terms of the Promotion of Administrative Justice Act[10] (PAJA) which has culminated in the present appeal. The matter was ultimately heard on 15 October 2020. The applicants advanced a sweeping set of grounds of review, which I do not set out in full. In essence, the case advanced was this: the Kgatla Commission's report was irrational, unlawful and was fashioned in a procedurally unfair manner. The nub of the rationality challenge appears to have been that the Kgatla Commission allegedly failed to take into account various submissions, which the applicants contend were relevant. This was said to include submissions on relevant customary law, which the Kgatla Commission

[10] 3 of 2000.

was obliged to consider and apply in terms of section 25(4)(a) of the Traditional Leadership and Governance Framework Act[11] (Traditional Leadership Act).

[14] The procedural unfairness was said to lie, amongst others, in the fact that the first applicant was not afforded a proper opportunity to challenge evidence and that the first applicant and his witnesses were treated in a biased manner. As to lawfulness, the applicants contended that the Kgatla Commission acted ultra vires section 25(4)(b) of the Traditional Leadership Act, by making recommendations more than five years after it was appointed. They contended further that the Kgatla Commission report was unlawfully implemented in breach of section 30 of the Limpopo Traditional Leadership and Institution Act[12] (Limpopo Act). That provision requires that the recommendations of a commission must be referred to the Provincial House of Traditional Leaders for advice before implementation. No such referral was made.

[15] In respect of the Premier's decision not to recognise the first applicant as acting Kgoshi, the essence of the challenge was that the Premier acted ultra vires section 15 of the Limpopo Act, by refusing to recognise the first applicant as acting Kgoshi in the face of a valid resolution of the Mamadi Royal Family identifying him as such. As for the Premier's recognition of the fifth respondent as acting Kgoshi, the applicants contended that the Premier had recognised him as such without a resolution of the Mamadi Royal Family, and thus in breach of section 15 of the Limpopo Act.

[16] The State respondents contended in answer that the applicants lacked locus standi to bring the application. They alleged that the group of individuals cited as the second applicant included the first applicant's children and had been "put together to parade as the Royal Family in order to satisfy the requirements of the [Limpopo Act]". On the merits, the State respondents and fifth respondent[13] collectively contended that the Kgatla Commission had examined and correctly applied relevant

[11] 41 of 2003.

[12] 6 of 2005.

[13] No affidavit was delivered on behalf of the sixth respondent in the High Court.

customary law, and that the first applicant had no entitlement to cross-examine witnesses before the Kgatla Commission. The Premier, they said, was not obliged by section 15 of the Limpopo Act to recognise a person as an acting Kgoshi when presented with a resolution which had been prepared by a group of individuals merely purporting to be the Royal Family. They contended further that, in appointing the fifth respondent as acting Kgoshi, the Premier had in fact acted on a written resolution taken by the legitimate Mamadi Royal Family on 5 March 2018. Finally, the fifth respondent contended that the applicants were time-barred from reviewing the Kgatla Commission report, and that the Premier's communication of 1 June 2018, in which he notified the first applicant that his claim for recognition had been rejected, was not a reviewable decision.

High Court

[17] During oral argument on 15 October 2020, the High Court noted that there were numerous disputes of fact – pertaining both to the merits and the issue of locus standi – that could not be resolved on the papers. The applicants filed supplementary written submissions on the appropriate remedy in which they submitted that since they were required to bring the application on motion in terms of rule 53, the appropriate course was to refer the matter for the hearing of oral evidence. The State respondents and fifth respondent contended that the application should be dismissed, because the applicants were not obliged to bring the review on motion, disputes of fact were reasonably foreseeable, and the referral of the matter to oral evidence as sought by the applicants was opportunistic and incorrect in law.

[18] On 26 November 2020, the High Court dismissed the application with costs. The essential basis for this decision, as I have mentioned, was that the matter entailed disputes of fact irresoluble on the papers both as to locus standi and the merits. The High Court held that rule 53 is not peremptory and, as a result, where disputes of fact irresoluble on the papers are reasonably foreseeable, a litigant must bring a review by way of action. The High Court further held that the applicants had impermissibly sought a referral to oral evidence after the merits had been argued, and in order to bolster a

floundering case and that referral was inappropriate because the balance of probabilities would not be tilted in favour of the applicants if referral to oral evidence was permitted.

Condonation

[19] Condonation for the late delivery of all relevant documents is granted. The State respondents erroneously served their opposing papers on the applicants' previous attorneys. However, the applicants have not contended that these papers were not drawn to their attention and, in any event, these papers had, at the time of the hearing, been available on this Court's website for at least a month. I am therefore satisfied that the applicants will suffer no prejudice through the admission of the State respondents' papers and these papers are accordingly admitted.

Jurisdiction and leave

[20] This application raises a discrete question of law: how does rule 6(5)(g) operate in the context of a review application brought in terms of rule 53? The application thus does not turn, as the opposing respondents suggest, merely on whether the High Court properly applied rule 6(5)(g). Instead, it raises the question whether the High Court correctly construed the rule. That question bears directly on the procedure available to litigants seeking to vindicate their rights to just administrative action in terms of section 33 of the Constitution. It also bears on the circumstances in which a court can refuse to render a final decision in a matter and thus on the right in terms of section 34 of the Constitution to have "any dispute that can be resolved by the application of law decided in a fair public hearing before a court". Our jurisdiction is therefore engaged.

[21] Whether we should grant leave depends on what the interests of justice require. At the hearing, it was vigorously argued by counsel for the State respondents that the High Court's decision did not render the dispute res judicata.[14] Were that so, it would provide an important consideration against granting leave because the High Court's

[14] A matter that has been adjudicated by a competent court and therefore may not be pursued further by the same parties.

decision would be without final effect.[15] That said, it would not provide a conclusive reason to refuse leave because, in this Court, even decisions without final effect are appealable if the interests of justice so require.[16]

[22] A dismissal in terms of rule 6(5)(g) does not preclude a litigant from proceeding by way of action, and thus does not finally dispose of a matter.[17] The difficulty, in this case, is that the precise basis for the High Court's dismissal is unclear. At various parts of its judgment, the High Court appeared to indicate that it had not simply dismissed the matter in terms of rule 6(5)(g), but that it had applied *Plascon-Evans*[18] to determine the merits. To this end, after holding that "the request to refer the matter to oral evidence is refused", it went on to hold that "[o]n the merits of the application, I am of the view that the applicants have not made out a case for the relief they seek".

[23] However, despite this, I do not understand the High Court to have determined the merits. It explained, in various parts of the judgment, that the dispute of fact was such that the application could not be decided on affidavit. And where it engaged the merits of the application, I understand it to have done so for the limited purpose of determining whether a referral to oral evidence was warranted. The High Court's conclusion that the applicants failed to make out a case for the relief sought meant only that the applicants had failed to make out a case for a referral to oral evidence. As a result, the High Court's decision did not render the dispute res judicata.

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[15] *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) at para 49.

[16] *Khumalo v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 8.

[17] *Lombaard* above n 7 at para 26.

[18] In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634H-I, the Appellate Division held that:

> "[W]here in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order."

This dictum is referred to as the *Plascon-Evans* dictum or rule.

[24] There are, nonetheless, compelling considerations of justice which suggest that we should grant leave. First, the effect of the High Court's decision is to establish a precedent of substantial import: where disputes of fact, irresoluble on the papers, are reasonably foreseeable, a litigant is required to forego the advantages of rule 53, and bring a review as an action. Second, as I have explained, dismissals in terms of rule 6(5)(g) are without final effect. Were we to refuse leave on the basis that the High Court's decision in this matter did not render the dispute res judicata, we would be foreclosing the possibility of this Court ever considering whether and in what circumstances a court is entitled to exercise its rule 6(5)(g) discretion to dismiss a rule 53 review. Given the broad import of this issue, and its bearing on sections 33 and 34 of the Constitution, I cannot accept that this is what the interests of justice require. Third, if the High Court misconceived its discretionary powers in terms of rule 6(5)(g) and we were to refuse leave, we would be forcing the applicants to institute proceedings afresh on the basis of the High Court's mistake of law. This would be contrary to the interests of justice. Finally, for reasons set out later, I am of the view that the application has prospects of success. Leave to appeal is thus granted.

[25] It is necessary to note that leave must be refused in respect of two aspects of the applicants' case. First, the applicants contended, in this Court, that the Premier failed to comply with section 12 of the Limpopo Act in refusing to appoint the first applicant as Traditional Leader. However, in the High Court, the applicants' challenge concerned the first applicant's non-appointment as *acting* Traditional Leader, rather than his non-appointment as Traditional Leader. In relying on section 12 in this Court, the applicants therefore attempted to enlarge the scope of their challenge. This is impermissible, and leave must therefore be refused in respect of the applicants' section 12 challenge. Second, the applicants sought to appeal the High Court's decision to admit various of the opposing respondents' affidavits, which the applicants contended did not comply with the provisions of the Regulations Governing the Administering of an Oath or Affirmation.[19] The High Court's exercise of its discretion

[19] GN R1258 *GG* 3619, 21 July 1972.

to overlook the irregularities in those affidavits does not engage this Court's constitutional or extended jurisdiction. Though there might be circumstances where the improper admission of an affidavit vitiates the fairness of proceedings, and thus raises a constitutional issue, this is not such a case. Leave must therefore be refused in respect of this issue.

Rule 53

[26] Rule 53 provides, in relevant part, that:

> "(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions *shall be by way of notice of motion* directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairperson of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected—
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> (a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and
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> (b) calling upon the magistrate, presiding officer, chairperson or officer, as the case may be, to despatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he or she is by law required or desires to give or make, and to notify the applicant that he or she has done so.
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> . . .
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> (4) The applicant may within ten days after the registrar has made the record available to him or her, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of his or her notice of motion and supplement the supporting affidavit." (Emphasis added.)

[27] Despite its peremptory language, it has long been settled that litigants are not obliged to bring review proceedings in terms of rule 53. In *Jockey Club*,[20] the Appellate Division explained the two-fold purpose of the rule. It provides a "procedural

[20] *Jockey Club of South Africa v Forbes* [1992] ZASCA 237; 1993 (1) SA 649 (A).

means whereby persons affected by administrative or quasi-judicial orders or decisions [can] get the relevant evidential material before the Supreme Court".[21] In addition, it means that litigants do not have to launch review proceedings in the dark, and then incur the expense of applying to amend their papers.[22] Instead, they can, as a matter of right, amend their founding papers after delivery of the rule 53 record.[23]

[28] Regarding the purpose of the rule, the Appellate Division concluded that:

> "The primary purpose of the Rule is to facilitate and regulate applications for review. On the face of it the Rule was designed to aid an applicant, not to shackle him. Nor could it have been intended that an applicant for review should be obliged, irrespective of the circumstances and whether or not there was any need to invoke the facilitative procedure of the rule, slavishly – and pointlessly – to adhere to its provisions. After all:
> '[R]ules are not an end in themselves to be observed for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before the courts.'"[24]

[29] In short, *Jockey Club* held that the rule is designed to confer advantages on litigants seeking to review administrative action. Litigants are however entitled to forego these procedural advantages.[25]

[30] It should be noted that at issue in *Jockey Club* was whether a litigant was entitled to bring review proceedings on motion in terms of rule 6, rather than rule 53. It therefore did not definitively decide whether review proceedings could be brought by way of summons. There is, however, no cogent reason why the *Jockey Club* dictum should be understood to mean that a litigant can only employ rule 6 instead of rule 53. Where, for instance, a litigant is in possession of the record of the relevant decision,

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[21] Id at 661H-J citing with approval *S v Baleka* 1986 (1) SA 361 (T) at paras 397-8.

[22] Id at 660D-H.

[23] Id.

[24] Id at 661E-H.

[25] *Adfin (Pty) Ltd v Durable Engineering Works (Pty) Ltd* 1991 (2) SA 366 (C) at 368H-G.

foresees that the disputes of fact are such that they can only be resolved in trial proceedings, and is willing to proceed by the lengthier process of trial, it would be undue formalism to require that proceedings be brought on motion and that a request must then be made to refer proceedings to oral evidence or trial.[26]

[31] For this reason, I also do not understand rule 2 of the Administrative Review rules (PAJA Rules) to preclude a litigant from instituting review proceedings by way of action. That rule is framed in peremptory language and provides, in relevant part, that:

> "[a]n application for judicial review in terms of the Act that is instituted in the High Court, in circumstances where no record or only part of the record has been furnished, *shall be brought in terms of rule 6 or 53 of the High Court rules*, at the election of the applicant, as the case may be."[27]

As with rule 53, the peremptory language of this rule should be understood against its purpose.[28]

[32] Administrative decisions, until set aside by a court, exist in fact and have legal consequences.[29] There is, accordingly, a need to have recourse to a procedure that may expeditiously set aside unlawful administrative action. Trial proceedings are in general lengthier than application proceedings and, as a result, are in general unsuitable for the expeditious adjudication of review proceedings. The PAJA Rules confer an entitlement on litigants to institute review proceedings by way of rule 6 or rule 53 of the Uniform Rules of Court, so that their section 33 rights are expeditiously vindicated if the

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[26] See for example *Nelson Mandela Bay Metro v Erastyle* 2019 (3) SA 559 (*Erastyle*), in which the High Court adopted this line of reasoning. Notably, however, and presumably because of the procedural advantages which rule 53 bestows, counsel for the opposing respondents were unable to point this Court in the direction of a decision in which a review had been brought by way of action. *Erastyle* is one notable exception.

[27] Emphasis added.

[28] *University of Johannesburg v Auckland Park Theological Seminary* [2021] ZACC 13; 2021 (6) SA 1 (CC); 2021 (8) BCLR 807 (CC) at para 65; *Chisuse v Director-General, Department of Home Affairs* [2020] ZACC 20; 2020 (6) SA 14 (CC); 2020 (10) BCLR 1173 (CC) at para 52; *Capitec Bank Holdings Ltd v Coral Lagoon Investments 194 (Pty) Ltd* [2021] ZASCA 99; 2022 (1) SA 100 (SCA) at para 25; and *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at para 18.

[29] *Oudekraal Estates (Pty) Ltd v City of Cape Town* [2004] ZASCA 48; 2004 (6) SA 222 (SCA) at para 26.

administrative decision is shown to be unlawful. But it does not follow that litigants cannot forego this entitlement.

[33] The High Court's conclusion that rule 53 is not peremptory, and that review proceedings can be brought by way of action proceedings, is therefore correct. This much was correctly conceded, in oral argument before this Court, by counsel for the applicants. This, however, provides no support for the High Court's crucial further finding that because a litigant *can* bring review proceedings by way of summons, where disputes of fact, irresoluble on the papers, are reasonably foreseeable, she must do so.

[34] The applicants contended that this finding impermissibly requires litigants, in circumstances where disputes of fact are reasonably foreseeable, to forego the advantages of the rule 53 record. The opposing respondents offered two answers to this contention. First, they contended that in trial proceedings, all relevant documents can be obtained by way of discovery. Second, that section 173 of the Constitution – which vests the courts with the power to regulate their own process – enables litigants in action proceedings to obtain the documents that would otherwise be obtained under rule 53.

[35] The short answer to the opposing respondents' first contention is this: the process under rule 53 is different from that under rule 35. Rule 53 provides access to a far greater ambit of documents than normal discovery under rule 35. As this Court explained in *Helen Suzman Foundation*:

> "[T]he rule 53 process differs from normal discovery under rule 35 of the Uniform Rules of Court. Under rule 35 documents are discoverable if relevant, and relevance is determined with reference to the pleadings. So, under the rule 35 discovery process, asking for information not relevant to the pleaded case would be a fishing expedition. Rule 53 reviews are different. The rule envisages the grounds of review changing later. So, relevance is assessed as it relates to the decision sought to be reviewed, not the case pleaded in the founding affidavit."[30]

[30] *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8; 2018 (4) SA 1 (CC); 2018 (7) BCLR 763 (CC) at para 26.

[36] The rule 53 record contains "all information relevant to the impugned decision or proceedings"[31] which includes "every scrap of paper throwing light, however indirectly, on what the proceedings were"[32] and the record of the deliberations of the relevant decision maker.[33] The fundamental importance of the rule 53 record was explained by this Court in *Turnbull-Jackson*:

> "Undeniably, a rule 53 record is an invaluable tool in the review process. It may help: shed light on what happened and why; give the lie to unfounded ex post facto (after the fact) justification of the decision under review; in the substantiation of as yet not fully substantiated grounds of review; in giving support to the decision-maker's stance; and in the performance of the reviewing court's function."[34]

[37] It is therefore no answer that a litigant will not be disadvantaged if she is required to institute review proceedings by way of summons because she can call for discovery in terms of rule 35.

[38] The contention that section 173 could be employed to obtain access to all relevant documents is likewise unpersuasive. That section has never been employed in trial proceedings, in effect, to obtain the rule 53 record. Whether it can be so employed was not adjudicated by the High Court, and I thus consider it unnecessary and imprudent for this Court to render any finding on this issue. It suffices to say that rule 53 provides the prevailing mechanism with which litigants can access all documents and reasons relevant to the impugned administrative decision.

[39] The applicants are accordingly correct that if, as the High Court held, litigants are in certain circumstances required to bring review proceedings by way of summons,

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[31] Id at para 17.

[32] *Johannesburg City Council v The Administrator Transvaal* (1) 1970 (2) SA 89 (T) at 91H.

[33] *Helen Suzman Foundation* above n 30 at para 24.

[34] *Turnbull-Jackson v Hibiscus Court Municipality* [2014] ZACC 24; 2014 (6) SA 592 (CC); 2014 (11) BCLR 1310 (CC) at para 37.

they will be forced to forego the advantages of rule 53. The advantages to an applicant are that once the record and the reasons are obtained, the applicant may supplement their founding affidavit, and the respondent is in a position to file a comprehensive answer. The issues are defined and the evidence marshalled on the basis of an informed understanding of the administrative action and the reasons underpinning it. It may be possible to replicate these advantages in a trial action, but the procedural route to achieve this has not been determined. But even if it were possible, there seems to be no compelling reason to require a litigant to forego the utility of rule 53, even if a dispute of fact is reasonably anticipated. Recourse to rule 53 will not be in vain. What may need to be referred to evidence or trial will become clear. To insist on the institution of a trial action may very well prove cumbersome and time-wasting. That is constitutionally unacceptable. The rule 53 record both gives effect to the section 34 right of access to courts, and enables a court to properly perform its constitutional review function. As the Supreme Court of Appeal held in *Democratic Alliance*:

> "Without the record a court cannot perform its constitutionally entrenched review function, with the result that a litigant's right in terms of section 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed."[35]

[40] There is no reason why, in a matter where disputes of fact irresoluble on the papers are reasonably foreseeable, a litigant should be forced to forego the benefit of rule 53. It follows that the High Court erred in holding that, where disputes of fact are reasonably foreseeable, review proceedings must be brought by way of action.

How does rule 6(5)(g) interact with rule 53?

[41] The remaining question is whether, in review proceedings brought in terms of rule 53, and after the applicant has obtained the record, a court may in terms of its

[35] *Democratic Alliance v Acting National Director of Public Prosecutions* [2012] ZASCA 15; 2012 (3) SA 486 (SCA) at para 37 cited with approval in *Helen Suzman Foundation* above n 30 at paras 14-5.

discretion under rule (6)(5)(g), on the basis that the matter cannot be decided on affidavit, dismiss the matter without rendering a final decision. Rule 6(5)(g) provides:

> "Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the aforegoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise".

[42] The purpose of the court's discretion under this rule to dismiss an application is to discourage a litigant from using motion proceedings when the court will not be able to decide the dispute on the papers. This is a waste of scarce judicial resources and prejudicial to the respondent. An applicant should not be able to use motion proceedings when the worst outcome is confined to a referral to oral evidence or trial. Rule 6(5)(g) thus vests a power in courts, where motion proceedings have been inappropriately used in this way, to penalise a litigant through dismissal without rendering a final decision. In short, therefore, a dismissal in terms of rule 6(5)(g) serves to punish litigants for the improper use of motion proceedings.

[43] Does a litigant who brings a review in terms of rule 53, and thus on motion, where disputes of fact are reasonably foreseeable, act in an impermissible way? Quite plainly not. Litigants are constitutionally entitled to make use of rule 53 in review proceedings, in order to properly give effect to their section 34 rights.[36] It therefore cannot be that a litigant can be penalised through the use of rule 6(5)(g), merely because rule 53 was utilised. It follows that a court does not have a discretion under rule 6(5)(g) to dismiss an application brought in terms of rule 53 on the basis that reasonably anticipated disputes of fact arise on the papers. This is neither just – because it penalises a litigant for making use of the procedural advantages of rule 53 – nor does it facilitate

[36] Id.

an expeditious and inexpensive resolution of the dispute, because it forces a litigant to begin proceedings afresh by way of action.

[44] This does not mean that an applicant in a rule 53 application is entitled, as of right, to have a matter referred to oral evidence or trial. General principles governing the referral of a matter to oral evidence or trial remain applicable. Litigants should, as a general rule, apply for a referral to oral evidence or trial, where warranted, as soon as the affidavits have been exchanged.[37] Where timeous application is not made, courts are, in general, entitled to proceed on the basis that the applicant has accepted that factual disputes will be resolved by application of *Plascon-Evans*. Likewise, where an applicant relies on *Plascon-Evans*, but fails to convince a court that its application can prevail by application of the rule, a court might justifiably refuse a belated application for referral to oral evidence. A court should however proceed in a rule 53 application with caution. An applicant might institute proceedings in good faith in terms of rule 53, in order to secure the advantages of the rule and on the basis that the application can properly be decided by application of *Plascon-Evans*, only for the respondent to later show that this is not so. In these circumstances, provided the dispute of fact which emerges is genuine and far-reaching and the probabilities are sufficiently evenly balanced, referral to oral evidence or trial, as the case may be, will generally be appropriate.

[45] It bears emphasis, however, that litigants cannot permissibly apply for referral to oral evidence or trial "where the affidavits themselves, even if accepted, do not make out a clear case, but leave the case ambiguous, uncertain or fail to make out a cause of action."[38] In that event, the application should of course fail without recourse to *Plascon-Evans* or oral evidence. But where a case is properly made out, the disputes of fact are genuine, far-reaching and fundamental and cannot be resolved by application of *Plascon-Evans*, the proper course in rule 53 proceedings is, in general, referral to oral

[37] *Law Society, Northern Provinces v Magami* [2009] ZASCA 107; 2010 (1) SA 186 (SCA) at 195C-D.

[38] *Carr v Uzent* 1948 (4) SA 383 (W) at 390.

evidence or trial. Dismissal without rendering a decision in these circumstances is inappropriate. Both rule 53 and the PAJA Rules render review by way of motion the default position. Determining a review application without making a final decision frustrates the purpose of expeditiously addressing unlawful administrative action. Put differently, where a review application is dismissed without rendering a final decision – so as to compel a litigant to proceed by way of action – this purpose is frustrated.

Appropriate remedy and conclusion

[46] In dismissing the application, the High Court was moved by a mistake of law, and we are therefore entitled to interfere with its wide discretion under rule 6(5)(g).[39] That Court made two further fundamental errors, which permit our interference, and which are also relevant to the question of remedy. First, it relied, in part, on the recommendations of the Kgatla Commission to conclude that the balance of probabilities would not be disturbed in the applicants' favour by referral to oral evidence, and that such referral was therefore inappropriate. This reliance was impermissible. The Kgatla Commission's recommendations were challenged by the applicants and could not therefore be accepted as true in order to refuse referral to oral evidence.

[47] Second, two of the bases upon which the applicants sought to challenge the impugned decisions were not seriously disputed in the High Court. In particular, it was not disputed that the Kgatla Commission delivered its recommendations outside of the five year time period prescribed by section 25(4)(b) of the Traditional Leadership Act. Nor was it disputed that the Premier did not refer the Kgatla Commission's recommendations to the Provincial House of Traditional Leaders for advice on their implementation. In this Court, the opposing respondents trenchantly submitted that, in fact, the Kgatla Commission had not been appointed in 2011 as alleged by the applicants, and therefore had timeously delivered its recommendations. And, they submitted further, even if the recommendations were delivered outside the allotted time

[39] *Ferris v FirstRand Bank Ltd* [2013] ZACC 46 (CC); 2014 (3) SA 39 (CC); 2014 (3) BCLR 321 (CC) at para 28.

period, this would not require that those findings be set aside. In respect of the Premier's failure to refer the Kgatla Commission's recommendations to the Provincial House of Traditional Leaders, the State respondents submitted that no referral is required where a commission merely refuses to recognise a claim to a position of traditional leadership.

[48] Whatever the merit in the opposing respondents' submissions, in refusing referral on the basis that the applicants' case was hopeless, without first assessing these undisputed grounds of review, the High Court committed a fundamental error. The High Court could have adopted the view that it would be preferable to refer the matter to trial, or to refuse to adjudicate any of the grounds of review before the hearing of oral evidence, and that it was undesirable to decide certain of the grounds of review in a piecemeal fashion. What it could not do, however, was refuse referral on the basis that oral evidence would not tip the balance in favour of the applicants, without first assessing each of their grounds of review, and especially those grounds of review that were undisputed.

[49] As indicated, the High Court rendered no decision on the merits. Were we to engage the applicants' various grounds of review, we would therefore do so as a court of first and last instance. That would not be appropriate. There are, furthermore, widespread and fundamental disputes of fact, which plainly cannot be adjudicated on the papers, and which are insufficiently narrow in scope to be referred to oral evidence.[40] Without being exhaustive, these include: the authenticity and validity of the various resolutions submitted to the Premier for purposes of recognising an acting Kgoshi; the competing claims as to the genealogy of the Mamadi Community; the competing claims as to whether the Kgatla Commission applied appropriate customary law in rendering its recommendations; and the date of appointment of the Kgatla Commission.

[40] *Pressma Services (Pty) Ltd v Schuttler* 1990 (2) SA 411 (C) at 419E-G.

[50] The appropriate order is therefore that the matter be referred to trial. Given the adverse remarks the High Court made about the merits of the applicants' case, the trial proceedings should be heard by a different Judge.

[51] The applicants' supplementary notice of motion will stand as a simple summons. Given the voluminous set of affidavits filed in this application, it will be facilitative of an orderly resolution of this dispute that the parties are directed to file pleadings, rather than that the affidavits be permitted to stand as such pleadings. Accordingly, 15 days after this Court's order, the applicants are to deliver a declaration, after which the ordinary rules for the filing of pleadings will apply.

Costs

[52] The applicants have been successful in this appeal, and costs in this Court must therefore follow the result. Since the applications for leave to appeal to the High Court and Supreme Court of Appeal were necessitated by the High Court's erroneous decision, the applicants are entitled to their costs in those applications. Costs in the High Court, save in respect of the application for leave to appeal in that Court, are to stand over for determination in the remitted trial proceedings.

Order

[53] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld and the order of the High Court is set aside.
3. The matter is remitted to the High Court for trial before a different Judge.
4. The applicants' supplementary notice of motion is to stand as a simple summons.
5. The applicants are directed to deliver their declaration 15 days following the date of this Court's order.
6. The rules as set out in the Uniform Rules of Court for the filing of further pleadings will thereafter apply.

7. The costs incurred to date in the High Court, save in respect of the application for leave to appeal, are to stand over for determination in the trial proceedings.

8. The first, second, third, fifth and sixth respondents must pay the applicants' costs in the applications for leave to appeal in the High Court and the Supreme Court of Appeal.

9. The first, second, third, fifth and sixth respondents must pay the applicants' costs in this Court.

For the Applicants:	M B Monyemoratho instructed by Mmamphiwa Phihlela Attorneys
For the First to Third Respondents:	M Makoti, N Ntuli and T Malatji instructed by Office of the State Attorney, Polokwane
For the Fifth and Sixth Respondents:	G R Egan instructed by Chris Greyvenstein Attorneys