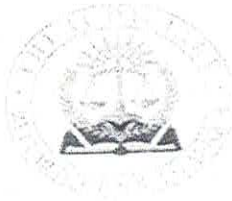


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE NO: 3762/2019 & 3722/2019

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED.
DATE: 20/9/2019 SIGNATURE: [Signature]	

MEMBER OF THE EXECUTIVE COUNCIL FOR
CO-OPERATIVE GOVERNANCE HUMAN SETTLEMENT
AND TRADITIONAL AFFAIRS, LIMPOPO PROVINCE

1ST APPLICANT

THE PREMIER, LIMPOPO PROVINCE

2ND APPLICANT

And

MATHOPO JUNIOR MONTSHA

1ST RESPONDENT

MABOGOANE SHIME JOB

2ND RESPONDENT

TJIANE BEN

3RD RESPONDENT

SEERANE ALFRED

4TH RESPONDENT

KAMELA MAKHUDU

5TH RESPONDENT

LESHABA DAVID

6TH RESPONDENT

MOSEHLA MATHUME

7TH RESPONDENT

MAAKE ABRAM PHULUSHI

8TH RESPONDENT

MASHEGOANE ANNAH

9TH RESPONDENT

TSHEGO JAN

10TH RESPONDENT

MAKABANE MARTHA

11TH RESPONDENT

TSHEGO LUCAS SPUNGA

12TH RESPONDENT

MALAPANE SINAH

13TH RESPONDENT

MAKGOPA ABRAM

14TH RESPONDENT

MOKGWADI PA

15TH RESPONDENT

SEKELE MP

16TH RESPONDENT

SEKELE A

17TH RESPONDENT

MOLAPO DITABENG RICHARD

18TH RESPONDENT

MASHUBUKU ISAAC

19TH RESPONDENT

MABOGWANE J

20TH RESPONDENT

MAKOLA MS

21ST RESPONDENT

MOSOTHO A	22 ND RESPONDENT
PHASHA P	23 RD RESPONDENT
MASHEGOANE MOLAPO	24 TH RESPONDENT
TALANE J	25 TH RESPONDENT
Ms MOHLAHLO	26 TH RESPONDENT
NKWANA IDAH	27 TH RESPONDENT
MASHAO MORWASEHLA ROBERT	28 TH RESPONDENT
MAHLAMOLA RASEOGO LIFI	29 TH RESPONDENT
RAMAWELA THOMAS	30 TH RESPONDENT
MOSHOLE NGWAKO JAMES	31 ST RESPONDENT
MOHALE SIPHO	32 ND RESPONDENT
MAGWAI SAMSON	33 RD RESPONDENT
KOMA JANUARY JOHANNES	34 TH RESPONDENT
MAHASHA ALEX MATOME	35 TH RESPONDENT
LESHIBA MABIDI	36 TH RESPONDENT
IVY MASHALANE	37 TH RESPONDENT
KGOSHIGADI MATHEBE MC	38 TH RESPONDENT
BANTWANE TRIBAL COMMUNITY	

KGOSHIGDI KEKANE MF
AMANDEBELE TRIBAL COMMUNITY

39TH RESPONDENT

KGOSHIGADI DINKWENYANE TF
BAPEDI BA DINKWENYANE TRIABAL COMMUNITY

40TH RESPONDENT

KGOSHIGADI MAMPURU MB
BAPEDI BA MAMONE

41ST RESPONDENT

KGOSHIGADI MADIHLABA N
MAROTA MADIBONG

42ND RESPONDENT

ACTING KGOSHIKGOLO SEKHUKHUNE KK
MAROTA MOHLALETSI

43RD RESPONDENT

KGOSHI MADIHLA DJ
KWENA-MADIHLABA TRIBAL COMMUNITY

44TH RESPONDENT

KGOSHI RAMAUBE KS
BAPEDI BA RAMAUBE TRIBAL COMMUNITY

45TH RESPONDENT

KGOSHIGADI NKOSI TE
BANGWENYAMA YA MASWAZI

46TH RESPONDENT

KGOSHI MALEKANA NM
BAHLAKWANA BA MALEKANA
TRIBAL COMMUNITY

47TH RESPONDENT

KGOSHI MAHLANGU PJ
NDEBELE TRIBAL COMMUNITY

48TH RESPONDENT

REGENT MODJADJI MT
MODJADJI TRIBAL COMMUNITY

49TH RESPONDENT

KGOSHI MATLALA TP
BAKONE TRIBAL COMMUNITY

50TH RESPONDENT

KGOSHI MAJA DC
MAJA TRIBAL COMMUNITY
LIMPOPO KOMA
PRACTITIONERS ASSOCIATION

51ST RESPONDENT

52ND RESPONDENT
(Intervening Party)

JUDGMENT

THE COURT: MAKGOBA JP et MG PHATUDI J

Introduction

[1] Member of the Executive Council for Co-operative Governance, Human Settlement and Traditional Affairs, Limpopo Province ("MEC COGHSTA") and the Premier of Limpopo Province ("the Premier") (hereinafter called "the applicants") brought an urgent application before this court against the First to the Thirty Seventh Respondents seeking an order in the following terms:

1. Interdicting and restraining the Respondents and ordering that they desist from continuing with the conduct of -

1.1 Illegal initiation schools in the respective areas of the Thirty-eight to Fifty First Respondents.

1.2 Further opening illegal initiation schools in any other area within the area of jurisdiction of Limpopo Province as demarcated in the Constitution of the Republic of South Africa.¹

1.3 Intimidating, harassing or threatening, impeding and/or in any other way interfering or harming any of the Applicants employee's agents, representatives of any government provincial department, and/or any other person present at or in the illegal initiation schools ('Koma'); and

1.4 Inciting or instigating any person or persons to conduct any unlawful activities in the area of authority of the Thirty-Eight (38th) to Fifty first (51st) Respondent;

2. Directing the closure of the illegal initiation schools and authorizing the members of the South African Police Service (SAPS) in all the regions where the schools are operating, to assist the officials of the Department to close the illegal schools;

3. Directing that the initiates who are presently in the illegal initiation schools be relocated to other schools which have been opened and are operating with permits issued in terms of the Act;

4. Directing the First to Thirty Seventh Respondents to pay over all the monies that they have collected from the initiates or the

¹ The Constitution of the Republic of South Africa, Schedule 1A of the Twelfth amendment.

initiates' parents or guardians over to the legal initiations schools conducted by the Thirty-Eight to the Fifty First Respondents, as the case may be;

5. Ordering any of the Respondents who oppose this application to pay the costs of the application, jointly and severally, the one paying the others to be absolved." The application is opposed by several respondents including the Fifty Second Respondent who is the intervening party.

[2] On the 25 June 2019, sitting as a single Judge, MG Phatudi J made an order that the above mentioned cases be consolidated and be heard in *tandem* on 02 July 2019.

[3] Because of the complexity, novelty and national significance of the issues raised in the application, this court deemed it apposite in the interests of equity and justice to constitute a Full Bench to deal not only with the question of urgency, but also to dispose of the merits once and for all. It was for these considerations that the matter was heard by Full Bench on 03 July 2019, **(Makgoba JP and MG Phatudi J constituting Coram).**

[4] On 03 July 2019 upon hearing the matter, the court in the interests of the public, admitted the 52nd Respondent as Intervening party to the proceedings. The Court also took the view as a preliminary way of expeditious hearing of and the disposal of the proceedings, to dispense with arguments confined to urgency only, but had to deal with the matter holistically.

[5] Having heard argument on the merits, and to a narrow extent on urgency of the matter, the Court made the following order and undertook to furnish reasons for the order in due course.

1. *"That, the time periods and service requirements provided for in the Uniform Rules of Court, are dispensed with and the case is disposed of as one of urgency in terms of Rule 6(12) (a) and (b).*
2. *That, a final order is granted in the following terms: -*

2.1 *Interdicting and restraining the first to Thirty Seventh Respondent from: -*

2.1.1 *Continuing with the conduct of illegal initiation school (Koma) in the areas referred to in the present application; and*

2.1.2 Further opening or to continue conducting illegal initiation schools ('Koma') within the areas of Jurisdiction of the Thirty-eight (38th) to Fifty First (51st) Respondents, or any other area in the province of Limpopo; and

2.1.3 Intimidating, harassing or threatening, impeding and/or in any other way interfering with or harming any of the Applicants' employees, agents, representatives of any government, provincial department, and/or any other person present at or in the illegal initiation schools ('Koma'); and

2.1.4 Inciting or instigating any person or persons to conduct any unlawful activities in the area of authority of the thirty (38th) to Fifty first (51st) Respondent;

3. Directing the closure of all illegal initiation schools ('Dikoma') within Limpopo Province which now or in future may conduct illegal or unlicensed initiation school, and authorizing members of the South African Police Services (SAPS) in all the provincial regions where such schools are operating, to assist the applicant's officials to close down the said schools; and

4. Directing that the initiates who are presently kept in the illegal initiation schools (Dikoma) be relocated and/or transferred to other initiation schools which operate with valid permits issued in terms of the Limpopo Province Circumcision Act of 1996 and Regulations promulgated thereunder ("the Act").

5. *The operation of the orders in 3 and 4 above, are hereby suspended for a period of twelve (12) months from the date of this order pending compliance by the Respondent with the provisions of sections 3 and 4 of the Act and the provisions of sections 3 and 4 of the Act and Regulations (sections 2,3,4,5,6,7,8, and 9A of the Regulations)*

6. *There is no order as to costs.*

What then follows are the reasons for the orders made.

Factual Matrix

[6] The applicants averred in their application that the First to Thirty Seventh Respondents all of whom are not "permit holders" as defined in Section 1 of the Regulations promulgated under Act 6 of 1996² (Limpopo statutes), have unlawfully and in contravention of the relevant Act and Regulations, opened and/or continued at the time with illegal initiation schools within the areas where the Thirty Eight to Fifty First Respondents exercise their authority as Senior Traditional Leaders ("Magoshi").

² Limpopo Province Circumcision Schools Act, 1996 and the Regulations promulgated thereunder, GN95 dated 28 May 2002, as amended by PG 897 Dated 20 May 2003.

A Senior Traditional Leader ("Kgoshi") is for the sake of completeness, defined in section 1 of Act 41 of 2003³ as amended, (the framework Act")

as: -

"a traditional leader of a specific traditional community who exercises authority over a number of headmen or headwoman in accordance with customary law, or within whose area of jurisdiction a number of headmen or headwomen exercise authority."

[7] The Applicants averred further that the First to the Thirty Seventh Respondents' conduct in operating the initiation schools without valid permits issued by the Second Applicant is inherently unlawful as it violates the legislative precepts laid down by the Limpopo Legislature regulating traditional schools of this nature. It is common cause that the Respondents have not been issued with the required permits by the Second Applicant.

[8] The issues for determination in this matter are crisp and are confined to the question whether a final interdict sought by the Applicants is a competent relief and whether the conduct of the

³ Traditional Leadership and Governance Framework Amendment Act, 2003. ["TLHF Act"]

aforesaid Respondents is repugnant to the applicable legislative framework and, therefore, offend the principle of legality and the rule of law.

Legislative and Regulatory Framework

[9] The customary practice of circumcision that is associated with traditional circumcision schools ("Koma") is an ancient custom that was practised from time immemorial among most African traditional communities as well as under ancient Jewish law and religion. Circumcision occurred mostly during childhood or around puberty as part of a rite of passage to manhood or womanhood.

Circumcision was prevalent in the religion of Judaism, Islam and Coptic Orthodox church. It was seen as a sign of the **Covenant with God**.⁴

In African cultural philosophy, however, it is seen as an entry or passage into rite of manhood/womanhood.

⁴ Genesis 17:13 "Good News Bible" - Each one must be circumcised, and this will be a physical sign to show that my Covenant with you is everlasting."

[10] For present purposes, the Limpopo Government has ordained legislation for the "control of holding circumcision schools" in accordance with the Act and the regulations promulgated thereunder.

[11] Section 3 of the said Act provides that:

"No person shall hold a circumcision school without a valid permit issued to him or her in terms of section 2(1)."

[12] Circumcision school's permit for holding of such school ("Koma") is issued by the Premier of Limpopo as envisaged in section 2(1) of the Act. In *casu*, the Second Applicant. In terms of section 7 thereof it is an offence for any person to contravene "any provision" of the Act or fail to comply with any condition imposed in terms of Section 2(1) of the Act.⁵

[13] The Premier or his /her authorised officer may under the provisions of section 2(1) issue to a "Kgoshi" (Senior Traditional Leader) a permit granting permission to conduct an initiation school. A "permit holder"

⁵ Limpopo Province Circumcision Schools Act 6 of 1996- the Preamble thereof

usually a "Kgoshi", is entitled to apply to the Premier or authorized officer for a permit to conduct an initiation school.⁶

[14] It was submitted on behalf of the applicants that none of the Respondents (the First to Thirty Seventh Respondents) were in possession of a valid permit to conduct initiation schools within the area of authority of the Thirty-Eight to Fifty First Respondents. Needless to mention, none of the affected Respondents complaint of are Senior Traditional Leaders entitled to seek permission to hold initiation schools as such. This submission is in our view well founded and correct.

[15] It is worthy to mention that the affected respondents have, by and large, relied on lack of urgency of the application and generally made no effort to attack the application on the merits. The reason is not hard to find. This is simply because none of the affected respondents had a valid permit to conduct Koma as envisaged in section 2(1) of the Act read with Regulation 2(1).

⁶ Section 2, The Initiation Schools Regulations"

[16] For all the foregoing considerations it follows that by their conduct, the affected Respondents have violated the principle of legality and the rule of law. The illegality stems from unlawful opening and holding of initiation schools in the arears referred to without authorised permits. The Act makes it an offence with criminal sanctions attached to conduct illegal Koma.

Furthermore, in instances where the initiation schools were already in session when the application was launched, traditional surgeons or nurses were not permitted to perform initiations and/or circumcision procedure on initiates.

Cultural and Religious Rights of Communities

[17] It is trite principle that “persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community⁷” to enjoy their culture, practise their religion and use their language. The rights referred to, however, may not be exercised in a manner inconsistent with any provision of the Bill of Rights. Closely interlaced with the above principle, is the right under section 30 to “participate in cultural life” of their choice which, in our view, covers the right to undergo initiation schools for circumcision purposes.

⁷ Section 31(1); 31(2) of the Constitution Act

Such rights are, however, circumscribed by the limitation clause enshrined in the Bill of Rights.⁸

[18] It is so that the rights referred to must be interpreted and applied through the prism of the Constitution. The enjoyment of these rights whether traditional or customary practices will be at odds with the Bill of Rights if the practice is left uncontrolled or unregulated, thus posing a danger to the initiates' right to life, health care and the right to human dignity.⁹ Accordingly, the state is enjoined to take reasonable measures within its available resources (including regulatory framework) to achieve the progressive realisation of each of these rights.

[19] The Limpopo Province Circumcision Schools Act ("Act") is framed in peremptory language and lacks ambiguity.

[20] In ***Sutter v Scheepers***¹⁰ **Wessel JA** stated that:

"If a provision is couched in a negative form it is to be regarded as peremptory rather than as a directory mandate"

⁸ Section 36(1), *Ibid*

⁹ Sections 10; 11 and 27(1)(a) *Ibid*

¹⁰ 1932 AD 165 at 173-174

We venture to add that where for instance Section 3 of the Act provides that "no person shall hold a circumcision school without a valid permit issued to him/her in terms of section 2(1)," it clearly discloses peremptory mandate than directory. Compliance therewith is imperative and non-compliance attracts legal consequence to which a sanction is attached.

[21] Having regard to the foregoing considerations and bearing in mind the facts in the present case, we find that a proper case has been made out for the granting of some relief sought in the application.

Considerations in dealing with Permit Applications

[22] While it is perfectly trite principle that granting of circumcision schools permit resides primarily in the hands of the Second Applicant ("Premier") subject, of course, to certain conditions the Premier may deem desirable to impose,¹¹ it is necessary to bear in mind that the decision to grant permission to conduct "Koma" becomes an

¹¹ Section 4, the Act

administrative action and requires, prompt consideration by the administrator concerned.¹²

[23] The aforementioned observations are particularly important to prospective applicants seeking to organize, prepare logistics, create site establishment and all infrastructure necessary to conduct an initiation school in compliance with all stringent terms and conditions referred to in section 2(2)(a) – (e); section 3(1) to section 4(1) and 4(2); and section 5 of the initiation schools' regulations. ("the Regulations").

[24] According to the applicants in the present instance, the process to start entertaining applications for permits commence annually at the beginning of the year, roughly in February.¹³ This is when persons seeking permits ("prospective permit holders) usually Senior Traditional Leaders (Magoshi) apply to the applicants to conduct "Koma" in their respective areas.

[25] A reading of annexure "**MMM**" to the Applicant's Founding Affidavit indicates that the Acting Head of Department attached to the First

¹² Section 1(a)(ii), Promotion of Administrative Justice Act 3 of 2000 ("PAJA")

¹³ Paginated Index 1, P19 Para: 70 – Founding Affidavit ("FA")

Applicant issued out an open invitation as early as 23 October 2018 to all District Heads calling upon them to inform all "Magoshi" in the Province to submit their applications to hold "Koma" and that the closing date is 28 February 2019. Subsequently, a compulsory workshop on initiation schools for traditional leaders was held in Polokwane on

23 May 2019 where approximately 258 traditional leaders registered their presence.

Permits were issued to those applicants who were compliant with relevant conditions attached to the permit.

Delay in the Consideration and issue of Permits

[26] Be that as it may, some of the affected Respondents have expressed disquiet on how the applicants' delay in giving reasons for rejecting their applications were proffered, it being alleged that the reasons were predicated on shaky grounds, to say the least.

[27] Counsel for the 52nd Respondent (Limpopo Koma Practitioners Association) in opposing the application, aptly advanced argument against undue delay by the applicants in deciding on whether or not to grant approval of the permits sought. Mr Moloto submitted on behalf of

the Intervening Party that the present application bordered on mootness because the matter was brought very late to court, on an urgent basis, even though the initiation schools were already long in progress having commenced on or about 08 June 2019. The initiates were due to graduate some two (2) days from 03 July 2019, the day on which the matter was called for hearing by this Court.

[28] This submission holds water. The applicants' Director: Anthropological and Institutional Support Services for COGHSTA (First Applicant) in his answering affidavit deposed to on 24 June 2019 opposing the 07th Respondent's application,¹⁴ (Petrus Ntshintshimale Moela) stated as a matter of fact that the 7th Respondent (Main applicant) applied for permits to hold both male and female initiation schools on 21 February 2019. The said respondent made certain enquiries relating to their application at the First Applicant's headquarters during March and April 2019, but to no avail. Quite significantly, is the concession that **"on 29 May 2019 the applicants were informed of a decision that the application was not successful."** This was a period of three weeks before the applicants in this matter brought their application now before us.

¹⁴ Third and Fourth Respondents' Answering Affidavit, Case no: 3722/2019, Pages 3 and 4 ("AA")

[29] If indeed the Applicants knew about the pending application for the required circumcision permit and have also known, as they averred, that the permit sought was applied for by Marota Mohlaletse Traditional Authority, ("Mohlaletsi") it defies logic as to why the Applicants failed to inform the 7th Respondents on good time of the refusal of the permit applied for. The reason given was that the 7th Respondent lacked "*locus standi*" to have sought the required permit, and worst still, it was quite nebulous a reason for having raised *locus standi* without explaining the notion.

[30] The confusion is apparently caused by the fact that for some inexplicable reasons, such traditional leaders as Headmen/Headwomen as defined in the National Act, *supra* (TLGF Act, 2003) and the Limpopo Traditional Leadership and Institutions Act, 2005¹⁵ ("LTLGF") were, until the coming into effect of the Limpopo Circumcision Act in 1996 by tradition, entitled to conduct "Koma" in the wards ("Dikgoro") under which a Kgoshi ruled. In terms of custom, once a Kgoshi authorizes "Koma" to a particular Headman/Headwoman under his/her jurisdiction, there was no requirement, to seek further permission from authorities in government.

¹⁵ Act 6 of 2005 ("LT LTE Act")

[31] This is where battle lines are drawn between tradition that is anchored in deep African tradition and culture flowing from traditional law and cultural practices on the one hand, and legislative framework the applicants are now relying upon for closure of the initiation schools conducted in violation of the law, on the other hand.

[32] Again in fortifying the submissions made against the unreasonable delay by applicants in considering the applications and, in addressing the media on 04 June 2019 Mr Basikopo Makamu (MEC: COGHSTA) stated *inter alia* that:

“This year initiation schools (*sic*) programme is scheduled to commence from 07 June and end on 14 July 2019”

With this empathetic media announcement, and against the date of 23 May 2019 in which the 7th Respondent's application was declined, one remains at sea why if it was known of the commencement date of most “Koma” did it take applicants up to 23 May 2019 to inform respondents of the adverse decision disapproving the permit/s. It is not surprising that most of the respondents affected had already set up establishments

sites and having already admitted the initiates before applicants brought the application seeking an injunction.

[33] It is upon a consideration of these developments that this court was persuaded on the principle of mootness and the impracticability of some of the prayers sought by the applicants that the orders referred to in paragraph 5 *supra* of this judgment, were immediately granted.

[34] Although the applicants contended that the decision for granting or refusing to grant permits for conducting Koma resorts squarely in the provincial administration, and because the decision falls within the ambit of PAJA, our view is that such decision which might invariably affect adversely the cultural rights of the Respondents, need not be unreasonably delayed before it is made known, lest it is rendered procedurally unfair. Such a delay may in appropriate circumstances amount to **“a refusal to take the decision”** on time when circumstances so dictate. (Own emphasis derived from Section 1 PAJA)

Consistent with the foregoing observations, it is necessary for and it is incumbent on the applicants who are the custodians for approval or otherwise of this equally important instruments of traditional and cultural practice, to ensure that upon receipt of applications for circumcision

permits, a prompt decision be taken and not to await the eleventh hour and only to grant or refuse the application. If and when granted, assuming for a moment, it is expected that the permit holder or applicant must comply with the stringent conditions envisaged in the regulations, the delay in making a decision is obviously prejudicial to the applicants.

[35] It is the duty of this court to ensure that applicants seeking to conduct "Koma" which, of course, is their cultural or traditional right to do so, must comply with the legal framework mainly to ensure that the facilities operate not only legally, but within a healthy environment as envisaged in the present Regulations. The Regulations were in our view not intended by the lawmaker to undermine tradition, custom or any cultural practices to which traditional communities are entitled to follow and practice.

[36] In order to develop and promote cultural practices contemplated in section 31(1)(a) of the Constitution, this court is required to strike a balance between lawful traditional or cultural practices and compliance

with the legal framework regulating such customary or cultural practices within traditional communities.

[37] It was for that reason that perhaps Murphy J stated in the case of ***Centre for Child Law and Others v MEC for Education and Others***¹⁶ that: -

“As a society we wish to be judged by the humane and caring manner in which we treat our children. Our Constitution imposes a duty upon us to aim for the highest standard, and not to shirk from our responsibility”

[38] The foregoing observation is in harmony with the salutary provisions found in section 18(2) of the Constitution to the effect that: -

“A child’s best interest are of paramount importance in every matter concerning the child.”

It is therefore imperative that compliance by the respondents with existing regulatory framework is jealously guarded as the “best interests” of the minor children who are initiates at legally run initiation schools are protected.

Just and Equitable Remedy

¹⁶ 2008 (1) SA 223 (T)

[39] As already indicated in paragraph 16 above, the conduct of the affected Respondents violated the broader principle of legality and the rule of law. However, because of the principle of mootness, logic, convenience and pragmatism, it would have been a gross taboo to have abruptly uprooted any "Koma" which were already in session and about to graduate a few days to come merely because there has been failure by the said respondents to have secured permits.

[40] Following the hallowed approach adopted in ***Allpay Consolidated Investments Holdings (Pty) Ltd and Others v Chief Executive Officer of South African Security Agency and Others***¹⁷, this Court, having considered the practical effect of the relief sought and the exigency of the matter as a whole, arrived at the conclusion that it would be a grave violation of deep rooted custom to order effective closure of the initiation schools. This decision was by no means condonation of illegality and any benefit which we thought should accrue to the initiates themselves. The illegal operators must therefore be held accountable for want of compliance with the law.

¹⁷ 2014 (4) SA 179 (CC)

[41] Consequently, this court having considered the matter not only logically but having interpreted the issues through the prism of the Bill of Rights, in particular, section 39(2) of the Constitution decided in its discretion, to grant partial success on the relief sought.

[42] The reasoning adopted was anchored in the provisions of section 172(1)(b) that: -

"When deciding a constitutional matter within its powers, a court

(a).....

(b) May make any order that is just and equitable including

(ii) an order suspending the declaration of invalidity for any period and on any conditions to allow the competent authority to correct the defect."

[43] On closer examination of the aforesaid provisions, it follows that courts are bestowed with judicial discretion to make in appropriate instances an order that is "just and equitable" in any given situation when it is expedient to do so.

[44] This court in the case of *Ephraim Mogale Local Municipality v Inkokeli Projects (Pty) Ltd and Others*¹⁸ had an opportunity to deal with relief that sought a “just and equitable” remedy, when it said in paragraph 40 that: -

“[40] In the same vein, the court in *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* remarked as follows: -

“I do not think it is wise to attempt to lay down inflexible rules in determining a just and equitable remedy following a declaration of unlawful administrative action. The rule of law must never be relinquished, but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and if so, to what extent.....”

[45] It goes without saying that every improper violation of the rule of law and enactment would mostly implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it such as the present respondents and yet indicate effectively the right violated. The relief must therefore be just and equitable in the light of the facts, the implicated constitutional framework, the objective in *casu* being to pre-

¹⁸(Case no: 3298/2018) [ZALDHC] delivered on 04 February 2019 (Reportable)

empt, correct or reverse an improper conduct, in order to entrench the rule of law.

See also the sentiments echoed in *Steenkamp N.O. v Provincial Tender Board, Eastern Cape*.¹⁹

[46] Ultimately, we venture to say that the approach we adopted was to view factual certainty that required some amelioration of legality and to a defined extent, with a repository of the facts presented. The equitable remedy was as provided for in the court order we made on the 3 July 2019

Proposed Remedial Action

[47] In order to properly regulate future handling of initiation schools permit, we propose without being prescriptive, while bearing in mind the *doctrine* of separation of powers implied in Chapters 4 to 8 of the Constitution, the following steps: -

47.1 Upon receipt of an application for a circumcision permit on the prescribed form, a Committee comprising certain members of the

¹⁹ 2007 (3) SA 121 (CC) Paragraph; 29

Provincial House on Traditional Leadership and designated officials of COGHSTA **must** within **Thirty (30) days** of receipt of the application scrutinise the application for compliance with Regulations 2; 3; 4 and 5 of Regulations promulgated under the Act.

47.2 If the relevant application is fully compliant with the Regulations, it **must** forthwith (**within 21 days**) be submitted together with the recommendations to the MEC for COGHSTA in the province for consideration and decision whether or not it is approved.

47.3 In terms of the present regulatory regime, the Premier **must**, within **twenty-one (21) days** after receipt from the said MEC of the recommendation, decide whether or not to issue a permit for holding of circumcision school subject to the conditions attached. (See 2(1) (of the Act)

47.4 Where the Premier has rejected the application for the permit, he/she **must** furnish the applicant with **written** reasons for the adverse decision within **five (5) business days**.

46.5 An applicant aggrieved by the decision declining the required permit may lodge an Appeal to the relevant Appeal Committee constituted by the Premier for intervention, setting out grounds of appeal. The appeal **must** be **lodged fifteen (15) days** after the decision appealed against.

Such an **Appeal Committee** may confirm, set aside or amend a decision of the Premier thereafter **must** promptly (5 days) inform the appellant accordingly of its decision.

[48] Because the decision to either grant or refuse a permit for holding of an initiation school is purely an administrative action, it creates an avenue for aggrieved applicants to upset such adverse decision by way of judicial review under PAJA. It will certainly obviate a situation where anyone would initiate "Koma" seeing that no decision was timeously forthcoming. It is critical that a decision to grant or refuse a permit be timeously communicated to an applicant in order to exercise his/her administrative rights properly, in the main, to review such a decision if offensive. See also, *Oudekraal Estate (Pty) Ltd v City of Cape Town and Others*.²⁰

[49] Finally, the Premier is enjoined to proclaim as a matter of urgency into law, the Limpopo Initiation Schools Act, 2016.²¹ The new Act will in our view correct or pre-empt the discrepancies inherent in the existing Regulations made under Act 6 of 1996. The provisions in Regulations


²⁰ 2010 (1) SA 333 (SCA) at Para: [26]

²¹ Issued in terms of Notice 65 of 2018

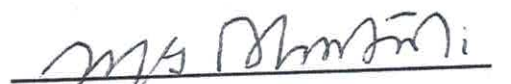
7(1) and (2) are in our view, not only mutually contradictory, but are unconstitutional violating the children's' rights under section 28(3) of the Constitution. We say so because Regulation 7(1) appears, by necessary implication, to be allowing a minor child of between 12 to 17 years old to be admitted to an initiation school, and yet Regulation 7(2) imports another dimension. This is untenable. A "child" is defined in the Constitution as a person under the age of 18 years.²²

[50] It is for all the above reasons that the Court granted the order on

3 July 2019.



E M MAKGOBA
JUDGE PRESIDENT OF THE
HIGH COURT, LIMPOPO
DIVISION, POLOKWANE



MG PHATUDI
JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION,
POLOKWANE

²² Section 28(3) Constitution