IN THE HIGH COURT OF SOUTH AFRICA, NORTHERN CAPE DIVISION, KIMBERLEY

Not Reportable
Case No: 1023/2022 &
Case No: 30/2022

In the matter between:

ELPHAS MUZIWOXOLO NDHLOVU **APPLICANT**

And

DEPARTMENT OF HEALTH,
NORTHERN CAPE PROVINCE **FIRST RESPONDENT**

DR JOSEPH RANKGALE MODISE N.O. **SECOND RESPONDENT**

Neutral citation: *Ndhlovu v Department of health, Northern Cape Province and Another* (Case no. 1023/22 & 30/22) (15 June 2023)
Heard: 05 May 2023
Delivered: 15 June 2023

Judgment

Phatshoane DJP

Introduction

[1] Two applications are at stake. In the first application, filed under case no 1023/2022, Mr Elphas Muziwoxolo Ndhlovu (the employee), the applicant, seeks an order interdicting the Department of Health, Northern Cape (the department), and Dr Joseph Rankgale Modise, the appointed chairperson of the disciplinary hearing, the first and second respondents, from proceeding with a disciplinary hearing against him pending the outcome of the "review" application filed under case no 30/2022 (the interdict).

[2] In the second application, brought under Case no 30/2022, incorrectly referred to as a "review" by the parties, the employee, who is once more the applicant, seeks an order that the investigation report dated March 2021 compiled and issued by Integrated Forensic Accounting Services (Pty) Ltd (IFAS), the first respondent in that application, and titled "Forensic Investigations into Medico-legal claims, Northern Cape Province", be declared unlawful, null and void (the declarator). The member of the Executive Council of the Department of Health, Northern Cape, is cited as the second respondent in the declarator.

[3] There are applications for condonation accompanying the respective applications. In respect of the interdict, the condonation is applied for the late delivery of the department's answering affidavit filed on 01 July 2022, four days out of the time allowed in the Notice of Motion and the Uniform rules. On 20 July 2022 the employee lodged a complaint in terms of rule 30A that the department had failed to file its application for condonation. The application for condonation was filed on 05 April 2023, some eight months later. The opposing affidavit by the employee was filed on 05 May 2023, a month later on the date of the hearing of the application.

[4] The department's answering affidavit was also filed late in respect of the application for the declaratory relief. It therefore seeks condonation which the employee opposes. The application for a declarator by the employee was served and filed on 10 January 2022. Several interactions took place between the local State Attorneys' Office and the National Department of Health with regard to which department (the National or Provincial Department of Health)

would oppose the application. It also took some time for the State attorney to secure the services for a senior and junior counsel as it had to follow the prescribed statutory procurement process prior to their engagement. The process, the department states, was tedious and took time to finalise.

[5] During the period of the delay, evident from the correspondence attached to the papers, there had been constant communication between the attorneys representing the parties concerning the filing of the answering papers and the extension of the days to file further affidavits. On 01 April 2022 the employee became averse to any further request for an indulgence to file the answering papers by the State Attorneys. The application was therefore set down on the unopposed Motion Court roll of 08 April 2022. However, on that date of set down, the parties agreed to the postponement of the application and that the affidavit be filed on 31 May 2022. That did not happen because the State Attorney had not yet finalised the procurement process. It was only on 04 June 2022 that counsel was appointed. Consultations ensued and the answering affidavit was filed on 22 June 2022, just over three months out of time.

[6] Condonation cannot be had for the mere asking and a party seeking an indulgence must show sufficient cause. The overriding consideration is the interest of justice. Factors that our courts would generally consider are the degree of lateness, the explanation therefor, the prospects of success, the importance of the case and prejudice to be suffered by the parties.

[7] The four-day delay in the filing of the answering affidavit in the interdict application is negligible. The explanation for the delay and the reasons advanced for the failure to bring condonation at an earliest opportunity are reasonable. In respect of the declarator the entire period of the delay, although inordinate, has been adequately explained. Evident from the interactions between the parties all indications are that the department had always intended to oppose the matter. It is remarkable that following the delivery of the answering affidavits, in both applications, the employee took no steps to bring the pleading to a close by setting the matters down for hearing. In conformity

with the dictates of justice and fairness, I am of the view, that condonation be granted in both applications.

[8] There are also two applications for condonation of the late delivery of the heads of argument and practice notes by the department. The slight delay in filing of the heads was occasioned by the employee's attorneys who had not provided their opponent with the indexes to the record on time. I can conceive of no prejudice if these applications also succeed. After all, heads are for the benefit and assistance of the Court.

Case No 1023/2022 (the interdict)

[9] The proliferation of claims against the department led to the advertisement of a tender by the National Department of Health for the appointment of a service provider to provide expert and strategic support including forensic, special and other investigations in the management of the medico-legal claims in eight Provinces of South Africa excluding the Western Cape. Following this, IFAS was appointed to undertake the said investigation and to deal with vexatious, frivolous, and unethical conduct by attorneys in the medico-legal litigations subject to the terms and conditions of a Service Level Agreement (SLA) concluded between the National Department of Health and IFAS.

[10] IFAS was not appointed specifically to investigate any employee of the department but was appointed to investigate certain law firms in order to determine whether the claims they lodged against the department were bona fide and had conducted themselves with probity in the prosecution of the claims. The abundance of the medical claims against the department merited an investigation by IFAS because the department was intent to uncover whether the difficulties it experienced in defending cases was as a result of the unethical conduct by the attorneys, its employees or practitioners in the various hospitals. IFAS's investigation would also focus on the department's huge financial loss which the department was anxious to nip in the bud through appropriate action.

[11] Mr Riaan Strydom (Mr Strydom), the Acting Head of the department and its deponent, states that in the event of any wrongdoing or criminal conduct being uncovered by IFAS the department would refer such conduct to the relevant regulatory bodies of the attorney's profession or the South African Police Service. However, disciplinary processes would be instituted where acts of misconduct were found to have been committed by its employees.

[12] On 11 December 2017, the department approved the establishment of the Medico-Legal Task Team. It was contemplated that through the establishment of the task team all the medico-legal matters from the department's legal services would be housed in this specialised unit.

[13] The employee is a legal advisor in the employ of the department. On 03 December 2020 two officials of IFAS, Mr P Gwamanda and Mr N Moothilal, informed him that they were conducting an investigation. He requested their terms of reference prior to his participation in the investigation. The employee says he raised concerns in relation to the lawfulness of the investigations which they rebuffed. Almost six months later, on 29 June 2021, the department placed him on precautionary suspension because he had allegedly assisted Dudula Attorneys with their medical negligence claims against the department; that he had acted in a conflictual manner against the department and had attempted to thwart the department's investigation by influencing potential witnesses not to cooperate.

[14] On 27 and 28 September 2021 the employee was given notice to attend a disciplinary hearing to answer to three allegations of misconduct. Prior to the date of the enquiry, on 17 September 2021, his attorneys directed a letter to the department in which they recorded that in their client's view, the investigation against him was unlawful and that the evidence obtained through the said investigation was unlawful. They urged the department not to proceed with the enquiry as the employee intended to "review the investigation and the investigation report". The employee states that the letter was not responded to. Four months later, on 10 January 2022, the employee launched an application

to declare the investigation report unlawful. Four days later, his attorneys once more wrote a further letter to the department directing its attention to the application for the declaratory relief and calling upon it not to proceed with the disciplinary hearing pending the hearing of the application. This correspondence too was not responded to.

[15] On 05 May 2022 the department directed a letter to the trade union representing the employee in which they were informed that the disciplinary hearing would continue on 16 May 2022. The employee continued to urge his employer to hold the enquiry in abeyance because the outcome of the declarator would affect the validity of a disciplinary hearing.

[16] An application to interdict the disciplinary hearing was launched because the department pressed ahead with the continuation of the hearing against the employee. It was argued for him that he had satisfied the requirements for an interim interdict in that he has a right not to be subjected to unfair labour practices. It was further argued that if the disciplinary hearing was to continue he would suffer grave injustice because the hearing is premised on an unlawful investigation and the unlawful investigation report.

[17] The employee argued that he does not have any adequate alternative remedy which is founded on the Labour Relations Act 66 of 1995 (LRA). He is of the view that the balance of convenience favours him because “If the disciplinary hearing continues against me before the determination of my review application by this honourable court, I will suffer prejudice in the sense that I will be subjected to unlawful disciplinary hearing.” He is of the view that exceptional circumstances exist to interdict the disciplinary hearing.

[18] The department contends that it is imbued with the prerogative to hold disciplinary hearings against its employees. It argued that the employee failed to show that he had been subjected to any unfair labour practice as a result of the pending disciplinary process. Insofar as the disciplinary hearing has not yet commenced, the department argued, the employee cannot enforce a right, by

way of an interdict, if the alleged right is not about to be infringed. It submitted that the application was premature because it was grounded upon what might happen in the future and not on any right which is being threatened.

[19] In any event, so argued the department, the investigation report is not a conclusive proof of the allegations made against the employee. Thus, he cannot be found guilty on its mere production. More is required from the initiator of the enquiry. For instance, the initiator may call witnesses to testify in support of the allegations made by the department against the employee. These witnesses may include persons allegedly assisted by the employee when Dudula attorneys lodged its claims against the department. Naturally, the employee has a right to cross-examine them. At the end of the enquiry the chairperson would render his decision on the merits. The investigation report may only be of little value in a disciplinary inquiry should the investigators wish to refresh their memories when adducing evidence, so ran the argument.

[20] The court's power to interdict incomplete disciplinary action is quite limited. Its intervention should be exercised sparingly and in exceptional circumstances. What would constitute exceptional circumstances would have to be determined by the court on casuistic basis. Among the factors generally to be considered would be whether failure to intervene would lead to grave injustice or whether justice might be attained by other means.[1]

[21] On the view I take of this matter no worthwhile purpose would be served to discuss at any great length whether the employee satisfied the requirements of an interim interdict. The interim interdict is sought pending the outcome of the application to declare the IFAS's investigation report unlawful. The latter application has been consolidated with and is heard simultaneously with the present interdict application. This effectively rendered the purpose for which the interdict application was initially sought brutum fulmen. It follows that the interdictory relief sought must be dismissed on this basis alone.

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[1] *Booysen v Minister of Safety & Security & others* (2011) 32 *ILJ* 112 (LAC) para 54.

Case No 30/2022 (the declarator)

[22] The background sketched in respect of the interdictory relief equally applies to the application for the declaratory order and need not be repeated. As already stated, the employee seeks an order directed at having the IFAS investigation and its concomitant report declared null and void and of no force and effect.

[23] The employee's version is that on 03 December 2020 Mr Gwamanda and Mr Moothilal of IFAS (the investigators) informed him that they were investigating his relationship with Dudula Attorneys. He replied that they were supposed to have consulted the Regional Office of the National, Education, Health and Allied Workers Union (NEHAWU), the union, as he was a shop steward. The investigators told him that the Acting Head of the Department, the Labour relations unit and Mr Stephen Motingoe (Mr Motingoe) of the medico-legal unit instructed them to investigate him. According to the employee, the medico-legal unit is a 'mere' task team not authorised to issue instructions. He questioned that they had not been accompanied by the acting director of Legal Services. He also demanded their terms of reference which they refused to give. The investigators left but shortly returned to hand over to him the terms of reference, the SLA and a letter from the Head of the Department directing the employee to cooperate with them. The employee says that Mr Moothilal made a call in which he suggested that the employee be suspended and charged. Certain aspersions are also cast on Moothilal. Nothing was achieved.

[24] The investigators returned five days later on 08 December 2020. The employee and his trade union representative once more enquired from Mr Gwamanda who the initiator of the investigation was. Mr Gwamanda informed them that it was the medico-legal unit. The employee showed Mr Gwamanda the organogram of the department which had no medico-legal unit. He went on to tell Mr Gwamanda that this meant that the instruction was unlawful. He made Mr Gwamanda also aware that the existence of the unit was temporary and demanded a letter detailing the specific instructions from Mr Motingoe that he be investigated. The document could not be produced. The employee says he

pointed out to Mr Gwamanda that the law firms they were enjoined to investigate did not include Dudula Attorneys and thus the investigation was unlawful. This was the last contact the employee says he had with IFAS.

[25] On 11 June 2021 the employee attended to the office of the Head of Department where it had been reported that there was a letter of his suspension. The provincial secretary of the union informed him that the suspension letter was based on IFAS's investigation report. He requested a copy of the investigation report but the labour relations unit refused to provide it because the report was intended to be used during the disciplinary enquiry. He questioned the labour relations unit on their failure to formally inform the union of his suspension. The meeting was adjourned on the basis that a formal communication would be directed to the union setting out the agenda concerning the department's intention to subject the employee to a disciplinary hearing.

[26] As already stated, on 29 June 2021, the employee was placed on precautionary suspension and given notice to attend the disciplinary enquiry on 19 August 2021. He was also given the department's bundle of documents that it intended to use during the disciplinary hearing. This included reports which contained the findings that were made against him to the effect that he had allegedly assisted Dudula Attorneys in their claims against the department. The employee gainsaid having assisted any law firm to file medical negligence claims against the department and neither did he influence any person not to cooperate with the investigation. He submitted that the investigation report was concluded without affording him a hearing and was therefore unlawful.

[27] The department's version is that the relevant functionaries of the department, that is, the Human Resource Manager, Chief Director of Corporate Services, Chief Financial Officer, Head of Department and the MEC approved the establishment of the medico-legal task team. Its scope of work included the investigation of unscrupulous behaviour by officials with regard to the

disappearance of files and collusion with the plaintiffs' attorneys in medico-legal claims.

[28] With regard to the ongoing investigation by IFAS Mr Motingoe, who had been engaged in the medico-legal unit, noted that the department 'was flooded with claims of astronomical amounts emanating from Dudula Attorneys'. He sought and obtained the approval of the National Department of Health, in particular, Ms Valerie Rennie, the Deputy Director General of Corporate Service (DDG), stationed in the National Department of Health, authorised the extension of the scope of investigation to include Dudula Attorneys. Pursuant to this, Mr Motingoe gave a written mandate to Mr MacMaster of IFAS to investigate Dudula Attorneys. Mr Motingoe's instruction, to extend the scope of investigation to the named firm of attorneys, the department contends, was lawful. IFAS uncovered that the employee assisted Dudula Attorneys in its claims against the department while he knew that this was irregular.

[29] The department says that on two occasions Mr Gwamanda and Mr Moothilal approached the employee for an interview, in order to afford him an opportunity to respond to the allegations that were made against him, but he refused to cooperate. They also paid him a visit unannounced as they gained an impression that he avoided the interviews. According to Mr Gwamanda, the employee gave various excuses. Mr Gwamanda says the discussions of 03 December 2020 were recorded and if made available would dispel any innuendo made by the employee that Mr Moothilal had advised that he be suspended. Mr Gwamanda says that the interview of 08 December 2020 with the employee also bore no fruit as the discussion, at the behest of the employee, centred on the legality and the existence of the medico-legal unit and the unlawfulness of the instructions by Mr Motingoe to extend the scope of the investigation.

[30] The grounds upon which the investigation report is attacked are couched in a slipshod manner and repetitive. Properly distilled the employee's contention is that the department's instruction that IFAS conduct forensic investigations on

certain top law firms, including Dudula Attorneys, was unlawful as the Legal Practice Council (LPC) is the only institution that has the authority to investigate legal firms in terms of s 37 of the Legal Practice Act 28 of 2014. He further contended that IFAS acted beyond its scope of investigation as the SLA concluded between the National Department of Health and IFAS did not include the investigation of Dudula Attorneys. He further argued that the mandate that Mr Motingoe gave to IFAS, to investigate Dudula Attorneys, was also illegal because he lacked the authority to do so. In any event, he argued, the medico-legal task team, which Mr Motingoe was part of, was established contrary to the Public Service Act and its regulations.

[31] The employee further contends that IFAS concluded its investigation without affording him the opportunity to respond to the allegations made in its report. In addition, he argued that reg 7(1) of the regulations in terms of s 10 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 disqualified Mr Gwamanda from attesting the affidavits of the officials interviewed during the investigation because he had an interest in the matter.

[32] Belatedly in the employee's heads of argument it was contended for him that by extending the scope of the investigation the department breached clause 18 of annexure "A" to the SLA. Clause 18 of the SLA stipulates that: "Any variation, addition or amendment of this SLA shall be dealt with in terms of clause 18 of Annexure A". Annexure A is not affixed to the employee's founding papers. However, I would accept for argument sake, that clause 18 of Annexure A is to the effect that the variation of the SLA is impermissible unless it is reduced to writing and signed by the parties as he sought to argue. He contended that the written agreement to vary the terms of the SLA does not exist.

[33] The employee submitted that if the investigating report is not declared unlawful it would tarnish his reputation. He further submitted that the department and IFAS would continue to act with impunity and arbitrarily use the said report during the disciplinary hearing against him. This would result in his "right to a *fair* and lawful disciplinary action being infringed".

[34] The employee did not file a replying affidavit to refute the averments made by Mr Strydom, Motingoe, Gwamanda and Moothilal in their answering and supporting affidavits. The primary purpose of the replying affidavit is to put up evidence which serves to refute the case made out by the respondent in his answering affidavit.[2] It is not in dispute that the department sanctioned IFAS's investigation. Neither was it disputed that the DDG authorised Mr Motingoe to extend the scope of the investigation to include Dudula Attorneys. This should put paid to any suggestion that the investigation was unlawful on those bases.

[35] Section 37(1) of the Legal Practice Act provides that:

> 'The Council must, when necessary, establish investigating committees, consisting of a person or persons appointed by the Council to conduct investigations of all complaints of misconduct against legal practitioners, candidate legal practitioners or juristic entities.'

Clearly, the investigation that the department undertook was not one as envisaged in s 37 of the Legal Practice Act but may lead to an investigation by the LPC in the fullness of time. The stance adopted by the employee is diversionary and devoid of any merit. It bears repeating that the department's quest to investigate the law firms, which is not disputed, was to determine whether the claims lodged against it were bona fide; whether in the prosecution of those claims there had been no unethical conduct committed by the firms and to curb its huge financial loss occasioned by the influx of the claims brought against it.

[36] Nothing, in my view, barred the department from investigating any malfeasance against those who had any dealings with it. The accounting officer for a department has an obligation to do so which is derived from, inter alia, s 38 read with s 39 of the Public Finance and Management Act 1 of 1999 (PFMA). Section 38(1)*(a)*(i) provides that the accounting officer for a department, trading entity or constitutional entity must ensure that the department, trading entity or

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[2] *Standard Bank of South Africa Ltd v Sewpersadh* 2005 (4) SA 148 (C) para 21.

constitutional entity has and maintains effective, efficient and transparent systems of financial and risk management and internal control. This should be read in conjunction with s 38(1)*(d)* and s 39(1)*(b)* of the PFMA. Section 38(1)*(d)*, on one hand, provides that the accounting officer is responsible for the management, including the safeguarding and maintenance of the assets and for the management of liabilities of the department. Whereas s 39(1)*(b)*, on the other, provides that the accounting officer is responsible for ensuring that effective and appropriate steps are taken to prevent unauthorised expenditure.

[37] Concerning the argument that Mr Gwamanda was disqualified from attesting to certain affidavits made in the course of the investigation in terms of reg 7(1) of the regulations promulgated in terms of s 10 of the Justices of the Peace and Commissioners of Oaths Act, the following remarks in *Papenfus v Transvaal Board for the Development of Peri-Urban Areas*[3] are apposite:

> 'The commissioner of oaths in the present case, being a legal adviser to the respondent Board, has, on the ascertained facts, no 'personal' interest whatever in the fate of these proceedings, even if it were to be assumed against the respondent that she advised her employer to resist the applicant's motion, drew the several affidavits now in question and was therefore 'interested' in the course advised and pursued by her on behalf of the respondent. Her 'interest' would only arise from the fact of her employment. The information disclosed justifies the inference that, if she had not been so employed, she would have had no interest whatever in the outcome of this litigation. (Cf. *Tambay and Others v Hawa and Others*, 1946 CPD 866 at p. 869).
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> The regulations should in my view be so interpreted as not to preclude a legal adviser from acting as a commissioner of oaths in litigation in which his employer is concerned. The 'interest' arising is too remote to fall within the general prohibition of reg. 3, and it is moreover rendered permissible by item 3 of the schedule.'

There is no evidence that Mr Gwamanda had any interest as contemplated in reg 7(1) which impeded him from attesting to the affidavits of the interviewees.

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[3] 1969 (2) SA 66 (T) at 69

[38] *In Jiba v Minister: Department of Justice & Constitutional Development & others*[4] Van Niekerk J sounded this important exhortation:

> '[12] …. By asking the court to rule that the disciplinary action initiated against the applicant was unauthorized and unprocedural, the applicant is effectively asking the court to bypass the bargaining council and to ignore its role in a carefully crafted scheme that acknowledges and gives effect to the value of self-regulation.
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> And at para 17
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> '. . . Urgent applications to review and set aside preliminary rulings made during the course of a disciplinary enquiry or *to challenge the validity of the institution of the proceedings ought to be discouraged*. These are matters generally best dealt with in arbitration proceedings consequent on any allegation of unfair dismissal, and if necessary, by this court in review proceedings under s 145 [of the Labour Relations Act 66 of 1995].' (*My emphasis*).

[39] It would be undesirable to make any definitive finding on the merits of the disciplinary enquiry. Greater care ought to be taken, at this stage of the dispute, for the Court not to usurp the functions entrusted upon the disciplinary tribunal. The Court's intervention in the uncompleted processes would, in this case, result in piecemeal adjudication of the issues and frustrate the expeditious resolution of labour disputes.[5]

[40] The employee's protestations with the investigation conducted and the resultant report as foreshadowed in his founding papers and briefly referred to above may, if so advised, be raised before the chairperson of the disciplinary hearing who would express himself on the weight or cogency of the evidence adduced and or the argument tendered at that enquiry. The employee has adequate redress in terms of the LRA should it ultimately be found that his right to a "fair", as he puts it, and lawful disciplinary action was infringed.

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[4](2010) 31 ILJ 112 (LC) para 12.

[5]See*Trustees for the time being of the National Bioinformatics Network Trust v Jacobson & others* (2009) 30 ILJ 2513 (LC) para 4.

[41] The employee cannot seek, through this application, to contest the allegations that he may have to possibly face during his disciplinary hearing. On the factual matrix sketched, he declined an invitation to be heard. Whether the employee has made himself guilty of the conduct as set out in the investigation report is not a matter to be dealt with by this Court. In his own words, he has already received a charge sheet calling him to appear before a disciplinary tribunal to answer to the allegations. The power to administer discipline to the employees lies within the province of the employer. The investigation report itself is not a jurisdictional requirement for the holding of a disciplinary hearing. Stated otherwise, the holding a disciplinary enquiry against the employee is not dependent on the existence of the investigation report.

[42] Almost two years has lapsed since the employee was placed on precautionary suspension on full pay. The department had been stymied from finalising disciplinary processes due to the impending applications. This defeats the purpose of expeditious resolution of labour disputes which ought not to be countenanced. On the aforegoing exposition, this application is ill-conceived and stands to be dismissed.

[43] That leaves the question of costs. Ordinarily costs attendant to the applications for condonation ought to be borne by a party seeking an indulgence. Insofar as there had been various engagements between the parties on the filing of the answering affidavit, the opposition was a bit contrived. In any event, the employee's opposition to the interdict application was also filed late. In my view, each party must pay its own costs in respect of those applications.

[44] On the two main applications (the interdict and the declarator), the department urged for costs on a punitive scale and that they be consequent upon the employment of two counsel. I am unpersuaded that this matter merited the employment of two counsel. It is certainly not one of a complex nature. I am also disinclined to award the costs on the punitive scale. While the employee delayed the completion of the disciplinary action, to my mind costs on a punitive

scale would be unjust. In accordance with the time-honoured convention, costs must follow the result on party and party scale. An order is therefore made:

Order:

1. The applications for condonation of the late filing of the answering affidavits in both case nos. 1023/2022 and 30/2022 are granted.
2. The applications under case no.1023/2022 and 30/2022 are dismissed with costs.

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Phatshoane DJP

Appearances:

For the applicant:	Mr L Matlejoane Instructed by Matlejoane Attorneys, Kimberley.
For the respondent:	Adv R Ramawele SC with Adv N Bhagwandeen Instructed by Office of the State Attorney, Kimberley.