



REPORTABLE

CASE NO: SA 21/2016

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

**THE COUNCIL OF THE ITIRELENG VILLAGE
COMMUNITY (Comprising the members listed per
annexure ABM1)**

1st Appellant

AUGUSTINUS BEBENG MODISA

2nd Appellant

and

FELIX MADI

1st Respondent

BERNHARD LANGMAN

2nd Respondent

GENOVEFA MOKALENG

3rd Respondent

EUPHORSINE MBUENDE

4th Respondent

VICTUS EDUARD

5th Respondent

REINHARD MORWE

6th Respondent

CYNTHIA MADI

7th Respondent

HEDWID TIBINYANE

8th Respondent

MICHAEL KAPENG

9th Respondent

LAZARUS SEBETWANE

10th Respondent

JASPER MADI

11th Respondent

CYPRIANUS POGISHO

12th Respondent

MARIA THEKWANE	13th Respondent
THEODOR TSHABANG MAKGONE	14th Respondent
PIO MOSALA	15th Respondent
ANNA MOKALENG	16th Respondent
BERNARD MOKALENG	17th Respondent
AUGUSTINUS MOKALENG	18th Respondent
OSWALD TIBINYANE	19th Respondent
ARNOLD MORWE	20th Respondent
ALEXIS UDIGENG	21st Respondent
BERLINDIS UDIGENG	22nd Respondent
RILEU KENE	23rd Respondent
JOSEPH ARNAT	24th Respondent
INGRID MOKWENA	25th Respondent
APPOLINIA TIBINYANE	26th Respondent
HANS KEDIAMOGETSE MAKGONE	27th Respondent
HERBERTHA BONTLEENG TIBINYANE	28th Respondent

Coram: DAMASEB DCJ, SMUTS JA, and FRANK, AJA

Heard: 5 October 2017

Delivered: 25 October 2017

Summary: The two issues raised in this appeal concern whether the appellants have legal standing (*locus standi*) to seek the relief set out in the notice of motion and secondly whether the claimed relief has prescribed or not. These two issues served before the High Court as preliminary questions and were argued separately from the merits of the application. The High Court (per Angula DJP) found that the

appellants lacked standing and that seven of the ten items of the relief sought had prescribed and struck the application from the roll on those grounds. This is an appeal against that decision.

Locus standi – to prove *locus standi*, a litigant must show sufficient and direct interest in the proceedings. It was agreed between the parties during judicial case management proceedings that the Itireleng Village Community is a *universitas* in the form of a voluntary association with legal personality distinct from its members with the power to own property and with perpetual existence. The association would thus have the power to sue and be sued in its own name. Its Council (first appellant) is a constituent organ of the association. Its thus has no standing to act on behalf of the association under rule 42 of the High Court Rules. Proceedings would need to be brought by the association. First appellant's reliance on rule 42 as a basis for standing is misconceived and must fail.

Locus standi – second appellant asserts that he has standing in his official capacity as headman of the Itireleng Community, by reason of his appointment to the position of senior traditional councillor under the Traditional Authorities Act, 25 of 2000 and in his capacity as member and chairperson of council in terms of the community's constitution. Firstly, the powers of the traditional authority in question and senior traditional councillors are confined to those set out in the Act. The association having its own separate and distinct legal personality means that the Act provides no authority affording second appellant any power over it. Secondly, proceedings instituted on behalf of the association as a separate and distinct legal personality would need to be brought by the association itself and not by someone claiming to be its chairperson or council member. The second appellant would however have

standing in respect of the relief claimed in paragraph 6 as it concerned terminating his position as chairperson of the council.

Prescription – a plea of prescription has not been established in respect of the reliefs sought in paragraph 6 (as well as in respect of paragraphs 1-5). This is because the relief claimed in these paragraphs does not constitute a ‘debt’ within the meaning of the Prescription Act. The relief sought in paragraph 6 is in essence a review of a decision by 14th respondent to terminate second appellant’s membership of council. Applying the principles set out by Wallis AJ in *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) in relation to paragraph 6, the relief claimed by second appellant – a review - is not a right of action for money or the delivery of goods, or the rendering of services which can be extinguished by prescription. The claim basically entailed the setting aside of disciplinary action of a voluntary association and is not a ‘debt’ for purposes of prescription. But a review is to be brought without unreasonable delay. The period of more than 5 years from the decision in question to bringing the application amounted to an unreasonable delay and should have resulted in this relief being dismissed.

Held - the court a quo should have dismissed the application and not merely struck it from the roll. It thus follows that the appeal failed.

APPEAL JUDGMENT

SMUTS JA (DAMASEB DCJ and FRANK AJA concurring):

[1] The two issues raised in this appeal concern whether the appellants have legal standing (*locus standi*) to seek the relief set out in the notice of motion and secondly whether the claimed relief has prescribed or not. These two issues served before the High Court as preliminary questions and were argued separately from the merits of the application. The High Court (per Angula DJP) found that the appellants lacked standing and that seven of the ten items of the relief sought had prescribed and struck the application from the roll on those grounds. The appellants appeal against that decision.

Factual background

[2] The underlying dispute between the appellants on the one hand and the respondents on the other essentially relates to the control of a voluntary association known as the Itireleng Village Community (the association) which in turn enjoys the servitudes of *usus* and *habitatio* over agricultural land at Epikuro in the Omaheke region.

[3] The Roman Catholic Church acquired the farm land in about 1903 for the purpose of taking care of and providing shelter to members of the Tswana community residing in the area. This community became known as the Itireleng Village Community. The community has resided on the farm since then.

[4] In the process of regularizing the position, a constitution for the community was adopted which formally established the association in 1983. It is attached to the appellants' founding papers.

[5] A lease agreement at a nominal rental of the farm was thereupon agreed upon with the Church in 1983. After this agreement lapsed, the Church in 2003 granted the community through the association servitudes of *usus* and *habitatio* over the farm.

[6] Membership of the association is regulated in its constitution. The constitution vests the management of the association in a council of 15 elected members, comprising a headman who chairs the council, an 'under chairperson', a secretary, two treasurers and nine ordinary members. Members of the community and association elect council members at 3 year intervals. Office bearers are in turn elected to their positions at the first meeting of a council.

[7] It is common cause that factional disputes in the association emerged from about late 2005 or early 2006 and have festered, culminating in the application launched in the High Court in early 2015.

[8] The first applicant (first appellant) is referred to as the Council for the Itireleng Village Community. It is described as being 'established in terms of the constitution of the (community)'. It is said to consist of certain elected members set out on an attached list 'and a headman who *ex-officio* is the chairperson of the Council', identified as the second appellant.

[9] The second applicant (second appellant) is a senior traditional councillor of the Batswana Ba Namibia Traditional Authority (appointed in that capacity in terms of the Traditional Authorities Act, 25 of 2000 - the Act). He also claims to be chairperson of the community and their headman. Although his name is however

set out on the attached list (annexure ABM1) of persons he says were elected as council members in 2004, he claims that he serves as chairperson of the association by virtue of his position of senior traditional councillor as that incumbency, so he asserts, renders him the headman of the community and the association. He asserts that the position as headman of the association is not subject to election and is held *ex-officio* by the senior traditional councillor.

[10] That status is disputed by the respondents. They do not dispute his appointment as senior traditional councillor under the Act, but state that prior to the bringing of the application in early 2015, two subsequent council elections were held in 2010 and 2013. Those elected in those elections are cited as respondents. The respondents aver with reference to the constitution that members of council including the headman are elected and dispute the second appellant's claim to incumbency to the position of 'headman' under the constitution by virtue of his appointment as a senior traditional councillor under the Act.

[11] The second appellant's appointment as senior traditional councillor was published in the Government Gazette on 14 June 2004. At the time of bringing of the application, he still occupied that position. He and the members appearing in annexure ABM1 were elected in 2004 as members of the council of the Itireleng in accordance with the provisions of the constitution. In 2005, allegations of theft were made against members of the erstwhile council. This, led to their suspension. There was an investigation into the allegations and an interim committee was appointed to serve in their stead. The investigation did not result in findings of theft or wrongdoing by the suspended members. They were reinstated on 22 November 2008. The

second appellant states that the members of the interim committee did not however vacate their positions.

[12] A hiatus then developed which has remained unresolved. The parties provided different versions as to why the interim committee continued after the others' reinstatement. The second appellant alleges that the members of the interim committee refused to relinquish their positions and hand over assets and books of account. He levels accusations of financial irregularities committed by the interim committee members. One concerns a claim that N\$159 510,90 was withdrawn from the association's bank account and deposited in the personal bank accounts of the 1st, 2nd, 3rd, 6th, 10th, 11th, 18th and 26th respondents. Further claims include the unlawful and unauthorised sale of community livestock.

[13] The respondents however claim that the members of the community were not inclined to have the second appellant and the members listed in ABM1 reinstated. Members of the interim committee continued to act as council members until a disputed council election was held in 2010. Another election took place subsequently in 2013.

The relief sought

[14] With these disputes as a backdrop, the appellants brought an application in the High Court in early 2015 seeking the following relief:

- '1. An order declaring that only a senior or traditional councillor appointed or elected as such in terms of the provisions of section 10 of the Traditional Authorities Act, Act No. 25 of 2000 may act as headman of the community

of Itireleng and that person, shall by virtue of that incumbency be the Chairperson of the 1st applicant;

2. An order declaring that the persons listed on Annexure ABM1 are currently the duly elected members of the Council of Itireleng Village Community (the 1st applicant);
3. An order interdicting and restraining the respondents or any one of them from acting or purporting to act as a headman of the Itireleng Village Community in contravention of the provisions of section 10 of the Traditional Authorities Act, Act No. 25 of 2000;
4. An order interdicting and restraining the respondents or any one of them from acting or purporting to act as the Chairperson of the Council of the Itireleng Village Community (1st applicant) in contravention of the provisions of the constitutions of the town community of Itireleng;
5. An order interdicting and restraining the respondents or any one of them from acting or purporting to act as a duly elected member of the Council of the Itireleng Village Community (the 1st applicant) in contravention of the provisions of the constitution of the town community of Itireleng;
6. An order declaring that, the decision taken by the 14th respondent on the 31st of October 2009 was null and void;
7. Ordering the respondents to forthwith restore *ante Omnia* the 2nd applicant's possession and control of the keys of the community hall at Epukiro;
8. Ordering the respondents to forthwith restore *ante omnia* the 2nd applicants' peaceful, undisturbed, unhindered access, occupation and control of the community hall at Epukiro;
9. Ordering the 1st, 2nd, 3rd, 6th, 11th, 12th, 18th and 26th respondents to reimburse the 1st applicant within 30 days from date of this court's order an

amount of N\$159 510,90 that they jointly and individually misappropriated from the funds of the Itireleng Village Community;

10. Ordering the respondents to reimburse the 1st applicant within 30 days from date of this court's order the full amount of money including interest if any that they jointly, collectively and individually received from the sale of 45 cattle that they sold or was sold on their behalf or at their behest at an auction that took place in the 27th November 2014 at Karoo Osche, in Gobabis.'

[15] The appellants also sought a costs order against any respondents opposing the application.

[16] The respondents disputed both appellants' *locus standi* to bring the application and also took the point that all the relief claimed had prescribed. In the course of judicial case management the parties agreed that these two issues be determined as preliminary issues.

The approach of the High Court

[17] The High Court first dealt with the issue of prescription and held that the relief sought in paragraphs 1, 2, 3, 4 and 5 of the notice of motion arose on at least 4 July 2010 when the election of a new council and a chairperson took place. As more than three years had elapsed by the time the proceedings were served on the respondents on 20 February 2015, those claims had prescribed. The court found that the claim for a declarator in para. 6 arose on 31 October 2009 when the second appellant received a letter dismissing him as the chairperson of the council. The court held that the relief claimed had prescribed as more than three years had elapsed before the proceedings were served on the respondents. It had been

correctly conceded by the appellants' legal practitioner that the claim for the payment of N\$159 510,90 had prescribed. The relief claimed in paragraph 9 was also held to have prescribed.

[18] The court found that the relief claimed in paragraphs 7, 8 and 10 had not prescribed. The court then turned to the issue of *locus standi*.

[19] In their joint case management report, the parties had agreed that the Itireleng Village Community is a voluntary association with a constitution and vested with legal personality, and that it owns property and has perpetual existence distinct from its members. The court *a quo* found that this agreement meant that the appellants' citation of the first appellant is wrong. The court rejected the appellants' argument that the association's constitution gave the appellants authority to act in their own right on behalf of the community of Itireleng to bring the application.

[20] The court reasoned that, even though the constitution of the association does not contain an express provision stating that the association as a legal person has the power to sue or be sued, this followed by implication of its legal nature, given that it is capable of entering into agreements and thereby incurring rights and obligations in its own name as an association and not the council. Its elected council members could only act on behalf of or represent the association when the association enters into transaction in its own name. This meant that the association would need to be a party to the proceedings and not the council, so the court held.

[21] The respondents had also challenged the first appellant's standing on the basis that the resolution authorising the bringing of the application had been passed

on 20 November 2011 and that those referred to in it (and set out in annexure ABM1) were no longer members of council as a new council had been elected on 4 July 2010. The appellants' response in reply was an unsubstantiated assertion that the election was not conducted in terms of the constitution. The appellants disavowed any material disputes of fact and did not apply for a referral of disputes to evidence. The court applied the rule in *Plascon Evans*¹ and accepted the respondents' version concerning the elections in 2010 and 2013 and found that the members listed on annexure ABM1 were no longer council members. The court found that the first appellant furthermore and in any event lacked *locus standi* in the form of authority to bring the application.

[22] As for the second appellant, the High Court referred to the two grounds asserted for his standing. The court found that he lacked standing as a senior traditional councillor to bring it on behalf of the Batswana Ba Traditional Authority, a separate legal personality established under the Act. It would have standing to institute legal proceedings and not individual councillors.

[23] The second basis asserted was in his capacity as appointed headman of the traditional authority, serving by virtue of that office as headman of the community. But this, the court pointed out, was contrary to the association's constitution which required that the headman as contemplated by it was to be elected. The court concluded that the second appellant thus lacked standing to bring the application as headman or council member.

¹ *Plascon Evan Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) 623 (A).

[24] The court upheld the two points in *limine* and struck the application from the roll and ordered the individuals listed in annexure ABM1 to pay the respondents' costs, jointly and severally.

Submissions on appeal

[25] Mr Khama, for the appellants, argued that the question of standing is to be resolved in favour of the appellants as they both had a direct and substantial interest in the relief claimed. Once that is established, he submitted that this would be sufficient to establish their respective standing.

[26] As far as the first appellant was concerned, Mr Khama argued that despite the legal personality of the community as an association, the first appellant had standing because of rule 42 of the High Court Rules. He argued that the council of the community is an association for the purpose of rule 42 and that this rule changed the common law to vest such an unincorporated association with standing.

[27] Mr Khama argued that the second appellant had standing as senior traditional councillor under the Act in that he automatically occupied the position of headman for the community by virtue of that position.

[28] Mr Khama also argued that all the claims, save for the financial claim in paragraph 9 of the notice of motion, did not constitute debts for the purpose of the Prescription Act and had not thus prescribed.

[29] Mr P Barnard, who appeared for the respondents, submitted that neither appellant had legal standing for the relief sought and supported the findings of the High Court on prescription.

First appellant's claim for legal standing

[30] As has been made clear by the South African Supreme Court of Appeal, the question of legal standing is in a sense procedural, but it also bears on substance.² It concerns the sufficiency and directness of interest in the proceedings which warrants a party's title to prosecute a claim.³ The onus is upon a party instituting proceedings to establish legal standing.⁴ This not only concerns establishing sufficiency and directness of interest but also that it is the rights-bearing entity or acting on the authority of that entity or has acquired the rights.⁵ Where the issue of legal standing is argued separately, as was the case here, a lack of legal standing on the part of the applicants, if upheld, would finally resolve the issues. This would obviate the need on the part of the court to determine other issues and the merits of the application.⁶

[31] In rule 42 an association is defined for the purpose of that rule as 'any unincorporated body of persons not being a partnership'. Sub-rule 42(2) provides that a partnership, firm or association may sue or be sued in its own name. It proceeds to set out the mechanism whereby parties being sued by or suing a firm or partnership may require the names and addresses of partners or proprietors to

² *Gross and others v Pentz* 1994 (4) SA 617 (A) per Harms JA (*diss*) at 632; *Sandton Civic Precinct (Pty) Ltd v City of Johannesburg and another* 2009(1) SA 317 (SCA) at para 19.

³ *Sandton Civic Precinct* at para 19.

⁴ *Gross* at p 632D-E.

⁵ See *Sandton Civic Precinct* at para 19.

⁶ *Kerry McNamara Architects Inc and other v Minister of Works, Transport and Communications and others* 2000 NR 1 (HC) (full bench).

be provided. In the case of an association, sub-rules 42(16) to (19), the other parties to the proceedings can by notice require a copy of the constitution of the association and a list of names and addresses of office bearers.

[32] In support of his argument on rule 42, Mr Khama placed heavy reliance upon a full bench decision of the High Court, as it was previously constituted, in *Parents' Committee of Namibia and others v Nujoma and others*.⁷ In that matter, the full bench found that the first applicant, which had its own constitution, although probably not a *universitas*, fell within the definition of association in rule 42's similarly worded predecessor, rule 14, which defined an association as being 'any unincorporated body'. The full bench held that, as an unincorporated voluntary association, it fell within the ambit of rule 14(2) and thus had *locus standi* to bring the application before court. The full bench followed the approach in *De Meillon v Montclair Society of the Methodist Church of Southern Africa* 1973 (3) SA 1365 (D):

'If Rule 14(2) was intended to be no more nor less than an indication that a common law *universitas* may sue or be sued in its name, then the Rule would have been entirely superfluous since that would have been in any event a necessary consequence of the common law At common law it would have been possible in circumstances such as the present to have cited as respondents those individuals being the members at the relevant time of the Montclair Society of the Methodist Church of Southern Africa It seems to me that the purpose of the Rule was to render it unnecessary to cite each and every individual forming part of an unincorporated body of persons and was designed to simplify the method of citation by enabling that body of persons to be sued in the name which that body normally bears and which is descriptive of it. Further in Rule 14 provision is made, in circumstances where it might become necessary, for the names and addresses of each member or person forming part of that association to be brought to the fore.'

⁷ 1990(1) SA 873 (SWA).

[33] The full bench concluded that rule 14(2) was nothing more than a procedural aid when citing partnerships, firms and associations.⁸

[34] Rule 42 thus enables an applicant or plaintiff to cite legal entities that do not have any existence separate from their members or owners⁹ in this way.

[35] As was correctly found in *Ex-TRTC*, the rule would not apply to an artificial or juristic person constituting a legal entity with perpetual succession and the capacity to acquire rights and incur obligations and own property separate from its members.¹⁰ As is explained in *Ex-TRTC*:¹¹

‘The reason for this is simply that a juristic person may in any event sue or be sued in its own name. It does not need the procedural assistance of rule 14.’

[36] The approach of the full bench in *Parents’ Committee* is to similar effect in approving the approach in *De Meillon* at 879B-E.

[37] Once it is accepted – as the parties had expressly agreed in the course of judicial case management - that the association is a *universitas* in the form of a voluntary association with legal personality distinct from its members with the power to own property and with perpetual existence, it (as a legal personality) would have the power to sue and be sued.

⁸ At 879B.

⁹ *Ex-TRTC United Workers’ Front and others v Premier, Eastern Cape Province* 2010 (2) SA 114 (SE) at para 15 and for a helpful discussion of rule 14.

¹⁰ At para 15.

¹¹ At para 15.

[38] The legal entity would in accordance with its constitution have *locus standi* to sue in its own name. Its council would not, as its council, have standing as an ‘unincorporated association’ to sue on its behalf under rule 42 where that right (to sue) would otherwise not exist or render an unauthorised act *intra vires*.

[39] Once an artificial legal person sues, then those proceedings are to be brought properly by that entity¹² - and not in the name of one of its constituent organs, such as the council in the case of the association. The analogy provided by the High Court in referring to a board of directors of a company attempting to sue as a board when the company is the entity before court, is apposite in demonstrating the misconceived approach in contending that the association’s council would have legal standing to sue on behalf of the association.

[40] The reliance upon rule 42 as a basis for standing for the first applicant is thus misconceived and must fail.

[41] The conclusion by the High Court that the first appellant as council of the association does not have legal standing or the right to sue in its own name cannot be faulted. The proceedings should have been brought in the name of the association.

The second appellant

[42] The second appellant’s claim for standing is asserted on a twofold basis. Firstly in ‘his official capacity of headman of the Itireleng Community’ and in his

¹² *Mall (Cape) (Pty) Ltd v Nerubi Ko-operasie Bpk* 1957 (2) SA 347 (C); *Ondonga Tribal Authority v Elifas and another* [2017] NAHCMD 142 (5 May 2017) at paras 18 and 19.

capacity as a member and chairperson of council in terms of the community's constitution.

[43] The first basis as headman is explained with reference to his appointment by the hereditary chief to the position of senior traditional councillor under the Act. By virtue of that appointment, the second appellant claims to exercise the powers of headman over the community. Despite a contradictory statement elsewhere in his affidavit to the effect that the council (which includes position of 'headman') was elected with reference to the names on annexure ABM1, which includes his name on that list, the second appellant repeatedly states elsewhere and in reply that the position of headman under the association's constitution is not elected and that he occupies it by virtue of his position as appointed traditional councillor under the Act.

[44] In the course of oral argument, Mr Khama was unable to point to any provision in the Act which vests the second applicant with the power to institute the proceedings on behalf of the traditional authority in question or in his capacity as a senior traditional councillor. The powers of the traditional authority, and senior traditional councillors are confined to those set out in the Act. The association is a distinct legal personality. The Act does not afford the second appellant any power over the association established under its constitution.

[45] The fact that he may be regarded as a 'headman' for the purpose of the traditional authority by virtue of his position as a senior traditional councillor under the Act, does not afford the second appellant any powers under the constitution. The fact that the constitution uses the term 'headman' for the chairperson of council does not assist the second appellant. His standing would need to arise from the

constitution. It expressly states that council members, including the designated position of headman under the constitution are elected. Council elections are also separately expressly provided for and there is a further reference in the clause dealing with elections to the association's headman under the constitution being elected.

[46] The second appellant does not rely on an election under the constitution to occupy his position as headman. In fact, in reply he states that the powers he asserts as headman arise by virtue of his appointment as senior traditional councillor and claims that he serves on the council by virtue of that appointment and is not subject to any election. As I have made clear, this is expressly gainsaid by the association's constitution. The fact that he may also use the title of headman is of no consequence when it comes to exercising powers under the association's constitution. The Act furthermore affords no such power to senior traditional councillors.

[47] The second appellant does thus not have any standing to bring those proceedings by virtue of his appointment under the Act.

[48] There remains his second basis for standing claimed – in his capacity as a member and chairperson of council under the constitution. He expressly does not claim to bring the proceedings in his personal capacity as a member of the community, as was confirmed in argument by Mr Khama.

[49] For the reasons already stated with reference to the claim of standing of the first appellant, proceedings instituted on its behalf as a separate and distinct legal

personality would need to be brought by it and not by and someone claiming to be its chairperson or council member.

[50] The relief sought in respect of paragraphs 1, 2, 3, 4, 5, 9 and 10 is asserted on behalf of the association. The proceedings would need to have been brought by it. The second appellant in his claimed position of chairperson or councillor would not have standing to do so in his own name in those capacities.

[51] The relief in paragraphs 7 and 8 concern the second appellant's claim of spoliation of possession of the community hall and access to and control of it.

[52] In the first instance, the basis for his claim is for use of the community hall in his capacity as senior traditional councillor. His statement is that it is in that capacity that he had control of the hall for the performance of official functions. This is elaborated upon by stating that the hall was government property because it had been erected by erstwhile second tier authority for Twanas prior to independence. As is pointed out in the answering papers, the hall is constructed on church property and would not constitute government property. But more importantly, if his possession was held in his official capacity under the Act to perform official functions under that Act, then he would need to look to the Act for standing as a senior traditional councillor. Mr Khama could not pinpoint any provision in the Act affording him standing. There is none. The Act does thus not afford him standing in that capacity. Although the second appellant also claims possession of the hall in his capacity as 'headman', this is with reference to his appointment as senior traditional councillor under the Act and is similarly flawed.

[53] Even if his claim for spoliation were to be raised in his capacity as headman under the constitution, this would not vest him with standing to claim that relief, as he claims no rights of his own. As has been made clear in *Yeko v Qana*¹³ the fundamental principle underpinning the remedy of spoliation is that no one is allowed to take the law into their own hands and that all that an applicant would need to establish is possession of a kind which warrants the protection accorded by the remedy and that the applicant was unlawfully ousted. Possession need not be in a juridical sense and it would ordinarily be enough if the holding by the applicant was with the intention of securing some benefit for himself.¹⁴

[54] The dictum in *Yeko* was applied in *Mpunga v Malaba*.¹⁵ There was a split in a church. Under its constitution, its controlling body was the Deacons' Court which was also split. The plaintiff's faction had control and use of the church. The defendant had broken in and replaced the locks and obtained possession of the church. The court held that a person in the position of the plaintiff was akin to a servant who held no right on his own behalf to bring proceedings for spoliation, except in so far as the rights derive from an authority given to him by the master. This was because the right to invoke spoliation proceedings is not something he had over and above his interest as employee. The court held that the use and possession of the plaintiff was not for any purpose of his own, but for the Deacons' Court.

¹³ 1973 (3) SA 735 (A) at 739.

¹⁴ *Yeko* at p 739E.

¹⁵ 1959 (1) SA 853 (W).

[55] A similar approach was adopted in *Dlamini and another v Mavi and others*¹⁶ where the applicants were trade union office bearers - secretary and treasurer. They were evicted from the union offices they occupied. It was held that their occupation of those offices was merely in their capacities as office bearers and employees of the union and that they were consequently not entitled to spoliation relief.¹⁷

[56] In this matter, the second appellant has failed to show that he has a right of which he has been spoliated over and above an interest he has claimed as chairperson or council member or senior traditional councillor. His possession was in that capacity and for no benefit to himself.

[57] The second appellant also faced the further difficulty on the facts properly approached by failing to establish that he is in any event a council member elected under the constitution. As the High Court correctly held, the respondents' version of two subsequent elections in 2010 and 2013 following the election of those persons set out on ABM1, including the second appellant was to be accepted. The appellants' bare denial (that the elections were not in accordance with the constitution without amplification) cannot avail the appellants in the face of the detailed account of the two elections provided by the respondents. This yet further difficulty would in any event preclude the second appellant from establishing *locus standi* as chairperson or as a member of council even if he were to establish a right which could be protected in spoliation which I have shown he had failed to do so.

¹⁶ 1982 (2) SA 490 (W).

¹⁷ See also *Mbuku v Mdinwa* 1982 (1) SA 219 (Tk SC), *Barbow Motors Investment Ltd v Smart* 1993 (1) SA 347 (W) at 351D-H.

[58] The second applicant thus failed to establish legal standing to seek the relief set out in paragraphs 1, 2, 3, 4, 5, 7, 8, 9 and 10 of the notice of motion, as found by the court below.

[59] There remains the relief set out in paragraphs 6, declaring that a decision taken by the 14th respondent on 31 October 2009 was null and void. The decision is not stated in the notice of motion. It is dealt with in a solitary paragraph in the second appellant's founding affidavit in these terms.

'On 31 October 2009 whilst I was still a senior traditional councilor and whilst I was still the chairperson of the first applicant's council, I and other members of the 1st applicant received letters authored and signed by the 14th respondent terminating our respective incumbencies and membership of the first applicant's council. I attach hereto copies of the letters and mark them "ABM 20". It is apparent from the terms of this letter that the 14th respondent claims to have acted in his purported capacity of chairman of interim committee. I point out that, I was never given a hearing or an opportunity to be heard before this decision was taken. I assert in any event that the 14th respondent had no legal authority to terminate my incumbency as chairman of the first applicant's council.'

[60] Only three letters were attached. They were addressed to three of the persons listed in annexure ABM1, none of whom made affidavits. No letter addressed to the second appellant was attached. The letters sought to terminate the addressee's services as members of the Itireleng 'Reinstated Council'.

[61] The second appellant contends that the 14th respondent sought to terminate his membership and chairmanship of the council in a similarly worded letter. The

second appellant would have standing to contest his termination in the position of chairperson and member of council in his claimed capacity. The High Court thus erred in holding that the second appellant lacked standing in the capacities asserted for this relief. The High Court however found that this claim as well as those set out in paragraphs 1, 2, 3, 4 and 5 had prescribed. It had been correctly conceded that the claim in paragraph 9 had prescribed. The High Court correctly found that the spoliation relief sought in paragraphs 7 and 8 would not prescribe. The relief sought in paragraph 10 was alleged to have arisen less than three years before the application was brought.

[62] It is accordingly necessary to determine whether the court below was correct in ruling that the relief sought in paragraph 6 had prescribed.

The plea of prescription in respect of the relief in paragraph 6

[63] The High Court held that for the purposes of prescription, a debt arises when a person acquires a right or when he or she ought to have been reasonably aware of the right to take legal action. The court further held the right to apply for declaratory relief or an interdict is a personal right and falls within the meaning of 'debt' as envisaged by the Prescription Act, 68 of 1969. This was the basis for holding that the relief sought in paragraphs 1 to 6 had prescribed.

[64] In my view, the plea of prescription is not established in respect of paragraph 6 (as well as in respect of paragraphs 1 to 5 although it is not necessary for present purposes to further elaborate in respect of these items, given the lack of legal standing of the applicants to seek that relief) because the relief claimed in each of

these paragraphs does not constitute a 'debt' within the meaning of the Prescription Act.

[65] The applicable principles were recently eloquently summarised by Wallis AJ in the South African Constitutional Court in *Makate v Vodacom Ltd*¹⁸ in the following way:

[187] Section 10 of the Prescription Act provides for a "debt" to be extinguished by prescription. In terms of section 12(1) prescription begins to run when the debt is due. The meaning that has been given to the word "debt" since the Prescription Act came into force has been in accordance with the definition in the New Shorter Oxford Dictionary, namely:

- "1. Something owed or due: something (as money, goods or service) which one person is under an obligation to pay or render to another.
2. A liability or obligation to pay or render something; the condition of being so obligated."

I agree with the main judgment that if the statement in *Desai* that debt "has a wide and general meaning, and includes an obligation to do something or refrain from doing something" was intended to extend this meaning, that was an error.

[188] The correlative of a debt in this sense is a right of action vested in the creditor in which the payment of money, or the delivery of goods, or the rendering of services is claimed. And, when payment, delivery or the rendering of services extinguishes the debt, the right of action is likewise extinguished. That is why section 12(1) of the Prescription Act provides that prescription will commence to run once the debt is due. If the debt is not due then prescription cannot run. Debts become due when they are immediately claimable or recoverable.

[189] Not all rights of action give rise to debts. That is well illustrated by the recent decision in *Keet*. Based on an ambiguous and obiter statement in the first instance Court in *Evins* it had been said in a series of cases in the Supreme Court of

¹⁸ 2016 (4) SA 121 (CC).

Appeal that a vindicatory claim, that is, a claim to assert a right of ownership in an asset, gave rise to a debt capable of being extinguished by extinctive prescription under section 10 of the Prescription Act. This occasioned confusion because the owner would remain the owner of the asset, but would not be entitled to exercise its rights of ownership against the possessor thereof. In effect it would be deprived of its rights of ownership by way of extinctive prescription, whereas the loss of the right of ownership by way of prescription is a matter of acquisitive prescription, which is dealt with in Chapter I and sections 1 to 5 of the Prescription Act, not Chapter III and sections 10 to 12 of that Act.

[190] The Court in *Keet* overruled these earlier cases and held that acquisitive prescription dealt with the acquisition (and corresponding loss) of real rights such as ownership, while extinctive prescription dealt with the extinguishment of debts and their correlative rights of action, in other words, with personal rights. The relevance of the case to the present one is that it illustrates that not every right to approach a court for relief will amount to a debt for the purposes of extinctive prescription. So the right to claim delivery of the motor vehicle in that case did not give rise to a “debt” for the purposes of extinctive prescription in terms of section 10 of the Prescription Act.

[191] It will be apparent from this that, depending on their source, rights of action directed at the same purpose and seeking identical relief may in one case give rise to a debt for the purposes of prescription and in another not. For example a right to claim occupation under a lease is a personal right and the obligation to satisfy that right by delivering possession of the property leased will be a debt capable of prescribing. But a claim to possession of the same property arising from a registered right of *usus* or *habitatio* will not.

[192] In the case of a continuing wrong there can be no question of prescription even though the wrong arises from a single act long in the past. The reason, which may appear somewhat artificial, but which is well established, is said to be that while the original wrongful act may have occurred at a past time the wrong itself continues for so long as it is not abated. But the running of prescription in respect of any financial claim arising from the same wrong will not be postponed. Accordingly, if financial loss was occasioned by the original wrongful act, the debt in relation to that loss would become due and prescription would commence to run when the original wrongful act occurred and loss was suffered. The result is that the impact of

prescription on claims having their source in the same right may differ depending on the nature of the claim.’

[66] The relief sought in paragraph 6 is to declare an alleged decision to terminate the second appellant’s membership of council as null and void. Even though the cause of action is barely specified, it would appear to rely upon the failure to accord the second appellant the right to be heard and thus a breach of natural justice and the 14th respondent exceeding his powers. The relief is in essence a review of a decision of the 14th respondent.

[67] This does not in my view amount to debt as contemplated in the Prescription Act. It is not a right of action for money or the delivery of goods or the rendering of services which can be extinguished by prescription, as they could by payment or performance as explained by Wallis AJ in *Makate*.¹⁹ Certainly a claim for payment for damages arising from the termination would constitute a debt and be susceptible to prescription. But the setting aside of disciplinary action of a voluntary association would not in my view amount to a debt even though damages, which may arise from it, conceivably could. Nor would interdictory relief arising from an ongoing wrong prescribe for the reasons articulated by Wallis AJ.

[68] It follows that the relief sought in paragraph 6 had not prescribed. But insofar as it is directed at setting aside decision making by way of review – even though the appellants did not seek to invoke the procedural aid of rule 76 (formerly rule 53). Clearly a court will have regard to the actual nature of the relief sought and not the procedure adopted or the way in which it is formulated.

¹⁹ At para 186.

[69] The parties were invited to address this court as to whether there had been an unreasonable delay on the part of the second appellant in seeking to declare the decision to terminate his services on council (and as chairperson) as null and void – and thus set it aside.

[70] Mr Khama argued that the delay was not unreasonable in the context of the disputes between the parties. He contended that no time period is specified for a challenge to administrative decision-making and that there was no factual basis to assert that the time taken to mount that challenge was unreasonable.

[71] Mr Barnard submitted that the time taken to challenge the decision was unreasonable in the extreme. He referred to the fact that on the papers two further council elections had taken place (in 2010 and 2013) prior to the bringing of the application and that council members only had terms of three years. He argued that no facts were set out in support of condonation for the delay.

[72] The question as to whether there had been an unreasonable delay in instituting proceedings is one which a court may raise of its own accord (*mero motu*).²⁰ It is well settled that the question entails a dual enquiry. The first is whether the time taken to institute the proceedings was unreasonable. That enquiry is factual and does not entail the exercise of a discretion. If a court finds that the delay is

²⁰ *Disposable Medical Products (Pty) Ltd v Tender Board of Namibia and others* 1997 NR 129 (HC) (full bench) at 133 H-I. See also *Radebe v Government of the Republic of South African and others* 1995 (3) SA 787 (N) at 798G-H.

unreasonable, the question arises as to whether a court would, in the exercise of discretion, grant condonation for the unreasonable delay.²¹

[73] As has also been repeatedly stated, each case is to be determined on its own facts as to whether the delay is unreasonable or not.²² The reasons for this delay rule were cogently summarised by this court in *Keya*.²³ They essentially relate to the public interest being served by finality and certainty in respect of administrative action. Delays may also cause prejudice to others if administrative decision making is challenged after an unduly lengthy delay.

[74] In this case, the second appellant alleges he received a letter terminating his services as chairperson and member of the council from the 14th respondent. The letter (which was not attached to the papers) was said to be addressed to him on 31 October 2009. The proceedings were served on the respondents on 20 February 2015 – nearly five years and three months later. The challenge is to be viewed in the context of the association's constitution. It provides for members of council being elected at three year intervals. By the time the second appellant had instituted these proceedings, his term of office under the constitution would have long since expired. Upon the facts, properly approached, there were council elections in 2010 and 2013. In the course of those elections, other council members were elected upon the facts properly approached in motion proceedings.

²¹ *Keya v Chief of the Defence Force and others* 2013 (3) NR 770 (SC) at para 21; *Kruger v Transnamib Ltd (Air Namibia) and others* 1996 NR 168 (SC).

²² See *Keya* at para 21.

²³ In para 22.

[75] The delay of more than 5 years in challenging the decision to remove him from the council is patently unreasonable in the circumstances. No factual matter at all is adduced in seeking to condone this inordinate delay. Indeed, the application inexplicably does not even make mention of the need to do so.

[76] In the absence of any factual matter raised to condone this unreasonable delay, it would follow that the relief sought in paragraph 6 should be dismissed on this ground.

Conclusion

[77] In view of the finding that the appellants' lack of standing in respect of all the other relief sought and the unreasonable delay in respect of applying for the relief in paragraph 6, the appeal to this court must fail. The application should however have been dismissed by the High Court for those reasons and not merely struck from the roll. The order of that court needs to be corrected. It also follows that the appeal to this court must fail.

[78] The High Court ordered that the persons set out in ABM1 are to pay the respondents' costs jointly and severally with the second appellant. Even though none of those listed in ABM1 filed an affidavit, some of them made common cause with the application by signing the resolution authorising it, even though this was done in November 2011. A costs order should be restricted to those persons listed in annexure ABM1 who signed the resolution, annexure ABM2. For the sake of clarity they are the second appellant, E Morwe, R Mokaleng, B Kauta, M Modisa, A Motonane, J Kasuto, C Goeieman, I Armat and F Molelekeng.

Order

[79] The following order is made:

- (a) The appeal is dismissed with costs.
- (b) The order of the High Court is set aside and replaced with the following order:
 - “1. The application is dismissed with costs;
 - 2. The persons who signed annexure ABM2, as listed above are ordered to pay the respondents’ costs, jointly and severally, together with the second appellant, the one paying the others to be absolved. These costs include the costs of one instructing and one instructed counsel.”
- (c) The costs on appeal include those consequent upon the engagement of one instructing and one instructed counsel and are to be paid by the second appellant and those persons who signed annexure ABM2, as listed above, jointly and severally, the one paying the others to be absolved.

SMUTS JA

DAMASEB DCJ

FRANK AJA

APPEARANCES

APPELLANTS:

D Khama

Instructed by Government Attorney

RESPONDENTS:

P Barnard

Instructed by Du Pisani Legal
Practitioners