

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 3618/22P

In the matter between:

MFANISENI MBONISENI MTUNGWA

FIRST APPLICANT

**MEMBERS OF UMNDENI WENKOSI LISTED IN
ANNEXURE 'A' WHICH IS ATTACHED TO THE
NOTICE OF MOTION**

SECOND APPLICANT

and

PREMIER OF KWAZULU-NATAL

FIRST RESPONDENT

**DEPARTMENT OF CO-OPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS, KWAZULU-NATAL**

SECOND RESPONDENT

THOKOZANI MTUNGWA

THIRD RESPONDENT

Coram: Mossop J

Heard: 28 February 2023

Delivered: 28 February 2023

ORDER

The following order is made:

1. The application for leave to appeal is refused with costs, such to include the costs of senior counsel.

JUDGMENT

MOSSOP J:

[1] This is an opposed application for leave to appeal against a judgment handed down by me on 18 November 2022, when I dismissed a review application brought by the applicants in which they sought an order, essentially, that the recognition of the third respondent as the iNkosi of the Mabaso clan (the traditional community), be reviewed, declared invalid and set aside and that the issue of the identification of the iNkosi of the traditional community be referred back to the umndeni wenkosi of the traditional community as provided for in section 19(4) of the KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005.

[2] My judgment on the issues is comprehensive and I stand by the reasons set out therein.

[3] The purpose behind requiring litigants to obtain leave to appeal was set out in the matter of *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd*,¹ where Wallis JA said that:

‘The need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit.’

[4] Section 17(1)(a)(i) and (ii) of the Superior Courts Act, 10 of 2013 (the Act) provides that leave to appeal may only be given where a judge is of the opinion that the appeal would have a reasonable prospect of success or there is some other

¹ *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd* 2013 (6) SA 520 (SCA) para 24.

compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

[5] Leave to appeal may thus only be granted where a court is of the opinion that the appeal would have a reasonable prospect of success, which prospects are not too remote.² An applicant for leave to appeal faces a higher threshold³ under the provisions of the Act than under the repealed Supreme Court Act 59 of 1959. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.⁴

[6] In their application for leave to appeal, the applicants have raised various grounds in support of their contentions that there are reasonable prospects that another court would grant a different order to the order granted by me.

[7] I have had a considerable amount of time to consider, in particular, the applicant's notice of application for leave to appeal and the grounds stated therein. I received it on 9 December 2022, after the conclusion of the judicial year, and read it immediately and I noticed that the copy of the notice of appeal provided to me by the Registrar was incomplete, it being obvious that at least the signature page thereof, and possibly other pages, were missing. I could, however, not deal with the application for leave to appeal at the beginning of 2023 as I was assigned circuit court duties in Madadeni during the first session of the first term. I returned last week from such duties.

[8] I have considered the papers filed by the applicants, such as they are, and I have further considered the arguments, authorities and submissions of the parties addressed to me this morning.

[9] At the core of this matter is the procedure for appointing a successor to a deceased iNkosi within the traditional community. I am satisfied that the method of identifying a successor to an iNkosi in the traditional community is through the male

² *Ramakatsa and Others v African National Congress and Another* [2021] JOL 49993 (SCA) para [10]

³ *S v Notshokovu* Unreported SCA case no 157/15 dated 7 September 2016, para [2]

⁴ *Smith v S* [2011] ZASCA 15; *MEC for Health, Eastern Cape v Mkhitha* [2016] ZASCA 176, para [17]

line of succession and that line runs through the eldest son of the iNkosi and that son's male progeny. If there are no male sons born of the eldest son, then the second eldest son succeeds and so on. This was the method of succession embraced by the traditional community. There is accordingly no basis for finding, as the applicants urged me to do when the matter was initially argued, that upon the death of the eldest son of an iNkosi, the youngest son succeeds to the position and the entitlement of the male progeny of the late iNkosi, and any other sons ranking between the deceased iNkosi and the youngest son, are to be ignored. As I noted in my judgment, if that was the case, which I found not to be the case, then the first applicant still could not succeed to the position that he covets because the youngest son of the late Thembitshe would inherit the title, not the first applicant. Any appeal therefore is futile, in my view.

[10] It was not submitted that there are any compelling reasons why an appeal should be allowed in the matter and I am not independently able to conceive of one.

[11] It follows that I am not persuaded that there is a reasonable possibility that another court would come to a different decision than the one to which I came. I am of the view that this is precisely the type of matter that Wallis JA was referring to in *Dexgroup*, namely, an appeal that lacks merit.

[12] In the circumstances, the application for leave to appeal is dismissed with costs, such to include the costs of senior counsel.

MOSSOP J

APPEARANCES

Counsel for the applicants	:	Mr M. N. Xulu
Instructed by:	:	S N Nxumalo Attorneys Incorporated
		20 Otto Street
		Pietermaritzburg

Counsel for the first and second respondents	:	Mr A. J. Dickson SC
Instructed by	:	PKX Attorneys Suite 36 3 on Cascades Crescent Montrose Pietermaritzburg
Date of Hearing	:	28 February 2023
Date of Judgment	:	28 February 2023