



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

CASE NO: 2367/2010

In the matter between:

ZWELIBHEKILE SIBUSISO MBUYAZI

APPLICANT

and

**THE PREMIER OF THE PROVINCE OF
KWAZULU-NATAL**

FIRST RESPONDENT

MKHANYISENI MBUYAZI

SECOND RESPONDENT

uMNDENI WENKOSI

THIRD RESPONDENT

STHEMBILE VALENCIA MKHIZE N.O.

FOURTH RESPONDENT

**THE M.E.C. OF THE DEPARTMENT OF
CO-OPERATIVE GOVERNANCE AND
TRADITIONAL AFFAIRS**

FIFTH RESPONDENT

JUDGMENT

SISHI J

Introduction

[1] This is an application for leave to appeal against the judgment of this court delivered on 6 October 2016.

[2] In the Notice of Application for leave to appeal, the findings of fact or rulings of law appealed against are set out as follows:

- a) That there is no applicant in the present review application (para 39).
- b) That the present review application should not be consolidated with the action in Pietermaritzburg High Court case number 4862/2015 (order para 1).
- c) That this court may or should rescind the order granted by Van Zyl J on 7 June 2011 (order para 2).
- d) That this court may or should discharge the rule *nisi* granted by this court on 11 May 2010, subsequently varied by this court on 26 May 2010, discharged by this court on 9 July 2013 and reinstated by the Supreme Court of Appeal on 28 November 2014 (order para 3).
- e) Costs (order paras 4 and 5).

[3] The grounds upon which the application is founded are that the appeal will have reasonable prospect of success and/or that there are compelling reasons why the appeal should be heard. The details of such grounds are fully set out in the Notice of Application for leave to appeal.

[4] The application was opposed by the first, second, third and fifth respondents.

[5] Mr Goddard SC, counsel for the applicant, submitted correctly in my view, that the issue of leave to appeal is governed by s 17 of the Superior Courts Act 10 of 2013 (the Act).

[6] Counsel then referred to para 17 of the Supreme Court of Appeal's (SCA) judgment in *Mkhize: In re Mbuyazi v The Premier of the Province of KwaZulu-Natal and Mbuyazi v Mbonambi Community Development Trust* (822/2013) [2014] ZASCA 204 (28 November 2014) which deals with the issues of convenience. In this paragraph the court stated:

'For the appellant to succeed in the deceased's damages claim she will have to prove that the deceased was wrongfully and unlawfully removed as Inkosi. As has been mentioned above, the disputes relating to this and other issues have already been referred to trial by Van Zyl J. It is therefore convenient, and in fact to the advantage of all involved, that the matter proceeds as directed by Van Zyl J, so that the important question of the rightful successor to late Inkosi Mbuyazi and/or the deceased may be settled as soon as possible.'

[7] Mr Goddard thereafter submitted that the order granted by Van Zyl J on 7 June 2011 had been rescinded by this court in para 2 of the order and that there is a reasonable prospect that another court may come to a different conclusion on this issue. As such, the order by Van Zyl J ought not to have been rescinded.

[8] Counsel further submitted that para 2 of the court order takes away the rights of the fourth respondent, Sithembile Valencia Mkhize, to pursue a claim for damages against the first and fifth respondents for outstanding salary on behalf of the deceased, as she had been substituted as such. Mr Goddard submitted that if that claim is pursued, consolidation of the review application with an action under case number 4862/2015 may be permitted.

[9] Mr Goddard SC submitted that in terms first leg of the Act the appeal would have to have reasonable prospects of success to be granted. He went on to state that the second leg of s 17(1)(a) is that there must be some other compelling reason why the appeal should be heard. He submitted that it is important that there should

be proper determination of who should succeed as Inkosi and that such a claim should not be dismissed on technical grounds. He then submitted that leave to appeal is normally granted in matters where leadership is disputed submitted that leave to appeal should be granted in the circumstances of this case.

[10] Mr Dickson SC for the first and fifth respondents opposed the application for leave to appeal. He referred to the anomaly created by the SCA in its judgment as referred to in the judgment of this court. He submitted that there are no reasonable prospects of success in this appeal. He specifically referred to paras 31 and 32 of this court's judgment dealing with the finding of the SCA and the interpretation thereof. He emphasised as stated in this court's judgment that in terms of the SCA's judgment, if no person other than the deceased has standing to bring a review of the Premier's decision to appoint the second respondent, then it would seem that his position is unassailable. Counsel then submitted that the review application can no longer be pursued in the light of the SCA's judgment.

[11] Mr Dickson submitted that the Inkosi's monetary claims are a separate issue and that no one has taken that right away from the fourth respondent. The purpose of the present court's judgment is to put an end to the dispute.

[12] He finally submitted that the application for leave to appeal should be refused.

[13] Mr Ngema appearing on behalf of the second and third respondents concurred with the submissions made by Mr Dickson SC. He submitted that the fourth respondent's claim is limited to the monetary or damages claim.

[14] Applications for leave to appeal are governed by s 17 of the Act. Section 17(1) provides as follows:

'17. (1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—

- (a) (i) the appeal would have a reasonable prospect of success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.'

[15] The grounds upon which this application for leave to appeal is founded mainly stems from the misinterpretation of the SCA case of *Mkhize* referred to above.

[16] The judgment of this court delivered on 6 October 2016 sought to be appealed against, should be understood in the light of the findings of the SCA. In para 12 of the judgment the court stated as follows:

'I agree with the finding of the court below that the deceased's claim, in the review application, that the Premier's withdrawal of his recognition as Inkosi of the Mbuyazi Community be set aside; that the Premier be directed to do all things necessary to withdraw the appointment of the second respondent as Inkosi of the Mbuyazi Community and to reinstate him (the deceased) as such, was personal to him and therefore not transmissible to anyone else. He was the only one, were he to be successful, who could be reinstated as Inkosi. However, since he has died, an order setting aside the Premier's withdrawal of the deceased's recognition as Inkosi and directing the Premier to reinstate him as Inkosi can no longer be made. That claim, therefore, could no longer be pursued after the death of deceased. It terminated upon his death. (See the relevant authorities referred to by Holmes JA in *Government of the Republic of South Africa v Ngubane* 1972 (2) SA 601 (A) at 607A-B). In my view, the claim for reinstatement could not be ceded, even after *litis contestatio*, and is thus not transmissible to the deceased heirs. It follows that the appellant cannot be substituted as applicant in the review application proper.'

[17] The SCA confirmed the rights of Sithembile Valencia Mkhize to solely pursue the damages claim on behalf of the estate of her late husband Zwelibhekile Sibusiso Mbuyazi. This appears to be sole acknowledgment by the SCA of the possible right of action that the executrix may have had against the first and/or fifth respondents. This excluded any claim that Sithembile Valencia Mkhize had relentlessly pursued in having her son appointed or being considered by Umndeni Wenkosi as Inkosi of the Mbonambi Tribe.

[18] What is clear from the SCA's judgment is that the issue of the monetary claim for damages is a totally separate issue, wherein the SCA held that the fourth respondent was entitled to bring an action against the MEC in this regard in her capacity as an executrix of the estate to adjudicate on the monetary issue. The monetary issue however had nothing whatsoever to do with the declaration of the second respondent as Inkosi and Chief of the Mbonambi Tribe or the fact that Zwelibhekile Sibusiso Mbuyazi may have been unlawfully removed as Inkosi.

[19] In order for this court or any other court for that matter to deal with the review application, there has to be an applicant in the review application.

[20] The SCA was clear in its judgment, it found that the deceased's claim, in the review application viz, that his removal be set aside, and that the appointment of the current Inkosi be set aside were personal to him and were not transmissible to anyone else (para 12).

[21] Since the death of the deceased, an order in the review application cannot be made.

" D7 "

[22] This court in its judgment at para 31 stated as follows:

[31] It needs to be emphasised that the Supreme Court of Appeal found:

- (1) That the deceased's review against the withdrawal of his recognition by the First Respondent was not transmissible to anyone else;
- (2) That no decision on this review could be made in the future at the instance of anyone; and
- (3) That the court *a quo* correctly dismissed the Fourth Respondent's claim to be substituted for the deceased in the review.'

The judgment went on in para 32:

[32] What is clear from this judgment is that if no person other than the deceased has standing to bring the review of the Premier's decision to appoint the Second Respondent, then it would seem that his position is unassailable.'

[23] It is in the light of the decision of the SCA that this court, in para 39 of its judgment, made a finding that in the present review application there is no more an applicant. The SCA already held that Sthembile Valentia Mkhize had no *locus standi* to persist with the review application. The action instituted is merely designed to defeat the inevitable result viz, that the order granted by Van Zyl J stands to be set aside and for the rule *nisi*, in the absence of an applicant, stands to be discharged.

[24] This court accordingly came to the conclusion to rescind the order and to discharge the rule *nisi*.

[25] A case for consolidation of case number 2367/2010 and the action brought under case number 4862/2015 was not made out. In dismissing the application for


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the consolidation of the two cases, the court was of the view that it was not just and equitable to do so as the two claims had nothing to do with each another.

[26] As indicated above, the issue of the monetary claim for damages is a totally separate issue, wherein the SCA held that the fourth respondent (Valencia) was entitled to bring an action against the MEC, in her capacity as executor of the estate to adjudicate on the monetary issues. This monetary issue has nothing to do with the declaration of the second respondent as Inkosi and Chief of the Mbonambi Tribe or the fact that Zwelibhekile Sibusiso Mbuyazi may have been unlawfully removed as Inkosi.

[27] In view of the fact that Sthembile Valencia Mkhize was no longer in a position to pursue the issue of her late husband as to the chieftainship, that the order should be set aside and the rule *nisi* should therefore be discharged.

[28] Having considered all the above, I am satisfied that the appeal has no reasonable prospect of success. I am also satisfied that there are no other compelling reasons why the appeal should be heard in this matter. The application for leave to appeal falls to be dismissed.

[29] In the result I make the following order:

The application for leave to appeal is dismissed.



SISHI J



"D9"

Appearances

For the Applicant	:	Adv G.D. Goddard SC
Instructed by	:	Schreiber Smith Attorneys c/o Stowel & Co. 295 Pietermaritz Street Pietermaritzburg
For the 1 st & 5 th Respondents	:	Adv A.J. Dickson SC
Instructed by	:	PKX Attorneys Suite 36, 3 Cascades Crescent Montrose Pietermaritzburg
For the 2 nd & 3 rd Respondents	:	Adv J.N.N. Ngema
Instructed by	:	Pretorius, Mdletshe & Partners Inc. Kwa Dukuza c/o McGregor & Associates 14 Leathern Street Pietermaritzburg
Date of hearing	:	29 March 2017
Date delivered	:	10 May 2017


S.V.