

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 11901/2022

(1)	REPORTABLE: <u>YES/NO</u>
(2)	OF INTEREST TO THE JUDGES: <u>YES/NO</u>
(3)	REVISED. _____
DATE: 1 November 2024 SIGNATURE: _____	

In the matter between:

NGWANATAU JOHANNES BALOYI

1ST APPLICANT

THUPANA JOSEPH MAKGOBA

2ND APPLICANT

SEWELE LINAH MMOLA

3RD APPLICANT

MMADINTSHI MARTHA RAPITSI

4TH APPLICANT

JANE MAHASHA

5TH APPLICANT

JIMMY KUBJANA

6TH APPLICANT

ALLY MAAKE

7TH APPLICANT

FRANS KUBJANA

8TH APPLICANT

DUSTY MAISHE MALATJIE

9TH APPLICANT

CURRY LETSOALO

10TH APPLICANT

MARY NTWAMPE

11TH APPLICANT

VERONICA MOTSWI	12TH APPLICANT
ATHANA MAFA	13TH APPLICANT
LLOYIDE MASHATOLE	14TH APPLICANT

-and-

LEDWABA LAZARUS	1ST RESPONDENT
GISELA STOLS	2ND RESPONDENT
THE MASTER OF THE HIGH COURT GAUTENG DIVISION, PRETORIA	3RD RESPONDENT
THE DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM, LIMPOPO PROVINCE	4TH RESPONDENT
MAMPHOKU MAKGOBA COMMUNITY TRUST (IT8699/2004)	5TH RESPONDENT
MASHEBANE DANIEL MALESA	6TH RESPONDENT
JOSEPH KAMELA MODIBA	7TH RESPONDENT
MOTHOKO TERRENCE MOSIBIHLA	8TH RESPONDENT
THETELE JOSEPH MALATJI	9TH RESPONDENT
MANKUROANE SAMUEL MODIBA	10TH RESPONDENT
MOTLATSO IVY MAGOELE	11TH RESPONDENT
MMATISHI SIMON MAKGOBA	12TH RESPONDENT
MOGOWE WINDSOR MADIA	13TH RESPONDENT
ONICA MAKGOBOLA	14TH RESPONDENT
MMAMOKGOTLA MONICA MATLEBJANE	15TH RESPONDENT
REFILWE IRENE LETSOALO	16TH RESPONDENT

MOTLOKWA SUZAN MOJAPELO

17TH RESPONDENT

MATOME DAVID MODIBA

18TH RESPONDENT

MOHALE ELIAS NYAKALA

19TH RESPONDENT

MATLU JACQYELINE MAKGOBA

20TH RESPONDENT

JUDGMENT: LEAVE TO APPEAL

BRESLER AJ:

Introduction:

[1] The Applicants (Applicants in the main application) apply for leave to appeal to the Supreme Court of Appeal, alternatively the Full Court of this division against the judgment and order of this court delivered on the 11th of March 2024 in terms whereof the Applicants' application was dismissed with costs.

[2] The Application for leave to appeal is premised on the following grounds:

2.1 The Court erred in respect of the position of the successors being excluded from the voting process.

2.2 The Court erred in respect of the issue of voting by proxy as testimony was led to the effect that Marry Hunadi Tsheola voted on behalf of her mother.

2.3 The Court failed to take the supporting affidavits into consideration.

2.4 It is in the interest of justice to grant leave to appeal.

[3] An application for leave to appeal is governed by section 17(1) of the **Superior Courts Act**, Act 10 of 2013 which provides:

‘17 Leave to appeal

(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,*
- (b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a), and*
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.’*

[4] In **MEC Health, Eastern Cape v Mkhitha**¹ the Supreme Court of Appeal said the following (reference to other authorities omitted):

¹ **MEC Health, Eastern Cape v Mkhitha** (1221/15) [2016] ZASCA 176 (25 November 2016)

'[16] Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard.

[17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal."

- [5] Having regard to the Application for Leave to Appeal and the oral arguments submitted by the Applicant, the Applicants require leave to appeal only on the premise that there is a reasonable prospect of success on appeal, alternatively that there is a compelling reason to hear the appeal.

Analysis:

- [6] I have reiterated in the judgment delivered on the 11th of March 2024 that what lies at the heart of this judgment, is an interpretation of the order granted by the Supreme Court of Appeal on the 30th of March 2021 under case number 1136/19 (the 'SCA order'), and the subsequent execution thereof.

- [7] As to the issue of the beneficiaries being entitled to vote, I am satisfied that my interpretation of the provisions of the SCA order is correct and that there is no reasonable prospect of succeeding in an Appeal on this aspect.
- [8] The terms of the order is clear and was analysed in the judgment.
- [9] Regarding the assertions that voting was allowed by proxy, the difficulty with the manner in which the evidence was presented, was dealt with in the judgment and during argument on the application for leave to appeal. Applying the well-known *Plascon-Evans* rule, this Court was not convinced, on a balance of probabilities, that Ms Tsheola-Mboweni voted on behalf of her mother as opposed to simply assisting her mother on that day. In my view, the evidence was therefore correctly rejected as being inconclusive and the Applicant did not move for an order referring same to oral evidence or trial.
- [10] I do not foresee that the Applicants will be successful in their Appeal on this point.
- [11] As to the allegations that the confirmatory affidavits were not taken into account in justification of the alleged irregularities in the voting process, this was duly considered by this court with specific reference to paragraph [29] of the judgment where several inconsistencies in the Applicants' evidence were highlighted.
- [12] It stands to be noted that the Court must be persuaded on a balance of probabilities that a case has been made out before any form of final relief can be granted. In this instance, this Court is not convinced that a higher court will come to a different conclusion with regards to the difficulties that the Applicants encountered in their Founding affidavit.

- [13] Specific mention should be made as to the questionable *locus standi* of the First Applicant in as far as the judgment addresses the concern in paragraph [23]. The First Applicant (deponent to the Founding affidavit) is evidently not one of the 'list of 603 beneficiaries' that were entitled to vote. Although he is a potential successor of a beneficiary, he does not appear on the list of persons that were entitled to vote, yet he specifically noted in the Founding affidavit, incorrectly, that he appears as number 1 on the list.
- [14] All of the above contributed to this Court not being satisfied that a case was indeed made out in justification of the relief prayed for, as a consequence whereof the application was dismissed with the appropriate cost order.
- [15] As stated in **Mkhita supra**, this Court does not see any 'sound, rational basis to conclude that there is a reasonable prospect of success on appeal' and leave to appeal must consequently be refused.

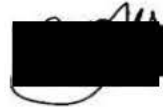
Costs:

- [16] There is no reason why the cost order should not follow the outcome of these proceedings. Having considered the nature of the proceedings, the complexity thereof, the volume of the record and the importance thereof to the parties, costs to counsel are warranted on Scale C.

Order:

[17] In the result the following order is made:

17.1 Leave to appeal is refused with costs including costs to counsel on Scale C.



M BRESLER
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

FOR THE APPLICANT : **Adv. K Mokwena**

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TWENTIETH RESPONDENTS

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DATE OF HEARING : 14 August 2024

DATE OF JUDGMENT : 1 November 2024

POLOKWANE HIGH COURT