



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CASE NO.: 2227/2023

In the matter between:

MTHETHO HLAMANDANA

1st Applicant

BHEKAMEVA ROYAL FAMILY

2nd Applicant

and

**PREMIER, EASTERN CAPE PROVINCIAL
GOVERNMENT**

1st Respondent

**MEC FOR COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS, EASTERN
CAPE**

2nd Respondent

ISIKELO TRADITIONAL COUNCIL

3rd Respondent

ADV.N. JAMES N.O

4th Respondent

**JUDGMENT
ON APPLICATION FOR LEAVE TO APPEAL**

ZONO AJ:

Introduction

[1] On 17th February 2025 the applicants lodged an application for leave to appeal against the judgment delivered on 04th February 2025. The application is, on relevant part, couched in the following terms:

“And further take notice that the grounds on which such leave will be sought are the following:

1.

(a) An Appeal Court would reasonably find that the Honourable Judge erred in remitting the matter to the fourth respondent for a lawful decision to be taken by the fourth respondent because the order for remitting the matter to the fourth respondent was never asked for, by any of the parties in the proceedings, and is not apparent on the pleadings that were before court. Accordingly, there is no evidential basis justifying the grant of such an order. In the circumstances it is respectfully submitted that the Acting Justice failed to exercise his discretion in this regard judicially, particularly in this case where the proceedings which His Lordship describes as being extant, are completed proceedings.

(b) In this regard the Appeal Court would reasonably find that had the court a quo judicially exercised its discretion it would have realized that remitting the matter to the fourth respondent in the circumstances of this case, where it had been established that the fourth respondent had exhibited gross incompetence, lack of skill in performing quasi-judicial function in the enquiry, in that he failed to properly evaluate the evidence and make rational findings, he failed to act fairly and that he exhibited lack of the understanding of the statute in terms of which he had been appointed and the functions he had to perform

in terms of the said statute that governs the enquiry he was appointed to preside over. Given that there was such a state of affairs, it is submitted that remittal of the matter to the fourth respondent will operate procedurally unfairly to both parties. Consequently, for the aforementioned reasons, the right which everyone has, to a lawful reasonable and a procedurally fair administrative action will not be given full effect to, and that will prejudiced both parties.

- (c) The appeal court would reasonably find that His Lordship erred in remitting the matter to the fourth respondent who had been appointed to specifically preside over an enquiry which ran its full course and completed its proceedings and made its decisions as contemplated in the statute. Currently the fourth respondent is not a holder of such an appointment and there is no order of court that directs that he be appointed once more. Having completed his duties his decisions were subsequently taken on appeal which appeal confirmed the fourth respondent's decisions. The fourth respondent is accordingly functus officio.*
- (d) The appeal court would reasonably find that the His Lordship erred in remitting the matter to the fourth respondent given what is set out in paragraph (c) above, because the consequences that flow therefrom is that the fourth respondent no longer exists in the capacity that he was clothed with when he presided over the enquiry, and therefore he cannot reconsider any of the decision that have been set aside without having been lawfully appointed. Accordingly, it is pointless to remit in this regard.*

2.

- (a) The appeal court would reasonably find that His Lordship misdirected himself in issuing the order for remittal in this*

regard if regard is had to what is alluded to in the above paragraphs and has consequently issued a formless, incomplete, incoherent and impermissibly vague remittal order which violates the rule of law, which is a founding principle of our Constitution.

- (b) *The appeal court would therefore reasonably find that given what is alluded to herein above. His Lordship ought to have decided not to remit the matter after having granted the other orders that have granted which are not a subject of this appeal, and should have left the matter there so that the first and second respondents would determine themselves how to deal with the matter in the manner that they deem fit.”*

- [2] Mr Mdoana, who appeared for the respondents in the main application on instructions of the State attorney, indicated that the respondents are not opposing the application for leave to appeal by the applicants. The application for leave to appeal then ran unopposed.

Legal Principle

- [3] An application for leave to appeal is governed by Section 17(1) of the Superior Court Act which provides as follows:

“(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 *Smith*¹Plasket AJA (as he then was) held that:

- “7. *What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.”*²

[5] These sentiments were shared by Schippers AJA in *Mkhitha*³ where the following was said:

- “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.”*

[6] In the light of this application section 8(1) of PAJA provides:

¹ *Smith v S* 2012 (1) SACR 567 (SCA) Para 7.

² *S v Mabena & Another* 2007 (1) SACR 482 (SCA) Para 22.

³ *MEC for Health, Eastern Cape v Mkhitha and another* (1225) [2016] ZASCA 176 (25 November 2016) Para 17.

“8(1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders—

(a) directing the administrator—

(i) to give reasons; or

(ii) to act in the manner the court or tribunal requires;

(b) prohibiting the administrator from acting in a particular manner;

(c) setting aside the administrative action and—

(i) remitting the matter for reconsideration by the administrator, with or without directions; or

(ii) in exceptional cases—

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or

(bb) directing the administrator or any other party to the proceedings to pay compensation;

(d) declaring the rights of the parties in respect of any matter to which the administrative action relates;

(e) granting a temporary interdictor other temporary relief or

(f) as to costs.”

[7] In line with the provision of section 8(1)(c) of PAJA, Section 172(1)(b) of the Constitution provides:

“1. When deciding a constitutional matter within its power, a court—

(a)

(b) May make any order that is just and equitable”

For context, section 8(1)(c)(i) of PAJA and section 172 (1)(b) of the Constitution must be read together.

[8] Despite its wordiness, application for leave to appeal demonstrates that the applicants are aggrieved by the remittal of the matter for reconsideration by the fourth respondent. The court, in its discretion may grant any remedy that is just and equitable in terms of section 8(1) of PAJA. The applicants, in their

wisdom sought a relief in paragraph 5 of the notice of motion in the following terms:

“5. *Granting applicants such further and alternative relief as this honourable court may deem fit.*”

This relief is wide enough to accommodate the remedy provided for in section 172(1)(b) of the Constitution and section 8(1) (c)(i) of PAJA. Applicants’ lament that the relief was not asked for by any party is devoid of merit.

[9] Section 8(1) of PAJA provides for just and equitable order. The power to make such an order also derives from Section 172(1)(b) of the Constitution⁴. A power to grant a just and equitable order is wide and flexible that it allows courts to formulate an order that does not follow prayers in the notice of motion or some other pleadings. This power enables courts to address the real dispute between the parties by requiring them to take steps aimed at making their conduct to be consistent with the Constitution.⁵

[10] In *Hoerskool Ermelo Moeseneke DCJ* declared:

“97. *A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct. This ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements. In several cases, this Court has found it fair to fashion orders to facilitate a substantive resolution of the underlying dispute between the parties. Sometimes orders of*

⁴ *Head of Department, Mpumalanga Department of Education v Hoerskool Ermelo* 2010 (2) SA 415 (CC), 2010 BCLR 177(CC) Para 96.

⁵ *Economic Freedom Fighters and Others v Speaker of the National Assembly and another* (CCT76/2017) [2017] ZACC47; 2018(3) BCLR 259 (CC); 20178(2) SA 571 (CC) Para 211.

this class have taken the form of structural interdicts or supervisory orders. This approach is valuable and advances constitutional justice particularly by ensuring that the parties themselves become part of the solution.

- [11] In a bewildered fashion the applicants seem to complain about fourth respondents' incompetence; lack of skill and understanding of the relevant statute. On that basis they suggested that remittal of the matter was erroneous. The fallacy of this ground is that the applicants do not suggest what must be done with the disciplinary proceedings. They do not and did not pray for substitution or variation of the fourth respondent's decision in terms of section 8(1)(c)(ii)(aa) of PAJA. It is disingenuous of the applicants to complain about an order that seeks to ensure that there is finality in the disciplinary proceedings. In fact, the applicants contend that the matter should have been left at a point where the fourth respondent's decision dated 28th February 2022 is reviewed and set aside. It was erroneous to take it further and remit the matter for reconsideration in terms of section 8(1)(c)(i) of PAJA, so it is argued.
- [12] Fourth respondent is cited by the applicants in the instant proceedings. He is cited in his capacity as a chairperson of the disciplinary enquiry who took a decision ostensibly against the first applicant. Section 8(1) (c) (i) of PAJA provides that the court in proceedings for judicial review may grant an order "*remitting the matter for reconsideration by the administrator with or without directions*". It is preposterous and disingenuous of the applicants to suggest that the matter should have been left open and without finality. This ground or point is equally unmeritorious and wasteful. The fourth respondent was lawfully appointed to deal with first applicant's disciplinary proceedings. It is not in dispute that those proceedings are still extant.
- [13] The fourth respondent was appointed by the Premier in terms of section 31(5) of Eastern Cape Traditional Leadership and Governance Act 1 of 2017 to preside over the inquiry. In terms of section 31(13) of this Act, the Chairperson is obliged to finalize the disciplinary proceedings by ultimately pronouncing

the sanction. It goes without saying that the Presiding Officer finalises his proceedings by giving either a verdict of guilty or of not guilty. Other processes depend on the nature of verdict given. A decision must be taken and it is that decision that finalises the disciplinary proceedings. Depending on the nature of the proceedings, some decisions are multi-staged decisions.

- [14] During the hearing of the matter Mr Ngumle contended that the court failed to engage the parties on the remittal of the matter during the hearing of the main application. He further contended that the remittal is dependent on the facts of the case; and that it should not be granted if there is a prejudice to the other party. The remittal does not necessarily follow court's decision reviewing and setting aside administrative decision, so is the contention.
- [15] Section 8(1)(c)(i) of PAJA empowers this court to set aside the administrative decision **And** remit the matter for reconsideration by the administrator. The administrator in this case is the fourth respondent to whom the matter was remitted. The usage of the word **And** in the text is very important. The word denotes that remittal of the matter for reconsideration is a quintessence and an essential part of a review order. I will deal with this aspect later in this judgment. A remittal order collectively arise from the same facts as review order.
- [16] A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity⁶. The ordinary grammatical meaning of the word **And** is to serve as a conjunction; it is used to connect words of the same parts of speech, clauses or sentences that are to be taken jointly; connecting identical comparatives⁷. The power to set aside the administrative decision must be undertaken together with the power to remit the matter to the administrator for reconsideration. The sentence empowering the court to set aside the administrative decision is the same sentence that gives power to remit the

⁶ *SATAWU and Another v Garvas and Others* 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) Para 37.

⁷ South African Concise Oxford Dictionary.

matter to be reconsidered by the administrator, but it is connected by the word **And.**

- [17] The power to set aside the administrative decision is the same power to remit the matter for reconsideration. When the court is remitting the matter it is exercising exactly the same power it has to review and set aside the administrative decision. A power to remit the matter is part and parcel of the power to review and set aside the decision.
- [18] The power to remit the matter in terms of section 8(1) (c) (i) naturally flows from the power to review and set aside the administrative action or decision. It is consequential upon the exercise of the power to review and set aside the decision. Its aim is to give effect to the power to review and set aside the decision and that work must be undertaken jointly and or simultaneously.
- [19] It is also important to consider the synonyms of the word **And,** with a view to give a proper construction of the text in section 8(1)(c)(i) of PAJA. The synonyms are the following: *“together with, along with, with, as well as, in addition to, and including, also, too, beside, furthermore, moreover, plus, and whatsmore”*. All these words or synonyms demonstrate that a decision by the court may be taken contemporaneously with and as part of the order granting review and set aside of the administrative decision without any preliminary exercise of engaging in a distinct and separate debate or discussion about the necessity of granting an order remitting the matter for reconsideration by the administrator. The argument that there should have been a separate oral argument about a need to remit the matter in terms of section 8(1) (c)(i) of PAJA is without merit. Remittal of the matter in terms of section 8(1) (c)(i) of PAJA is the quintessence of the review application referred to in section 6(1) and 8(1) of PAJA. An order remitting the matter for reconsideration by the administrator must be taken together with and alongside the decision reviewing and setting aside the administrative action or decision on the same facts and contentions.

[20] However, Mr Ngumle was requested to advance an argument he would advance before the grant of the main judgment had he been afforded the opportunity to do so. He stated that the facts of this case do not require the remittal of the matter for reconsideration by the fourth respondent as the administrator. He contended that the matter should have been remitted to the second respondent's Department as it is that Department that had appointed the fourth respondent. That argument is without merit. The empowering provision provides for the remittal of the matter to the administrator. An administrator is defined to "*mean an organ of state or any natural or juristic person taking administrative action*⁸". No legal basis or whatsoever was laid for the remittal of the matter for reconsideration by the Eastern Cape Department of Cooperative Governance and Traditional Affairs. This contention is likewise unsustainable. In any event it is legally and factually incorrect that the fourth respondent was appointed by the Department. Section 31(5) of Eastern Cape Traditional and Leadership and Governance Act 1 of 2017 empowers the Premier to appoint the Chairperson and the applicants acknowledge that in their founding papers.

[21] No prejudice was shown to exist by the applicant as a result of the remittal of the matter for reconsideration. Technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their merits⁹. Although in the case of *Maluleka* the *dictum* was made in the context of Rules of court, it applies equally on the facts of this case. There can never be a basis for the court to countenance an unjustified delay in any proceedings.

[22] When this case was decided it was ready for hearing and to be adjudicated upon. The *status quo ante* reverted when this court reviewed and set aside fourth respondent's decision dated 28th February 2022. The administrative proceedings are as they were before the hearing and decision. Mr Ngumle

⁸ Section 1 of Promotion of Administrative Justice Act 3 of 2000- See also Section 6(1) and (2) of Promotion of Administrative Justice Act 3 of 2000.

⁹ *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 at 277 A-B.

contended that this court should have only reviewed and set aside fourth respondent decision and leave the matter at that. It would be for the respondents to decide what to do with that matter. I disagree. The empowering provisions confers powers to the court to remit the matter for reconsideration as part of its review jurisdiction. The power to remit the matter for reconsideration by the administrator is aimed at achieving speedy and expeditious resolution of the administrative proceedings.

- [23] I find it strange that authorities referred to in the main judgment when an order remitting the matter was granted are not adverted to by the applicants in their leave to appeal application. It is even more strange that in one of the authorities Mr Ngumle, who is applicants' Counsel was appearing as Counsel for the respondent and no complaint or leave to appeal against that order was lodged. The application for leave to appeal cannot succeed as it demonstrates no prospect of success on appeal. The remaining issue is that of costs.

Costs

- [24] There is no reason why costs should follow the result. The applicants are liable to pay costs of this application.
- [25] Mr Ngumle, as a seasoned lawyer is assumed to have advised the applicants of the authorities referred to in the matter of Buqwana¹⁰ where Mr Ngumle was one of the legal practitioners appearing in the matter. Had those authorities and authorities referred to herein been followed, this application would not have been launched. This application amounts to an abuse of court process and scarce judicial resources.
- [26] Whilst the applicants clearly and perfectly understand that the matter was remitted to the fourth respondent, that understanding flowing from paragraph 54, 57.1, 57.2 and 57.7 of the main judgment, the applicants amassed audacity to impolitely refer to remittal order as *"formless incoherent,*

¹⁰ ***Buqwana v Road Accident Fund Appeal Tribunal and Other*** (3823/2018) [2019] ZACEMHC 67(12 November 2019) Para 16.

incomplete and impermissibly vague.” These adjectives are impolite, condescending and contemptuous to the court. It is so especially that there is no basis laid in the application for leave to appeal for that kind of unprovoked attack to be launched against the work of the court. An attack of incoherence (in clarity and confusion), formlessness (without shape or structure) and other descriptive words can only be justified when based on fact. An unjustified attack to the work of the court by a litigant who is not happy with a part of the judgment and its order (not with the whole judgment and order) cannot be countenanced. This court is displeased with that unjustified conduct. As a result, costs on an attorney and client scale is justified in the circumstances.

[27] Let me be clear: It is not permissible for a disgruntled litigant to besmirch the reputation of the judiciary or its members without fear of consequences. He or she who abandons all ethical standard in pursuit of a cause must prepare to meet this court’s reproach, and the award of punitive costs that naturally follows¹¹. A malevolent behaviour or attitude of disgruntled unsuccessful litigant is intolerable.

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

28.1 The application for leave to appeal is dismissed.

28.2 The applicants are ordered to pay costs of the application on an attorney and client scale jointly and severally, the one paying the other to be absolved (Scale C).

A.S ZONO

JUDGE OF THE HIGH COURT (ACTING)

¹¹ Secretary of the Judicial Commission of Inquiry into allegation of State Capture, corruption and fraud in the public sector including organ of **State v Zuma and others** 2021(5) SA 327 (CC); 2021(9) BCLR 992 (CC) Para 136; **Limpopo Legal Solution v Eskom Holdings SOC Limited** [2017] ZACC 34; 2017(2) BCLR 1497 (CC) Para 36

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