

SOUTH AFRICA / JUDGMENT

Baloyi and Others v Lazarus and Others (Leave to Appeal) (11901/2022) [2024] ZALMPPHC 169 (1 November 2024)

[2024] ZALMPPHC 169

COURT

Limpopo High Court, Polokwane

BEFORE

M Bresler

CASE / FILE NUMBER

11901/2022

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 11901/2022

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO THE JUDGES: YES/NO
- (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):

‘[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,

APPEARANCES:

FOR THE APPLICANT : Adv. K Mokwena

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FOR THE FIFTH TO : Adv. APJ Els SC

TWENTIETH RESPONDENTS

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DATE OF HEARING : 14 August 2024

DATE OF JUDGMENT : 1 November 2024

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

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