

SOUTH AFRICA / JUDGMENT

Mkono and Another v MEC for Co-Operative Governance and Traditional Affairs Eastern Cape and Others (Leave to Appeal) (3603/2021) [2025] ZAECMHC 6 (11 February 2025)

[2025] ZAECMHC 6

COURT

Eastern Cape High Court, Mthatha

BEFORE

N Cengani-Mbakaza

CASE / FILE NUMBER

3603/2021

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IN THE HIGH COURT OF
SOUTH AFRICA
(EASTERN CAPE
DIVISION, MTHATHA)
CASE NO.: 3603/2021
Reportable: NO

In the matter between:

SAZISO
MKONO
First
Applicant
GIBISELA
TRADITIONAL COUNCIL
Second
Applicant
and
MEC
FOR CO-OPERATIVE GOVERNANCE
AND
TRADITIONAL AFFAIRS,
EASTERN
CAPE
First
Respondent
PREMIER
OF THE EASTERN CAPE
Second

Respondent
NTSIKA
MKONO
Third
Respondent
LWAZI
MKONO
Fourth
Respondent

JUDGMENT

(APPLICATION FOR LEAVE TO APPEAL)

Cengani-Mbakaza AJ

[1] On 10 August 2021, the applicants approached this court by way of a notice of motion seeking an order setting aside the decision of the first respondent. The decision which was based on the findings of a

panel appointed by the first respondent effectively found that the fourth respondent qualifies as a traditional leader of the AmaNdanya

community. The applicants also sought an order declaring the first respondent's act of appointing a panel to investigate the Headmanship of Ndanya Administrative Area between the first applicant and the third respondent to be unlawful and of no legal force and effect. In addition, the applicants sought an order declaring that the resolution taken on 3rd April 2018 where a determination was made on who should be the Headman of the Ndanya Administrative Area between the first applicant and the third respondent to remain lawful. This resolution recognized the first applicant as the Headman of the AmaNdanya community. Furthermore, an order was sought directing the first or second respondent to recognise the first applicant as the Headman of Ndanya Administrative Area.

[2] Subsequent to the relief sought which was vehemently opposed, I granted an order dismissing the application with costs. Aggrieved by the events, the applicants applied for leave to appeal to the Full

Court against the whole judgment (the judgment a quo) and the order that I made. The grounds of appeal are comprehensively stated in the notice of appeal dated 14 November 2024. In my opinion, it is unnecessary to repeat these grounds, as it appears that all these issues listed as the grounds of appeal were submitted in the previous court hearing and meticulously dealt with in the judgment a quo.

[3] Again, I do not see it befitting to repeat the whole background of this case. However, it may be necessary to give a glimpse of what had led to this litigation. The passing of Nkosana Velile Mkono (the

deceased) created a contentious succession dispute within the AmaNdanya community. This controversy was further exacerbated by the existence of a will, wherein the deceased leader bequeathed the communal land of AmaNdanya and, more importantly, nominated the first applicant to succeed him as the traditional leader of AmaNdanya community. This will was not administered, specifically on the issue of land because the deceased had no authority to administer the land that falls under the Tribal Authority. The dispute escalated when the clique of AmaNdanya community recognised the third respondent as the rightful successor of the AmaNdanya. Conversely, on 2 April 2018 the first applicant and his siblings from the second wife's lineage held a meeting under the chairpersonship of Ms Nomawonga Mapipa (the aunt/udadobawo) and recognised the first applicant as the legitimate Headman of the AmaNdanya community.

[4] Aggrieved by the events, the third respondent challenged the recognition made under the chairpersonship of udadobawo, including the will. Following these controversies, a plethora of litigation ensued, with numerous cases being filed one after the other involving all the parties except for the fourth respondent.

[5] On 09 February 2021, the parties obtained an order by consent under Case No.4048/2020 (court order). The order reads thus:

‘Having considered the documents filed of record and hearing Mr Mtshabe for the applicant:

IT IS ORDERED BY CONSENT THAT:

1. The application, in respect of both PART A and PART B, is stayed pending the investigation by the 1st Respondent, the MEC for Co-operate Governance and Traditional Affairs, on the suitable candidate for the Headmanship of AmaNdanya

Administrative Area, Ngqeleni, between the Applicant and the 7th Respondent;

2. That costs of the application are hereby reserved.’

[6] This court order serves as a foundation that led to the appointment of the panel, which subsequently resulted in the recognition of the fourth respondent as the Headman of the AmaNdanya community. In the circumstances, declaring the first respondent's act of appointing a panel to investigate the legitimate Headman between the first applicant and the third respondent unlawful would have been absurd because this process was because of the order that was obtained by agreement between the parties.

[7] An application for leave to appeal is regulated by Section 17 of the Superior Court's Act[1] (the Superior Court's Act) which provides as follows:

‘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 reasonable prospects of success; or

(ii) there is some compelling reason why the appeal should be heard, including conflicting judgments on the same matter under consideration.....’

[8] In the present instance, there are substantive grounds that underpin my conviction that there exist compelling reasons that warrant scrutiny by the appellate court, and it is those reasons that I shall

now turn to. It is observed that in its investigation the first respondent embarked on a more comprehensive fair approach and interviewed all the interested parties. Although the investigation was flawlessly conducted, in my view, the court order was only limited to investigate who between the first applicant and the third respondent should succeed the deceased. However, in a curious turn of events which were culminated by the investigations, it became apparent to the majority of the interviewees that due to the history of the customs, traditional values and customary law of the AmaNdanya, inkulu (the first-born son of the first wife) qualifies to be appointed as a successor. For that reason, the process of recognising the fourth respondent as the deceased’s successor as opposed to the first applicant and the third respondent ensued.

[9] A crucial question that necessitates a thorough scrutiny by the appellate court is whether the findings of the panel appointed by the first respondent which resultantly led to the recognition of the fourth respondent, who was not part of the original dispute did not constitute the overstepping of the court order which was obtained by

agreement between the parties involved.

[10] Having considered the submissions made by both parties including a vigorous opposition to the application for leave to appeal, I consider the issues that I have raised above as compelling reasons for the granting of this application. Consequently, the application for leave to appeal must succeed.

Order

[11] The following order is issued:

1. The application for leave to appeal to the Full Court, Eastern Cape Division is granted.
2. Costs shall be costs in the appeal.

N CENGANI-MBAKAZA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

APPEARANCES:

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Instructed by

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For the Third and Fourth Respondent : Mr NZ Mtshabe

NZ MTSHABE INCORPORATED

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Tel.: 047 – 532 2454

Date Heard

: 14 November 2024

Date Delivered

: 11 February 2025

[1] Act 10 of 2013.

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Prepared on 13 October 2026 · Esheria