

SOUTH AFRICA / JUDGMENT

Pilane and Others v Premier of the North West Province and Others - Application for Leave to Appeal (UM127/2020) [2023] ZANWHC 231 (14 December 2023)

[2023] ZANWHC 231

COURT

North West High Court, Mafikeng

BEFORE

FMM Reid

CASE / FILE NUMBER

UM127/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION, MAHIKENG

Reportable: YES/NO

Circulate to Judges: YES/NO

Circulate to Magistrates: YES/NO

Circulate to Regional
Magistrates: YES/NO

CASE NUMBER:

UM127/2020

In the matter between:-

KGOSI

MOLEFE JOHN PILANE

1st

Applicant

BAKGATLA

BA KGAFELA TRADITIONAL COUNCIL

2nd

Applicant

BAKGATLA

BA KGAFELA ROYAL FAMILY (MORULENG)

3rd

Applicant

and

PREMIER

OF THE NORTH WEST PROVINCE

1st

Respondent

RANGWANE

RAMONO PILANE LINCHWE

2nd

Respondent

KGAFELA

KGAFELA II

3rd

Respondent

PHINEAS

TJIE

4th

Respondent

MERAFE

RAMANO

5th

Respondent

COMMISSION

OF INQUIRY INTO THE TRADITIONAL LEADERSHIP DISPUTES IN RESPECT OF
BAKGATLA BA KGAFELA, BATLHAKO BA LEEMA AND BAPO

I AND II COMMUNITY

DISPUTE

6th

Respondent

NORTH

WEST PROVINCIAL HOUSE OF TRADITIONAL LEADERS

7th

Respondent

MEC

FOR LOCAL GOVERNMENT, HUMAN SETTLEMENT AND TRADITIONAL AFFAIRS

8th

Respondent

This judgment is

handed down by electronic means via email to the legal

representatives of the parties. the date and time

of the

handing down of the judgment is deemed to be 14 December 2023 at

10h00.

Summary:

Leave to appeal –

test for leave to appeal – what constitutes sufficient grounds

for leave to appeal – when leave

to appeal is to be granted to

the Supreme Court of Appeal.

ORDER

The

following order is made:

- i)
Leave to appeal to the Supreme Court is granted.
- ii)
Costs of the application for leave to appeal is to be cost in the appeal, unless the applicants do not pursue the appeal, in which case the application for leave to appeal is to be paid by the applicants jointly and severally, the one paying the other to be absolved;
- iii)
The costs include costs of two (2) counsel (including Senior Counsel) where so employed.

JUDGMENT

APPLICATION FOR LEAVE TO APPEAL

FMM REID J

Introduction

- [1] This is an application for leave to appeal against the judgment granted on 4 July 2023 in which the application to review and set aside the decision of the Premier was dismissed^[1] (the judgment a quo).
- [2] In the review application, which is the judgment that leave to appeal is sought against, I have set out the factual position and the legal position and set out my reasoning in detail. I do not intend to rehash same.

The appeal

- [3] The grounds for the application for leave to appeal are as follows (my own summary, not all the grounds are repeated to avoid duplication):

3.1. The court misinterpreted the true issues before court, such as consideration to the appointment of the Commission of Inquiry, which was not to be considered at all;

3.2. The court incorrectly had regard to three (3) decisions that was taken after the recommendations were made by the Premier;

3.3. The court erred in considering issues outside the relevant legislation.

3.4. The court failed to identify that the Premier incorrectly applied the legislation in accepting the recommendations of the Baloyi Commission of Inquiry.

3.5. The court erred in failing to make a negative inference of the failure of the Premier to file an answering affidavit.

3.6. The court misconstrued the constitutional issue of the Premier's executive functions in terms of section 140[2] of the Constitution 108 of 1996 of relevance as the judgment deals with the withdrawal and issuing of a certificate bestowing the powers of a Kgosi on an individual.

3.7. The court failed to take into account the functional differences

between the position of a Kgosi and an Interim Kgosi. The court also failed to recognise that the legislature does not make any provision for the appointment of an Interim Kgosi.

[4] The application for leave to appeal is opposed, in summation, on the following main grounds (own summation, not all grounds quoted to avoid duplication):

4.1. The Premier acted in terms of his legislative duty and with due regard to the recommendations made in the Baloyi Commission report. The Premier has the power to appoint and remove a Kgosi when the community cannot agree on chieftainship, which is the de facto position before court. The Premier's decision confirming the recommendations of the Baloyi report, is administratively sound.

4.2. In the Commission of Inquiry the question of chieftainship was thoroughly investigated and all parties were granted an opportunity to present its case.

4.3. The appeal has no prospects of success as the Premier's actions withstands administrative scrutiny.

Legal position

[5] The legal basis for leave to appeal is found in section 17(1)(a) of the Superior Courts Act 10 of 2013 (Superior Courts Act) which provides that:

"(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;"

(own emphasis)

[6] After the enactment of section 17 of the Superior Courts Act, the test for the application for leave to appeal, has been set out as follows in S v Kruger 2014

(1) SACR 647 (SCA):

“[2] Before dealing with the merits of the appeal, it is necessary at the outset to deal with the test applied by the high court in granting leave to appeal to this court. Despite dismissing the appellant's appeal, the high court concluded that it was 'possible' that another court might arrive at a different conclusion and that leave to appeal should not be 'lightly refused' where the person concerned is facing a lengthy sentence of imprisonment. This is an incorrect test. What has to be considered in deciding whether leave to appeal should be granted is whether there is a reasonable prospect of success. And in that regard more is required than the mere 'possibility' that another court might arrive at a different conclusion, no matter how severe the sentence that the applicant is facing. As was stressed by this court in S v Smith 2012

(1) SACR 567 (SCA) para 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.”

[3] The time of this court is valuable and should be used to hear appeals that are truly deserving of its attention. It is in the interests of the administration of justice that the test set out above should be scrupulously followed. In the present case it was not, and this court has had to hear an appeal in respect of which there was no reasonable prospect of success.”

[7] In MEC for Health, Eastern Cape v Mkhita 2016 JDR 2214 (SCA) the Supreme Court of Appeal emphasised the application of the correct test to be applied in an application for leave to appeal. In Mkhita the Supreme Court of Appeal found as follows in paragraphs [16] to [18] in relation to consideration to be given when dealing with an application for leave to appeal:

“[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.

[18] In this case the requirements of 17(1)(a) of the Superior Courts Act were simply not met. The uncontradicted evidence is that the medical staff at BOH were negligent and caused the plaintiff to suffer harm. The special plea was plainly unmeritorious. Leave to appeal should have been refused. In the result, scarce public resources were expended: a hopeless appeal

was prosecuted at the expense of the Eastern Cape Department of Health and ultimately, taxpayers; and valuable court time and resources were taken up in the hearing of the appeal. Moreover, the issue for decision did not warrant the costs of two counsel.”

- [8] This test whether to grant leave to appeal or not, was also aptly set out in *Cook v Morrisson and Another* 2019 (5) SA 51 (SCA) as follows:

“[8] The existence of reasonable prospects of success is a necessary but insufficient precondition for the granting of special leave. Something more, by way of special circumstances, is needed. These may include that the appeal raises a substantial point of law; or that the prospects of success are so strong that a refusal of leave would result in a manifest denial of justice; or that the matter is of very great importance to the parties or to the public. This is not a closed list (Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd 1986

- (2) SA 555 (A) at 564H – 565E; *Director of Public Prosecutions, Gauteng Division, Pretoria v Moabi* 2017

- (2) SACR 384 (SCA) ([2017] ZASCA 85) para 21.”

- [9] The above caselaw emphasise that a “reasonable prospect of success” in itself, is no longer sufficient to justify the granting of leave to appeal. As set out in *Cook v Morrisson* “something more” is required in considering whether leave to appeal should be granted. The concept of “something

more” is described by the Supreme Court of Appeal to be something that would demonstrate special circumstances, such as a

substantial point of law, or that refusal to grant leave to appeal would result in a manifest denial of justice.

- [10] As set out in *Mkhita supra*, the workload in the judiciary is ever increasing and a judge who considers any application for leave to appeal, and specifically an appeal to the Supreme Court of Appeal, has a judicial duty to ensure that appeals without merit do not become an unnecessary part of the workload of the Supreme Court of Appeal. Appeals with no merit should simply not be granted leave to appeal.

Consideration

- [11] The disputes between the tribal groups of the Bakgatla ba Kgafela is nothing new to this court. The dispute of chieftaincy dates back to pre-1994 and the proverbial “roots” of the dispute originated in the Bophuthatswana era, thus prior to the amalgamation of Bophuthatswana with South Africa during 1994. Despite the change in role players, the disputes between the tribal groups remain alive.

- [12] The judgment a quo deals inter alia with the constitutional duty of the Premier who exercised his powers in determining the chieftaincy. In the judgment a quo the background was set out as follows:

“[20] It is clear from the above quotation (sic- in reference to an excerpt of the terms of reference of the Commission of Inquiry) that community conflict and court orders were the motivation behind the establishment of the Commission. The terms of reference of the Commission was (broadly put) to investigate the legitimacy of the traditional leadership, specifically the rightful heirs from the time of Kgosi Tidimane Ramono Pilane in 1993, and to determine the rightful successor to the bogosi of the Bapo I and II Traditional Community.”

- [13] The above underscores the fact that disputes of this nature in Bakgatla Ba Kgafela have been active for the past three (3) decades, thus more or less 30 years. The longstanding nature of these disputes and the frequent litigation favours the granting of leave to appeal.
- [14] The judgment a quo dealt with the powers of the Premier. The applicants argue that the Premier was not exercising his legislative power, but was “interfering” with the traditional leadership. The respondents argue that the Premier exercised his legislative powers in regulating traditional leadership with tribal disputes relating to chieftaincy. Certainty on the legal position also favours the granting of leave to appeal.
- [15] As referred to in the judgment a quo, several judgments were made in this court which relates to collateral issues that arose from the tribal dispute that stems from chieftaincy. Such collateral issues are the mandate to call a tribal meeting etc. Legal certainty has to be obtained with regards to the leadership position in the Bakgatla ba Kgafela traditional community.
- [16] The judgment sought to be appealed against, meets the cross-roads between tribal or traditional law, encompassed in the Traditional Customs Act and the functions of the executive (in the person of the Premier) by means of legislation regulating the traditional law. The tribal community’s rights of traditional law are thus juxtaposed to the community’s rights to administrative fair action.
- [17] Having regard to the grounds for leave to appeal, as well as the factors listed in paragraphs [11] to [16] above, I hold the view that this application for leave to appeal displays more than a reasonable prospect of success and that the issues raised in the appeal serves to be dealt with on appeal.
- [18] The applicants request leave to appeal to the Supreme Court of Appeal. I have regard to the fact that several judgments on the issue of chieftaincy, as well as collateral issues have been canvassed by this Division, including the full court of this Division.
- [19] The nature of the appeal and the unique issues raised in the grounds of appeal, as well as the considerations as set out in paragraphs
- [11] to [16] above, are indicative thereof that the issues to be determined, can be of national interest. Disputes in tribal authorities on chieftaincy and collateral issues are no novelty to civil litigation. Legal certainty has to be obtained to the benefit of the litigants.

[20] Having due cognisance of the above, I hold the view that it would be in the interest of justice, obtain legal certainty and may be of national interest, that leave to appeal to the Supreme Court of Appeal be granted.

[21] I hold the view that this application for leave to appeal deals with issues of a legal nature and relate to competing rights, namely that of tribal communities to regulate themselves, as opposed to administrative justice as encompassed by the legislature. This moves me to find that the appeal would be best dealt with by the Supreme Court of Appeal.

Costs

[22] The normal rule is that the cost of an application for leave to appeal would be cost in the appeal. Should the applicant not pursue the appeal, the cost of the application for leave to appeal should be borne by him/her. I find no reason why this rule should not be followed.

[23] Both the applicants and respondents employed two (2) counsel. In my view, the applicable legal principles and the volume of documents in the application indeed justify the instruction of two

(2) counsel.

[24] I find no reason to deviate from the normal scale of cost being that of party – and – party and no argument has been made by any party that there should be a deviation from the normal scale of cost.

[25] I therefore find that the costs of the leave to appeal is to be costs in the appeal. In the event that the applicants do not pursue the appeal, the cost of the application for leave to appeal should be borne by the applicants individually and severally, the one paying the other to be absolved.

[26] Costs are to include the cost of two (2) counsel, where so employed.

In the premise I make the following order:

ii) Costs of the application for leave to appeal is to be cost in the appeal, unless the applicants do not pursue the appeal, in which case the application for leave to appeal is to be paid by the applicants;

FMM REID

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION MAHIKENG

DATE OF HEARING: 27 OCTOBER 2023 DATE OF JUDGMENT: 14 DECEMBER 2023

APPEARANCES: FOR THE APPLICANT: ADV ZZ MATEBESE SC WITH ADV HL KELAOTSWE

INSTRUCTED BY: BHADRISH DAYA ATTORNEYS C/O M E TLOU ATTORNEYS & ASS 43 CNR

BADEN POWELL & VISSER STREET MAHIKENG TEL: 018 011 0036 FAX: 018 011 0527 REF: MR

TLOU/B0166/CIV FOR THE 1ST , 4th , 6th & 8th RESPONDENT: ADV KD RAMOLEFE WITH ADV T

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[1] As succinctly summarised in *Pilane and others v Premier of North West Province and others*

[2023] JOL 59900 (NWM): “The present application was for the review and setting aside of the decision of the first respondent (“the Premier”) to appoint the fourth respondent as Administrator to manage and control the affairs of the second applicant (Bakgatla Ba Kgafela Traditional Council), with retrospective effect from 6 January 2020. As ancillary relief, the decisions of the Premier to withdraw a Recognition Certificate of the first applicant (“Pilane”) and to issue a Recognition Certificate to the second respondent (“Linchwe”) as interim Kgosi to the Traditional Council and the third applicant (“Royal Family”) was sought to be reviewed and set aside. Lastly, the applicants sought to have the decisions and actions taken by the Administrator and Linchwe subsequent to their appointments, declared invalid and of no force and effect.”

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[2] “140 Executive decisions (1) A decision by the Premier of a province must be in writing if it-

(a) is taken in terms of legislation; or

(b) has legal consequences. (2) A written decision by the Premier must be countersigned by another Executive Council member if that decision concerns a function assigned to that other member. (3) Proclamations, regulations and other instruments of subordinate legislation of a province must be accessible to the public. (4) Provincial legislation may specify the manner in which, and the extent to which, instruments mentioned in subsection (3) must be-

- (a) tabled in the provincial legislature; and
 - (b) approved by the provincial legislature.”
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 - (3) Proclamations, regulations and other instruments of subordinate legislation of a province must be accessible to the public.
 - (4) Provincial legislation may specify the manner in which, and the extent to which, instruments mentioned in subsection (3) must be-
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