THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY

JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

DATE 18 December 2020

STATUS Immediate

Please note that the media summary is for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Thobejane and Others v Premier of the Limpopo Province and Another (Case no 1108/2019) [2020] ZASCA 176 (18 December 2020).

Today, the Supreme Court of Appeal (SCA) upheld an appeal against a judgment of the Limpopo High Court, Polokwane, in which that court issued an order which effectively purported to rescind its earlier order. The first to fifth appellants had launched an application challenging the decision of the respondents, Premier and the Member of the Executive Committee for Traditional Affairs, Limpopo not to recognise them as traditional leaders of the Tjatje Community in Limpopo. The appellants sought an order compelling the respondents to do so. The respondents raised a preliminary point of non-joinder of the Commission on Traditional Leadership Disputes and Claims of the Limpopo Provincial Committee (the Commission), which had investigated the disputes about traditional leadership in the community, and the Marota-Mohlaletsi Traditional Council. On 24 April 2019 the court dismissed the preliminary point, after which the merits of the review application were argued. The court reserved judgment. On 17 May 2019 the court delivered judgment in which it revisited the respondents' preliminary point of non-joinder, and upheld it. It accordingly struck the application from the roll with costs, but subsequently granting leave to the appellants to appeal to the SCA.

The SCA first considered whether the order of 24 April 2019 dismissing the respondents' preliminary point of non-joinder, was final in effect, and therefore, not susceptible to alteration or amendment by the high court. It referred to *Zweni v Minister of Law and Order* [1993] 1 All SA 365 (A); 1993 (1) SA 523 (A) at 536B and concluded that indeed the order had all the attributes of a final order and therefore, the high court was not competent to revisit it, as it was *functus officio*. Viewed in that light, it followed that the order of 17 May 2019 constituted a nullity, which had to be set aside.

As to the further conduct of the matter, the court considered the appellants' submission that it should itself determine the merits of the review application, because, as was the submission, this court was in as good a position as the high court to do so to substitute the premier's decision with its own, in terms of which the appellants are recognised as traditional leaders, instead of remitting the matter to the Premier for reconsideration. First, the Court declined to consider the merits of the review application because it jurisdiction had not been triggered, as the high court had made no findings on the merits, and strictly confined itself to the preliminary point of non-joinder, and consequently, no leave to appeal had been granted in respect of those issues. Secondly, the Court observed that a substitution order is not to be lightly made, and a court would adopt such a course only in exceptional circumstances in terms of s 8(1)*(c)*(ii)(aa) of the Promotion of Access to Justice Act 3 of 2000. On the facts of the case, the Court concluded that it was not in as good a position as the Premier to substitute its own decision, and found no exceptional circumstances to do so. Accordingly, it determined that the matter be remitted to the high court to determine the merits of the review application. With regard to costs, the Court considered that the appellants, not only sought to set aside that order, but also urged the SCA to consider the merits. This warranted the respondents' opposition. Had the appellants simply confined themselves to the attack on the impugned order, and not sought to have the merits determined by this Court, the appeal would probably have been unopposed. In the circumstances it would only be fair to make no order as to costs.

In closing, the Court critisised the high court's decision to grant leave to the SCA, instead to the full court, in the circumstances where there was no discernable reason to do so, as there were no issues of law or any compelling factor which warranted the attention of the SCA.

In the circumstances, the Court (per Makgoka JA) with Petse DP, Zondi JA and Mabindla-Boqwana and Poyo-Dlwati AJJA concurring, upheld the appeal with no order as to costs; set aside the order of the high court dated 17 May 2019; and remitted the matter to the high court to determine the merits of the review application.

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