**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Not Reportable**

Case No: 1108/2019

In the matter between:

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| **MOREKWA FRANCINAH THOBEJANE** | **FIRST APPELLANT** |
| **MASEBOTI SIMON PHOLWANE** | **SECOND APPELLANT** |
| **CEDRICK PHOLOSHI MOGOBA** | **THIRD APPELLANT** |
| **MOLOHLANYE WILLIAM PHALA** | **FOURTH APPELLANT** |
| **KGOLANE DAPHNEY THOBEJANE** | **FIFTH APPELLANT** |

and

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| **PREMIER OF LIMPOPO PROVINCE** | **FIRST RESPONDENT** |
| **MEC FOR TRADITIONAL AFFAIRS OF LIMPOPO PROVINCE** | **SECOND RESPONDENT** |

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

**Coram:** PETSE DP, ZONDI and MAKGOKA JJA and MABINDLA-BOQWANA and POYO-DLWATI AJJA

**Heard:** 23 November 2020

**Delivered:** This judgment was handed down electronically by circulation to the parties' representatives by email, and by publication on the Supreme Court of Appeal website and release to SAFLII. The time and date for hand down is deemed to be 10h00 on the 18th day of December 2020.

**Summary:** Civil procedure – court ruling on preliminary point and later reversing its own order – court *functus officio* and the second order is incompetent and a nullity – jurisdiction of the Supreme Court of Appeal (the SCA) – not triggered where high court had not given judgment or order on the issue sought to be argued on appeal – no discernable reason why leave to appeal was granted to the SCA.

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## ORDER

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On appeal from: Limpopo High Court, Polokwane (Semenya J sitting as court of first instance):

1 The appeal is upheld with no order as to costs.

2 The order of the high court dated 17 May 2019 is set aside.

3 The matter is remitted to the high court to determine the merits of the review application.

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## JUDGMENT

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**Makgoka JA (Petse DP and Zondi JA and Mabindla-Boqwana and Poyo-Dlwati AJJA concurring):**

[1] This appeal concerns two mutually exclusive orders issued by the same judge in respect of the same issue. The first to fifth appellants had launched an application in the Limpopo High Court, Polokwane (the high court) seeking to review and set aside the decision of the respondents, the Premier of Limpopo (the Premier) and the Member of the Executive Committee for Traditional Affairs, Limpopo (the MEC), not to recognise them as traditional leaders[1] of the Tjatje Community (the community) in Limpopo. The appellants sought an order compelling the respondents to do so. In their opposition to the relief sought by the appellants, the respondents

[1] The first appellant sought recognition as Khoshigadi (Chieftainess); the second to fourth appellants as headmen, respectively, and the fifth appellant as a headwoman.

raised a two-pronged preliminary point of non-joinder. They averred that the appellants had failed to join two parties, whom, according to the respondents, had a direct and substantial interest in the relief sought by the appellants.

[2] The first of the parties alleged to have such interest was 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. The first respondent's decision not to recognise the appellants as traditional leaders was based on the report of the Commission. The respondents also contended that a structure which was in control of community, the Marota-Mohlaletsi Traditional Council, ought also to have been joined in the proceedings.

[3] The application came before Semenya J on 24 April 2019. After hearing arguments on the preliminary point referred to above, the learned Judge made the following ruling:

'The application before me relates to the [re]view of the decision made by the Premier in this matter, the decision which [he] has exercised or supposed to have been exercised in terms of section 12 of the Act and I agree with the applicant[s] that it was not necessary for the applicant[s] to join the parties that are supposed to… that the respondent[s] says should have been join[ed] in this matter. I do not see how they have a substantial interest in the outcome of this application. The points in limine are therefore dismissed.'

[4] The preliminary point having been dismissed, the parties argued the merits of the review application before the learned Judge, after which she reserved judgment. On 17 May 2019 Semenya J delivered judgment. In paragraph 2 thereof, she revisited the respondents' preliminary point of non-joinder referred to earlier. Why she did so is, however, nowhere explained in her judgment. The learned Judge took the view that in respect of the Commission, no purpose would be served by

considering whether it should be joined as a party to the proceedings as it had since dissolved. She proceeded to consider the averred non-joinder of the traditional council, at the end of which she concluded as follows:

'The respondents' second point in limine that the applicants' failure to join the Marota-Mohlaletsi Traditional Council constitutes a misjoinder[2] is upheld.'

The learned Judge accordingly struck the application from the roll with costs, but subsequently, issued an order granting leave to the appellants to appeal to this Court.

[5] Before I consider the parties' submissions in this Court, it is prudent to first determine whether the order of 24 April 2019 dismissing the respondents' preliminary point of non-joinder, was final in effect. In *Zweni v Minister of Law and Order*[3] it was held that an order that is final in effect has three attributes: first, the decision must be final in effect and not susceptible to alteration by the court that made it; second, it must be definitive of the rights of the parties; and third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. There are no conceptual difficulties with regard to the first two. As to the third attribute, the question is whether the 'relief claimed' is restricted to the relief claimed by the plaintiff/applicant. In *Caroluskraal Farms v Eerste Nasionale Bank*[4] it was held that it includes the relief claimed by the defendant/respondent in the form of special pleas and preliminary points. Therefore,

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[2] Presumably the learned judge meant 'non-joinder'.

[3] *Zweni v Minister of Law and Order* [1993] 1 All SA 365 (A); 1993 (1) SA 523 (A) at 536B. *Zweni* has undergone some modification over the years. See for example *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A); *Philani-Ma-Afrika and Others v Mailula and Others* [2009] ZASCA 115; [2010] 1 All SA 459 (SCA); 2010 (2) SA 573 (SCA); *Nova Property Group Holdings Limited v Cobbett and Others* [2016] ZASCA 63; [2016] 3 All SA 32 (SCA); 2016 (4) SA 317 (SCA). However, none of these find application in this case.

[4] See *Caroluskraal Farms (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk, Red Head Boer Goat (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk; Sleutelfontein (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk* 1994 (3) SA 407 (A) at 415B-416A; *Durban's Water Wonderland (Pty) Ltd v Botha and Another* [1999] 1 All SA 411 (A); 1999 (1) SA 982 (SCA) at 992G-H; *Ndlovu v Santam Ltd* 2006 (2) SA 239 (SCA) para 9.

in the context of the present case, the dismissal of the respondents' preliminary point thus disposes of a substantial portion of the relief sought.[5]

[6] Viewed in light of the above, the order of 24 April 2019 in respect of the preliminary point, indubitably had all three of the *Zweni* attributes. Accordingly, the high court was not competent to revisit it. As explained in *Firestone v Genticuro*,[6] as a general rule, a court has no power to set aside or alter its own final order, as opposed to an interim or interlocutory order, for two reasons. First, once a court has pronounced a final judgment, it becomes *functus officio* as its authority over the subject matter ceases. The second is the principle of finality of litigation, it being in the public interest that litigation be brought to finality.[7]

[7] Thus, counsel for the parties agreed that the court a quo's order of 17 May 2019 constituted a nullity, which falls to be set aside. They parted ways, however, on the further conduct of the matter. On the one hand, counsel for the respondents submitted that the matter should be remitted to the high court for that court to give judgment on the merits of the application. On the other, it was submitted on behalf of the appellants that this Court should itself determine the merits of the review application, as, so went the argument, this Court is in as good a position as the high court to do so. Counsel further submitted that should the merits be decided in the

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[5] Compare *Limpopo Legal Solutions v Vhembe District Municipality and Others* [2017] ZACC 30; 2018 (4) BCLR 430 (CC) para 10.

[6] *Firestone South Africa (Pty) Ltd v Genticuro AG* [1977] 4 All SA 600 (A); 1977 (4) SA 298 (A) at 306F-G and 309A.

[7] See also *Minister of Justice v Ntuli* 1997 (2) SACR 19 (CC); 1997 (6) BCLR 677 (CC); 1997 (3) SA 772 (CC) paras 22 and 29; *Zondi v MEC, Traditional and Local Government Affairs and Others* 2006 (3) BCLR 423 (CC); 2006 (3) 1 (CC) para 28; *Freedom Stationery (Pty) Limited and Others v Hassam and Others* [2018] ZASCA 170; 2019 (4) SA 459 (SCA) para 16.

appellants' favour, we should substitute the Premier's decision with our own, in terms of which the appellants are recognised as traditional leaders, instead of remitting the matter to the Premier for reconsideration.

[8] The path suggested by the appellants faces two insurmountable obstacles. First, this Court's jurisdiction to determine the merits has not been triggered. The high court made no findings on the merits, and strictly confined itself to the preliminary point of non-joinder. This is unlike a case where the high court, in its ruling on the preliminary point, had given an indication that it was inclined to dismiss the application. Under those circumstances, it could conceivably be contended that the outcome is a foregone conclusion.

[9] That cannot be said to be the case here. The substantive issues in dispute have not been decided by the high court, and consequently, no leave to appeal has been granted in respect of those issues. Differently put, until the high court pronounces on the substantive issues relating to the right of the appellants to be appointed as traditional leaders, and leave is granted to this Court, this Court has no jurisdiction to consider the merits of the review application. Were we to do so, we would impermissibly usurp the function of the high court to ordinarily sit and pronounce as a court of first instance.

[10] In *Theron v Loubser*[8] this Court had occasion to consider a similar situation. There, the respondents had raised a preliminary point that the applicants lacked the necessary locus standi to bring the three applications before court. The high court had upheld the respondents' preliminary point in two of the applications. It

[8] *Theron NO and Another v Loubser NO and Others, In Re: Theron N.O and Another v Loubser and Others* [2013] ZASCA 195; [2014] 1 All SA 460 (SCA); 2014 (3) SA 323 (SCA).

dismissed the applications on that ground alone, and deemed it not necessary to consider the merits of the applications. On appeal, this Court reversed the high court's finding on locus standi but declined to consider the merits of the applications. Instead, it remitted the matter to the high court. With reference to *Caroluskraal v Eerste Nasionale Bank* this Court reasoned as follows (at para 21):

'The entire record of the proceedings did not serve before this court on appeal. The record came to be limited by agreement between the parties in the light of the solitary issue that had been decided by the high court and which, in turn, required determination on appeal. But even if the full record had served before us, the high court had declined to enter into a consideration of any of the other issues in the application. This court has thus been deprived of the benefit of the high court's view on any of those issues. In the result this court will in effect be sitting both as a court of first instance, as also, a court of appeal insofar as those issues are concerned. It follows that the matter has to be remitted to the high court for a determination of each of the two applications which are the subject of this appeal. In the event, it was agreed from the bar in this court that that course should be adopted. For the rest, it will be left to the Judge President of the Western Cape High Court to issue directions to the parties as to the further conduct of the matter in that court.'

The second obstacle is that a substitution order is not to be lightly made, and a court would adopt such a course only in exceptional circumstances. Pursuant to an administrative review under s 6 of the Promotion of Administrative Justice Act 3 of 2000 and once administrative action is set aside, s 8(1) affords courts a wide discretion to grant 'any order that is just and equitable'. In exceptional circumstances, s 8(1)*(c)*(ii)(aa) affords a court the discretion to make a substitution order. In *Trencon v IDC*[9] the Constitutional Court explained how an order of substitution should be considered:

'[G]iven the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is

[9] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) para 47.

a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.'

[11] In the present case, I am by no means persuaded that we are in as good a position as the Premier to substitute our own decision. From even a cursory reading of the papers, there are a number of issues that would seek further clarification. One springs to mind, and it relates to the position of Mr Nthobeng Thobejane, the community's current headman, who is said to be mentally challenged, but continues to receive a stipend from the provincial government in that capacity. His position must be clarified, and possibly, he might have to be joined as a party to the proceedings, as the order sought by the appellants appears to have a direct bearing on him. As to the decision of the Premier, there is no suggestion before us that such is a foregone conclusion, or that it is tainted by bias, incompetence or malice. Given these considerations, I discern no exceptional circumstances to move this Court to make a substitution order.

[12] The matter must in all circumstances be remitted to the high court to determine the merits of the review application. We were informed during the hearing that the first appellant has since died. This should have no effect on the order for remittal to the high court. If that court determines that she was entitled to be appointed as Kgoshigadi, her natural successor would surely be substituted for her.

[13] There remains the issue of costs. Counsel for the appellants pressed for costs against the respondents on the basis that the appellants would have achieved substantial success in this Court were the order of 17 May 2019 to be set aside. On the other hand, counsel for the respondents pointed out that in their notice of appeal and in their heads of argument, the appellants, not only sought to set aside that order, but also urged this Court to consider the merits. Thus, so went the submission, the respondents were duty bound to oppose the appeal to the extent the appellants persisted with the latter relief. In my view, there is something to be said about this submission. 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.

[14] Before I conclude, I am constrained to comment on the high court's decision to grant leave to this Court. That leave to appeal was correctly granted is beyond question. The high court recognised the irregularity of its order of 17 May 2019. But as to why leave was granted to this Court, escapes me. There is nothing in the issues canvassed here which even remotely warrants the attention of this Court. No controversial legal principle was involved. As this Court pointed out in *Shoprite Checkers v Bumpers Schwarmas*,[10] the inappropriate granting of leave to appeal to this court increases the litigants' costs and results in cases involving greater difficulty and which are truly deserving of the attention of this court having to

[10] *Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC and Others* [2003] ZASCA 57; [2003] 3 All SA 123 (SCA) para 23. See also *S v Monyane and Others* [2006] ZASCA 113; 2008 (1) SACR 543 (SCA) para 28.

compete for a place on the court's roll with a case which is not. This must be deprecated.

[15] The following order is made:

1 The appeal is upheld with no order as to costs.

2 The order of the high court dated 17 May 2019 is set aside.

3 The matter is remitted to the high court to determine the merits of the review application.

**T M Makgoka**
**Judge of Appeal**

APPEARANCES:

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| For Appellants: | J L Griffiths |
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| For Respondents: | P M Maake |
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