THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 31 May 2022

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

Frank Mhlongo and Others v Tryphinah Mokoena N O and Others (723/20) [2022] ZASCA 78 (May 2022)

Today the Supreme Court of Appeal (SCA) handed down a judgment upholding, with costs, an appeal against the decision of the Gauteng Division of the High Court, Pretoria (the high court).

The issue before the SCA was whether it was competent for a Judge President of a high court to remove certain areas of the court's jurisdiction through a practice directive; in particular, whether the high court had jurisdiction to determine the appellants' application.

The appellants approached the Gauteng Division of the High Court, Pretoria (the high court), seeking an order compelling the Trustees and their attorneys, who were all cited as co-respondents, to inter alia furnish them with various documents, and to disclose information pertaining to any funds previously paid or still due to the Trust. In addition, the appellants sought orders prohibiting the Trustees' attorneys from paying out monies that were due to the Trust and required that the attorneys furnish them with the trust account journals relating to all the financial affairs of the Trust.

The eighth respondent raised a *point in limine* (preliminary point), contending that the high court did not have jurisdiction to adjudicate the application because the leased property (the farm owned by the Trust) was situated in the province of Mpumalanga. Relying on the provisions of Gauteng Division Practice Directive No 1 of 2015 (the Practice Directive), the eighth respondent contended that the appellants' application ought to have been launched in the Mbombela or Middelburg circuit courts, as the high court had ceased to have jurisdiction in any matters emanated and arose from magisterial districts in the Mpumalanga province. In contrast, the appellants contended that the high court had jurisdiction in terms of s 21(2) of the Superior Courts Act 10 of 2013, by virtue of the fact that the office of the sixth respondent was in Pretoria, that the practice of the ninth respondent was situated in Johannesburg and that the registered address of the tenth respondent was also situated in Johannesburg.

In upholding the *point in limine*, the high court alluded to the Practice Directive, quoting the clause which stipulated that the high court 'shall' cease to have jurisdiction in any matters that emanated and arose in and from specified magisterial districts in Mpumalanga. Accordingly, the high court found that it did not have the jurisdiction to adjudicate the application. Consequently, the merits of the matter were not considered. Aggrieved by the order granted by the high court, the appellants sought the high court's leave to appeal its order but were unsuccessful. The appellants then approached the SCA on petition, which granted leave to appeal on a limited basis.

The SCA juxtaposed the provisions of the Practice Directive with the relevant provisions of the Superior Courts Act in order to assess whether there were any inconsistencies between the two.

The SCA held that a fundamental tenet of statutory interpretation was that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. Accordingly,

the SCA held that the words in the relevant sections of the Superior Courts Act are clear and unambiguous.

Furthermore, the SCA held that it was plain from the provisions of s 21(2) of the Superior Courts Act, read with ss 7 and 50(2) respectively, that the circuit courts that were established in terms of the Practice Directive were not established as self-standing Divisions. Thus, the high court retained its territorial jurisdiction over all the areas which did not as yet fall within the jurisdiction of any other Division(s). Since the Gauteng Divisions retained their territorial jurisdiction, the newly established circuit courts, established in terms of the Practice Directive, could not have ousted the jurisdiction granted by that legislation. The SCA considered that the Minister had published a notice contemplated in s 6(3)*(a)* establishing the Mpumalanga Division, with a description of its territorial reach, in Government Notice No 615 published in Government Gazette No 42420 on 26 April, which only took effect on 1 May 2019. It held that until that date, the Gauteng Division also functioned as the Mpumalanga Division and had jurisdiction in the geographical area of Mpumalanga.

The effect of clause 1.1 and 1.2 of the Practice Directive was that there was an overlap of jurisdiction between the high court and the Mbombela and Middelburg circuit courts; they had concurrent jurisdiction. All these circumstances led the SCA to conclude that the high court erred when it found that it had no jurisdiction to entertain the appellants' application. This conclusion addressed the first issue. With regard to the second issue, the SCA held that it followed that the Judge President did not have the power, when constituting circuit courts in Mpumalanga by virtue of the notice dated 1 September 2017, to exclude the jurisdiction of the Gauteng Divisions, bestowed on them in terms of s 21 of the Superior Courts Act, in respect of the matters that arose in the area of jurisdiction of those circuit courts prior to the date on which the Minister promulgated the determination of the Mpumalanga Division of the High Court, namely 1 May 2019. The SCA held that ousting the jurisdiction of the Gauteng Divisions by dint of clause 1.5 of the Practice Directive was therefore beyond the powers of the Judge President, which conduct was invalid. It followed that clause 1.5 of the Practice Directive ought to be declared null and *void ab initio*. Accordingly, in a unanimous judgment by Molemela JA, the appeal was upheld.

In a separate unanimous concurring judgment, Makgoka JA wrote separately to deal with two aspects: the eighth respondent's reliance on ss 173 and 34 of the Constitution, as well as the eighth respondent's reliance on the decision in *First National Bank v Lukhele and Seven Other Cases* (*Lukhele*). The SCA considered the status of that decision in the light of this Court's decision in *Standard Bank of SA Ltd and Others v Thobejane and Others; Standard Bank of SA Ltd v Gqirana N O and Another* (*Thobejane*). The SCA held that jurisdiction was a matter of law, and not of discretion or equity, which is what ss 173 and 34 are concerned with.

The SCA held that a court could not use the s 173 power to assume jurisdiction that it did not have. Axiomatically, it could not use the s 173 power to oust jurisdiction which it ordinarily had. The SCA held that s 34 had no place to the enquiry as to whether or not a court had jurisdiction. No reasons of equity could ever clothe a court with jurisdiction it did not have. Hence, the SCA found that ss 173 and 34 considerations were totally irrelevant to the enquiry whether a court had jurisdiction or not. Equally irrelevant to the jurisdiction inquiry, were the objectives sought to be achieved through the practice directive.

Furthermore, the SCA held that the present case was not about a court declining to exercise its jurisdiction, as was the case in *Thobejane* and *Lukhele*. The SCA held that in the present case, the court's jurisdiction had been ousted by a practice directive. For that reason, *Lukhele*, like *Thobejane*, was unhelpful in determining the question in issue.

Lastly, the SCA noted that in *Thobejane* it was held that the main seat of a Division of a High Court was obliged to entertain matters that fell within the jurisdiction of a local seat of that Division, and was not entiltled to decline to do so because the main seat had concurrent jurisdiction. Given these findings, and to the extent contrary views were expressed in *Lukhele*, the latter must be considered to have been overturned by *Thobejane*.

~~~~ends~~~~
~~~~