THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case no**:** 78/2014

In the matter between:

THULAMELA MUNICIPALITY	**FIRST APPELLANT**
THE MUNICIPAL MANAGER: THULAMELA MUNICIPALITY	**SECOND APPELLANT**
and	
THOVHELE MIDIAVHATHU PRINCE KENNEDY TSHIVHASE	**FIRST RESPONDENT**
TSHIVHASE TRADITIONAL COUNCIL	**SECOND RESPONDENT**
VALULINE 203 (PTY) LTD	**THIRD RESPONDENT**
MEC FOR CO-OPERATIVE GOVERNANCE HUMAN SETTLEMENTS AND TRADITIONALAFFAIRS: LIMPOPO PROVINCE	**FOURTH RESPONDENT**
MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	**FIFTH RESPONDENT**
REGISTRAR OF DEEDS: DEEDS REGISTRATION OFFICE	**SIXTH RESPONDENT**

Neutral citation: *Thulamela Municipality & another v T Tshivhase & others*

(78/2014) [2015] ZASCA 57 (30 March 2015)

Coram: Ponnan, Shongwe and Majiedt JJA, Dambuza and Gorven AJJA

Heard: 11 March 2015

Delivered 30 March 2015

Summary: Appeal against dismissal of an exception – a plea of lack of locus standi in an interlocutory application raised as a point in limine – dismissal of exception not appealable - judgment not finally determinative of the rights of the parties.

ORDER

On appeal from: Limpopo High Court, Thohoyandou (Mpshe AJ sitting as court of first instance):

1 The matter is struck off the roll.

2 Each party is ordered to pay its own costs.

JUDGMENT

Dambuza AJA (Ponnan, Shongwe, Majiedt JJA and Govern AJA concurring):

[1] The first appellant, the Thulamela Municipality (the municipality), exercises executive jurisdiction in and around the City of Thohoyandou, amongst others. The first respondent, Chief Thovhele Midiavhathu Prince Kennedy Tshivhase (Khosi Tshivhase), is a traditional leader who exercises

traditional authority over the Ha-Tshivhase villages located in and around Thohoyandou. He is assisted in his duties by the second respondent, the Tshivhase Traditional Council (the council).

[2] On 23 February 2012 the municipality sold erven 22 and 26 Thohoyandou IA to Valuline (Pty) Ltd for R579 150 each. The properties were transferred to Valuline on 11 June 2012 by virtue of Deeds of Grant. On the same day two other properties, erven 21 and 27 Thohoyandou IA were also transferred by the Registrar of Deeds to Valuline.

[3] On 18 February 2013, Khosi Tshivhase and the council launched an application (the main application) in the Limpopo High Court seeking to have reviewed and set aside the decisions by the municipality to alienate the properties. The grounds of review were, amongst others, that the decisions to alienate the properties were unconstitutional, illegal, arbitrary, irrational, unfair, inequitable, unreasonable, were taken without consultation or authorisation and were based on inaccurate or wrong information.

[4] The municipality did not timeously file its answering affidavit to the main application. Khosi Tshivhase and the council also sought from the municipality and the municipal manager, in terms of rule 53 of the Uniform Rules of court, the record relevant to the decisions to alienate the properties. When the municipality failed to furnish the required record, they launched an interlocutory application to compel the municipality to produce it. The municipality then filed two sets of affidavits, one in opposition to the main application and one in opposition to the interlocutory application. In both, the municipality challenged, in limine, Khosi Tshivhase and the council's locus standi. It contended that they had an obligation to prove on the papers that they were traditional leaders as provided in the Traditional Leadership and Governance Framework Act 41 of 2003, as well as the Limpopo Traditional Leadership and Institutions Act 6 of

2005. It challenged them to produce the government gazette in which they were recognised by the Premier of Northern Limpopo as traditional institutions. It was alleged on behalf of the municipality that Khosi Tshivhase's claim to traditional leadership was rejected by the Nhlapo Commission which was established by former President Thabo Mbeki, in October 2004, to determine the traditional leadership of the Venda people, amongst others. Regarding the merits of the application, the municipality pleaded that the properties in question did not fall under the jurisdiction of Khosi Tshivhase and the council.

[5] The issue of locus standi, as raised in the interlocutory application, was heard before Mpshe AJ who considered the point in limine as an exception and dismissed it. He made no order as to costs. It is against that order that the municipality appeals.

[6] Although not raised by any of the parties in the appeal, prior to the hearing of the appeal counsel were asked to address the issue whether the order of the court a quo was appealable. Counsel for the municipality submitted that the dismissal of the exception was appealable. The argument, on behalf of the municipality was based on an understanding that the order of the court a quo was a pronouncement on the rights of Khosi Tshivhase and the council to institute the application and was thus finally dispositive of that issue.

[7] The dismissal of an exception, save an exception to jurisdiction, does not finally dispose of the issue raised by the exception and is not appealable.[1] In *Maize Board v Tiger Oats Ltd & others,*[2] Streicher JA referred with approval to the following remarks by Schutz JA in *Cronshaw & another v Fidelity Guards Holdings (Pty) Ltd:*[3]

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[1]D E Van Loggerenberg SC (2014) *Erasmus Superior Courts Practice;* Revision Service 45 at B1-152.
[2]*Maize Board v Tiger Oats Ltd & others* 2002 (5) SA 365 (SCA) at 373.
[3]*Cronshaw & another v Fidelity Guards Holdings (Pty) Ltd* 1996 (3) SA 686 (A) at 690 D-G.

‘The question is intrinsically difficult, and a decision one way or the other may produce some unsatisfactory results. There has to be a rule, however, and that rule was laid down by not later than the *Pretoria Garrison* case *[Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 (A)]. It is, as stated by Schreiner JA (at 870) that:

“… a preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to ‘dispose of any issue or any portion of the issue in the main action or suit’, or which amounts, I think, to the same thing, unless it irreparably anticipates or precludes some of the relief which would or might be given at the hearing.’”

Streicher JA concluded (para 14): ‘. . . it now has to be accepted that a dismissal of an exception (save an exception to the jurisdiction of the Court), presented and argued as nothing other than an exception does not finally dispose of the issue raised by the exception and is not appealable’. In arriving at this conclusion Streicher JA stated that the order made was capable of being reconsidered and that the decision on exception was not the final word on the point. He thus expressed the view that laying down that general principle would ‘create certainty and accordingly be in the best interests of litigating parties’. On the strength of Maize Board, it is plain that the order of Mpshe AJ was not appealable. But that is not the end of the matter.

[8] A further difficulty that arises in this case was raised with counsel for Khosi Tshivhase and the council. This relates to the relief sought in the main application: the review and setting aside of the decisions to alienate the properties. It is evident that, even if obtained, the relief sought would be ineffective. This is because the properties in question were transferred to Valuline in 2012. When Khosi Tshivhase and the council launched the main application transfer of the properties or the rights thereto to Valuline, had long been completed. It thus can hardly assist Khosi Tshivhase and the council to now challenge the administrative decisions that preceded the registration and transfer of the property into the name of Valuline. That is so because in *Legator McKenna Inc & another v Shea & others* 2010 (1) SA 35 (SCA) para 22, this

court accepted that the abstract theory of transfer applies to immovables as well. In the light thereof it appears to me that the main application may well be academic. For that reason, I am of the view that although the order of Mpshe AJ was not appealable, Khosi Tshivhase and the council may have misconceived their relief in the main application. In those circumstances the appropriate costs order is that each party should pay its own costs.

[9] Consequently I make the following order:

1 The matter is struck off the roll.

2 Each party is to pay its own costs.

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N DAMBUZA

Acting Judge of Appeal

APPEARANCES

For Appellants:	G J Diamond Instructed by: Khathutshelo A Mainganye Attorneys, Thohoyandou Webbers, Bloemfontein
For First and Second Respondent:	Lebala SC with EM Baloyi -Mere Instructed by: Anton Ramaano Attorneys, Thohoyandou Matsepes, Bloemfontein