THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 341/2016

In the matter between:

JOYINA JIM MAHLANGU	**FIRST APPELLANT**
SOKHULUMI ROYAL COUNCIL	**SECOND APPELLANT**
and	
MKHAMBI PETROS MAHLANGU	**FIRST RESPONDENT**
MEC LOCAL GOVERNMENT AND HOUSING – GAUTENG	**SECOND RESPONDENT**
J B TOLO – CHAIRPERSON OF THE COMMISSION ON TRADITIONAL LEADERSHIP DISPUTES AND CLAIMS	**THIRD RESPONDENT**

Neutral Citation:	*Mahlangu v Mahlangu* (341/2016) [2017] ZASCA 81 (2 June 2017).
Coram:	Cachalia, Majiedt, Petse, Zondi and Mathopo JJA
Heard:	10 May 2017
Delivered:	2 June 2017

Summary: Appeal: Power of court of appeal: Section 16(2)*(a)*(i) of the Superior Courts Act 10 of 2013: Appellate Court empowered to dismiss an appeal where judgment or order sought would have no practical effect or result: Discretion of court: Not an appropriate case for court to exercise its discretion in favour of determining merits of the appeal: Appeal dismissed.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Hughes J sitting as court of first instance):

1 The appeal is dismissed in terms of s 16(2)*(a)*(i) of the Superior Courts Act 10 of 2013.

2 The appellants' attorneys, Messrs Zehir Omar Attorneys, are ordered to pay the costs of the appeal *de bonis propriis*.

JUDGMENT

Petse JA (Cachalia, Majiedt, Zondi and Mathopo JJA concurring):

[1] In this appeal the parties were, at the outset of the hearing, required to address argument on the preliminary question of whether the appeal and any order made thereon would, within the meaning of s 16(2)*(a)*(i) of the Superior Courts Act 10 of 2013 (the Act), have any practical effect or result. The appeal, which is before us with leave of the High Court, emanated from a dispute between the first appellant, Mr Joyina Jim Mahlangu, and the first respondent, Mr Mkhambi Mahlangu, as to who between them was rightfully the senior traditional leader of the Sokhulumi community of the AmaNdebele tribe. It bears mention that since the granting of leave to appeal the first appellant has died. But for ease of reference I shall still refer to the first appellant in this judgment as such.

[2] The appeal lies against a judgment of the Gauteng Division of the High Court, Pretoria (Hughes J) in terms of which the review application instituted by the present appellants against the respondents was dismissed with costs. The appellants (Mr Joyina Jim Mahlangu and the Sokhulumi Royal Council as first and second appellants respectively), inter alia, sought the following relief in part B of their notice of motion:

‘(a) that the first [appellant] be declared … to have been correctly appointed as the senior traditional leader of the Sokhulumi community;
(b) setting aside the decision of the second and third respondents removing the first [appellant] as the senior traditional leader of the Sokhulumi community;
(c) interdicting the first respondent from interfering in the administration of the Sokhulumi community or frustrating the first [appellant] in discharging his duties.’
Five days before the hearing of this appeal on 5 May 2017, the appellants applied for an amendment to the notice of motion. I deal with this aspect later.

[3] The first respondent was appointed as the senior traditional leader of the Sokhulumi community by the second respondent pursuant to a determination made by the third respondent to the effect that he was entitled to hold that position. The second respondent is the Member of the Executive Council responsible for the Department of Local Government and Housing of the Gauteng Province.

[4] The third respondent, Mr J B Tolo, was the chairperson of the Commission on Traditional Leadership Disputes and Claims established in terms of the Traditional Leadership and Governance Framework Act 41 of 2003. The Commission was charged with the task of, inter alia, investigating and determining disputes and claims relating to traditional leadership of the Sokhulumi community. In the execution of its mandate, the Commission investigated and determined the competing claims by the first appellant and the first respondent to the leadership of the Sokhulumi community.

[5] In the event the Commission decided the issue in favour of the first respondent. Pursuant to this determination the second respondent informed the first appellant by letter dated 10 October 2012 that his acting appointment as the senior traditional leader of the Sokhulumi community was rescinded with effect from 30 November 2012. The first respondent was then appointed in his stead.

[6] The review application came before Hughes J who dismissed it with costs. The High Court subsequently granted the appellants leave to appeal to this court.

[7] The first appellant passed away on 18 April 2016, a few days before the notice of appeal was lodged in this court. The respondents were made aware of this

by the appellants' attorneys on 18 November 2016, a few days after the appellants' heads of argument were delivered.

[8] Following the death of the first appellant, the respondents (barring the second respondent who never entered the fray) made written submissions in support of an order dismissing the appeal, on the ground that the decision sought on appeal would have no practical effect or result within the meaning of s 16(2)*(a)*(i) of the Act. These submissions, to which I shall return later, are opposed by the appellants.

[9] In the light of this turn of events, the Registrar of this Court wrote to the parties' attorneys on 27 February 2017 and enquired whether the appeal would be pursued.[1] The response received from the appellants' attorneys was to the effect that the appeal would be prosecuted to its final determination. In support of their resolve to argue the merits of the appeal the appellants, inter alia, said that the first respondent was previously removed from office on account of misconduct; that if his reappointment is declared unlawful the community would, in terms of their customs, elect a new leader to succeed the first appellant.

[10] At this juncture it is necessary to set out the following brief factual background. The Sokhulumi community was initially a traditional community under the then KwaNdebele self-governing territory. The first respondent was the senior traditional leader. Following allegations of misconduct, he was removed as the traditional leader, after a judicial enquiry was held into his fitness to hold office. In January 1993 the first appellant was appointed by the Chief Minister as acting traditional leader of the Sokhulumi community. During May 2011 the Secretariat of the Commission on Traditional Leadership Disputes and Claims wrote to the first appellant to inform him that the first respondent was claiming that he was the rightful traditional leader of the Sokhulumi community. The first appellant was consequently invited to appear before the Commission to answer to the claim. Although the first appellant had initially resisted the Commission's request to attend the hearing, he later relented and sent representatives (including legal representatives albeit acting

[1] The parties were requested: (i) to confirm whether it is correct that the first appellant died on 18 April 2016; (ii) if this is correct, to advise on what basis it is proposed to continue with the appeal, in view of the fact that the principal purpose of the application was to have the deceased appointed as senior traditional leader of the Sokhulumi community and this can no longer occur.

in an advisory capacity only) to represent him at the hearing. At the hearing, his daughter made representations that the Commission, inter alia, had no jurisdiction over the dispute.

[11] As already mentioned, the Commission determined the dispute in favour of the first respondent. The second respondent in turn rescinded the first appellant's acting appointment and appointed the first respondent in his stead.[2] Aggrieved by the Commission's determination and the second respondent's revocation of his acting appointment, the first appellant took those decisions on review in the High Court. It is necessary to emphasise that what the first appellant sought in the review application was in essence an order reinstating him as the acting traditional leader of the Sokhulumi community. And the ancillary relief claimed was predicated upon him succeeding in the principal relief sought.

[12] As indicated earlier, at the hearing of the appeal, counsel were at the outset called upon, having been forewarned as required in terms of s 16(2)*(b)* of the Act, to address argument on the question whether in light of the first appellant's demise the appeal had not become moot and whether any order made would have any practical effect or result within the meaning of s 16(2)*(a)*(i) of the Act.

[13] Section 16(2)*(a)*(i) of the Act reads:

'When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.'

Section 16(2)*(a)*(i) was modelled on s 21A of the Supreme Court Act 59 of 1959[3] (the old Act). In turn, s 21A(1) of the old Act provided:

'When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local Division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone.'

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[2] The first respondent's appointment was published in a provincial notice for the province of Gauteng, 'Publication of the name of Senior Traditional Leader of Amandebele Ndzudza Sokhulumi, *Provincial Notice* 297, 4 February 2013.'

[3] The Supreme Court Act was repealed in terms of s 55(1)*(a)* of the Superior Courts Act 10 of 2013.

[14] Section 21A of the old Act was considered in several decisions of this Court. Thus, much assistance can be derived from those decisions. In *Coin Security Group (Pty) Ltd v SA National Union for Security Officers & others* 2001 (2) SA 872 (SCA) this Court said:

'[7] The purpose and effect of s 21A has been explained in the judgment of Olivier JA in the case of *Premier, Provinsie Mpumalanga, en 'n Ander v Groblersdalse Stadsraad* 1998 (2) SA 1136 (SCA). As is there stated the section is a reformulation of principles previously adopted in our Courts in relation to appeals involving what were called abstract, academic or hypothetical questions. The principle is one of long standing.

. . .

This is a principle which is common also to other systems - where the doctrine of binding precedent is followed. It has particular application in Courts of appeal. The attitude of the House of Lords is illustrative of this. What that Court has held is that it is an essential quality of an appeal (such as may be disposed of by it) that there should exist between the parties to the appeal a matter "in actual controversy which (the Court) undertakes to decide as a living issue". See *Sun Life Assurance Co of Canada v Jervis* [1944] 1 All ER 469 (HL) at 471A - B. This phrase accurately states the standpoint of our Courts. It is a principle consistently adopted by this Court and the other Courts in the Republic.'

[15] In *Radio Pretoria v Chairman, Independent Communications Authority of South Africa and Another* 2005 (1) SA 47 (SCA) Navsa JA said the following (para 41):

'Courts of appeal often have to deal with congested rolls. They do not give advice gratuitously. They decide real disputes and do not speculate or theorise . . .'.

In effect what the parties are seeking is legal advice from this Court. But as Innes CJ observed in *Geldenhuys & Neethling v Beuthin* 1918 AD 426 at 441:

"After all, Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important."'

[16] Accordingly, it goes without saying that an appellate court will not concern itself with disputes that no longer exist between the parties the determination of which will have no practical effect. And I did not understand the attorney appearing for the appellants to contend that the present is an appropriate case in which this Court can, in the exercise of any discretion it might have, consider the merits of the

appeal even absent a live issue between the parties.[4] Furthermore, there was no suggestion that this case raised any discrete legal issue of public importance.

[17] The attorney representing the appellants contended that the issue is not moot because the second appellant still has an interest in the outcome of the appeal. But this contention has no merit for essentially three reasons. First, the interest of the second appellant in the relief sought, if any, is nowhere articulated on the papers. Second, and of fundamental importance, there is no evidence regarding the legal standing of the second appellant and whether it has the capacity to sue or be sued. Third, there is no averment, still less proof, that the second appellant was authorised to be party to these proceedings. The problem is compounded by the fact that in his founding affidavit the first appellant appears to believe that both the second appellant and himself are but one person for he averred, unintelligibly, that: 'I am an adult male person, (the first and second appellant) in this matter'.

[18] This conclusion brings me to the question of costs of the appeal. Counsel for the first and third respondents both submitted that the costs of the appeal should be borne by the appellants' attorneys *de bonis propiis*. Counsel contended that the respondents were compelled to come to court to oppose the appeal because the mootness point had not been conceded.

[19] In response, the attorney for the appellants submitted that there would be no basis to award the costs of the appeal against the appellants' attorneys *de bonis propiis*. This was so, so the argument went, because the attorneys were instructed by the first appellant's brother to pursue the appeal and were therefore duty-bound to execute those instructions. In the alternative, he submitted that the costs should be for the account of the person (this being a reference to the first appellant's brother) who had given instructions for the appeal to be pursued. I do not agree. The first appellant's brother was not a party to these proceedings. The appellant's attorneys came to this court to argue the appeal, despite the death of the first appellant when it was clear that the appeal was moot.

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[4] Compare: *Qoboshiyane NO & others v Avusa Publishing Eastern Cape (Pty) Ltd & others* [2012] ZASCA 166; 2013 (3) SA 315 (SCA) para 5.

[20] Having been forewarned that following the death of the first appellant, the appeal had then become moot, they persisted in prosecuting the appeal. Rather than pause for reflection they were undaunted and heedlessly sought to pursue the appeal to its conclusion. To that end they filed supplementary heads of argument and a notice of intention to amend the appellants' notice of motion on which reliance before us was disavowed. All of these steps were undertaken in the vain attempt to salvage an appeal that could not be salvaged as the cause of action, which is not transmissible, was extinguished by the death of the first appellant. (See *Minister of Justice and Correctional Services v Estate Stransham-Ford* (531/2015) 2016 ZASCA 197 (6 December 2016) paras 19-20.)

[21] To my mind, all these factors, considered cumulatively, demonstrate that the appellants' attorneys were remiss in failing to appreciate that it would be futile to prosecute the appeal as the dispute had become academic. Even the warning by this Court when it raised the issue of mootness with the parties some seven weeks before the date of the hearing, fell on deaf ears. In these circumstances this Court retains its inherent discretion to make such an order as to costs as it considers appropriate. (Compare *Tropical (Commercial and Industrial) Ltd v Plywood Products Ltd* 1956 (1) SA 339 (A) at 346A-B; *Kett v Afro Adventures (Pty) Ltd & another* 1997 (1) SA 62 (A).)

[22] Before concluding, it is necessary to say something about the events that occurred subsequent to the hearing of this appeal. A day after the hearing of the appeal, members of the bench received a letter from the appellants' attorneys requesting that the delivery of our judgment be held in abeyance. This, so it was stated, was to enable the appellants to file additional papers in relation to 'the authority of the second appellant to proceed with the appeal'. The Registrar of this Court replied, at our behest, informing the appellants' attorneys that their request was declined.

[23] Undeterred, the appellants' attorneys filed a new notice of motion three days later in which 12 new applicants sought leave to intervene as appellants in this case. I do not propose setting out in any detail the basis upon which this order is being sought. Suffice it to say that the applicants assert that they collectively have a direct

and substantial interest in the present appeal. Apart from contending that they are either members of the Sokhulumi Royal Family or members of the Sokhulumi community, the basis of their alleged interest in this appeal is nowhere clearly articulated. It will be recalled that the first appellant challenged his removal as acting traditional leader of the Sokhulumi community. But it bears emphasising that the first appellant's right to continue as acting traditional leader, assuming that he had such a right, inhered in him and no one else. Consequently, his death meant that the *lis* between him and the first respondent came to an end.

[24] Moreover, as Nugent JA observed in *Allpay Consolidated Investment Holdings*:[5]

'It is the practice of this Court that parties may not file new material after the hearing of an appeal without the leave of the court. There must be finality in litigation and finality comes for the litigants once the appeal has been heard.'

That much was conveyed to the appellants' attorneys by the Registrar of this Court as mentioned earlier. The fact that they still went ahead to file additional papers in the face of this indication from this Court is to be deprecated.

[25] In the result the following order is made:

1 The appeal is dismissed in terms of s 16(2)*(a)*(i) of the Superior Courts Act 10 of 2013.

2 The appellants' attorneys, Messrs Zehir Omar Attorneys, are ordered to pay the costs of the appeal *de bonis propriis*.

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X M PETSE
JUDGE OF APPEAL

[5] *Allpay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency & others* [2013] ZASCA 29; 2013 (4) SA 557 (SCA) para 7.

APPEARANCES:

For the Appellant:	Z Omar Instructed by: Zehir Omar Attorneys, Springs c/o EG Cooper Attorneys, Bloemfontein
For the First Respondent:	S J van Rensburg Instructed by: Venn & Muller Attorneys, Pretoria c/o Webbers Attorneys, Bloemfontein
For the Third Respondent:	Z Z Matebese (with M X Shibe) Instructed by: Nonxuba Attorneys, Johannesburg c/o Webbers Attorneys, Bloemfontein