IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MTHATHA)

CASE NO.: 2607/2022

REPORTABLE		**NO**

THULANI PATRICK SITHELO First Applicant

SITHELO ROYAL FAMILY Second Applicant

and

PREMIER OF THE EASTERN CAPE PROVINCE First Respondent

MEC FOR CO-OPERATIVE GOVERNANCE & TRADITIONAL AFFAIRS Second Respondent

GWADISO KHIWA ROYAL FAMILY Third Respondent

DUMISANI GWADISO Fourth Respondent

MPUMALANGA GWADISO Fifth Respondent

THOZAMILE SITHELO Sixth Respondent

JUDGMENT

TOKOTA ADJP

[1] This is an application for leave to appeal against the judgment and order granted by Notyesi AJ dated 9 April 2024. The grounds of appeal are not elegantly put as envisaged in Rule 49 of the Uniform Rules of Court. They are what was referred to by Leach J, as he then was,[1] as a diatribe of some [15] pages criticising the judgment, analyzing (at times incorrectly) certain of the evidence and the findings made, putting forward certain submissions. These criticisms of the judgment did not clearly and succinctly spell out the grounds upon which leave to appeal is sought in clear and unambiguous terms.

[2] Rule 49(4) provides:

> "Every notice of appeal and cross-appeal shall state-
>
> (a) what part of the judgment or order is appealed against; and

[1] *Songono v Minister of Law & Order* 1996 (4) SA 384 (E)

(b) the particular respect in which the variation of the judgment or order is sought."

Consequently, part of the judgment or order must be clearly identified and the grounds upon which such finding or order is attacked must be clear in no uncertain terms.

[3] This application was couched in the form of an affidavit with lengthy ambiguous paragraphs full of argument. To begin with, it is stated that in paragraph 6 of Notyesi AJ's judgment, the court said condonation was being sought in respect of the late institution of the proceedings. This assertion is incorrect and Mr Tyopo for the applicant properly conceded so much. Paragraph 6 of the said judgment reads:

'[6] The relief is opposed by the third to sixth respondents on the basis that the applicants have failed to meet the requirements for the grant of condonation in respect of the late institution of the proceedings and that the matter has already been determined by the court.' When one has regard to the answering affidavit of the respondents the deponent says 'The late filing of this application for review should not be condoned.'

[4] In addition, the basis upon which it is alleged that Notyesi AJ erred in finding that in the previous *Sithelo* case quoted hereunder Jolwana J dismissed the application on the basis of undue delay is puzzling.

In Sithelo v Royal Family and Another v Premier of Eastern Cape and Others (2779/2020) [2021] ZAECMHC 28 (17 August 2021) Para.28 Jolwana J held: 'As I have said before, the applicants elected not to apply for an extension of the 180-day period, or for the condonation of any delay even out of caution, if they believed that it was not necessary. They have not done so. On the authority of *Opposition to Urban Tolling Alliance* which was cited with approval by the Constitutional Court in *ASLA Construction*, this Court has no jurisdiction to even entertain the review application and therefore, this application stands to be dismissed on this ground alone.'

[5] As I understand Notyesi AJ's judgment he dismissed the application primarily on three grounds. First, he found that there was an undue delay of the institution of the proceedings and there was no application for condonation. Therefore, on that basis the application had to be dismissed. Second, the court held that the matter was res judicata. Third, he held that there was a dispute of fact which could not be resolved on the papers. Consequently, since the applicant did not ask for referral to oral evidence the application fell to be dismissed.

[6] As regards undue delay point, Mr Tyopo argued that since the relief sought was concerned with a declaratory order, not a review, the court erred in invoking the unreasonable delay rule. Consequently, so the argument went, the question of condonation was moot because the prayer seeking a review was abandoned. This, so he contended, is because the court was left with prayer 1 to decide the matter. Prayer 1 related to a declaratory order that the first applicant is the only rightful and legitimate heir to the headmanship of Lower Ndungunyeni Administrative Area, Ngqeleni.

[7] The submission was therefore that since the relief sought is of a declaratory nature the rule against undue delay is not applicable. If regard is had to case law the correctness of the submission is doubtful. In *Lion Match Co Ltd v Paper Printing Wood and Allied Workers Union,*[2] the applicant sought an order declaring that an application made by the first respondent to the Regional Director of Manpower for KwaZulu-Natal for the establishment of a conciliation board was invalid for want of compliance

[2] 2001 (4) SA 149 (SCA) at para.25.

with the provisions of s 35(2)(b) of Act 28 of 1956. The learned judge of appeal said in that case:

'In my view, it is clear, as counsel for the appellant conceded, that in essence the appellant's attack on the jurisdiction of the industrial court to determine the dispute between the parties amounted to a review, even though it had not been brought under Rule 53 of the Uniform Rules of Court. That being so, it follows that the rule that an applicant for review who fails to bring the application within a reasonable time may (unless the delay can be condoned) lose the right to complain of the irregularity in regard to which the review is brought applies in this case; see, for example, Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A) and Mamabolo v Rustenburg Regional Local Council 2001 (1) SA 135 (SCA).'

[8] Again in *Naptosa v Minister of Education, Western Cape*[3] Conradie J said:

'The declaratory order, being as flexible as it is, can be used to obtain much the same relief as would be vouchsafed by an interdict or a mandamus. *Where it is not necessary that a record of proceedings be put before the Court, a declaratory order could serve as a review.* A Court, in exercising

[3] 2001(2) SA 112 (c) at 126G

its discretion whether to grant a declaratory order should, accordingly, in an appropriate case weigh the same considerations of 'justice or convenience' as it might do in the case of an interdict or a review.' Accordingly, a relief sought in the form a declaratory order of the past event is in essence a review. A declaratory order is an order by which a dispute over the existence of some legal right or entitlement is resolved. The right can be existing, prospective or contingent. [Emphasis added]

[9] Ms Msindo, for the third to the sixth respondents, contended that when the court is called upon to make a declaratory order it exercises a wide or loose discretion. Therefore, a court of appeal will not lightly interfere with the exercise of that discretion. She relied on the case of *Queen Sibongile Winnifred Zulu v Queen Buhle Mathe and Others*[4] where Mbatha JA said: 'The test whether a court of appeal is entitled to interfere with the exercise of a wide discretion is now settled. It is that, in the absence of misdirection or irregularity, a court of appeal would ordinarily not be entitled to substitute its discretion for that of a lower Court.' Accordingly, Ms Msindo contended that the appeal has no prospect of success as the appeal court would not come to a different conclusion.

[4] (1062/2022) [2024] ZASCA 22 (8 March 2024) Para 13.

[10] The rule against undue delay is procedural and can therefore be enforced by the Courts mero motu.[5] Consequently, Notyesi AJ was entitled to deal with unreasonable delay mero motu even if it was not raised by the respondents. There was no application for condonation. It follows that the court was entitled to refuse to entertain the matter in those circumstances. I am not persuaded that another court would see things differently.

[11] In substance in prayer 1 the applicants indirectly sought an order recognizing the first applicant as the only rightful and legitimate heir to the headmanship of the area concerned. This recognition has been refused by the first and second respondents who are empowered to do so in terms of the legislation The applicant says so in so many words when he said in the affidavit. "Because of this objection the first and the second respondents refused and or failed to recognize my identification and as required by legislation".[6] To make such a declaratory order would be tantamount to reviewing and setting aside such decision.

[12] In the event I am wrong about the delay rule being applicable in this case there is still an insurmountable obstacle of res judicata. The question of res judicata was fully dealt with by Notyesi AJ in the judgment and I agree

[5] *Mkhwanazi v Minister of Agriculture & Forestry, KwaZulu* 1990 (4) SA 763 (D) at 767.
[6] Para.30 p.15 of the Founding affidavit.

with his reasoning and conclusion in this regard. In my opinion, the previous application before Jolwana J was in substance the same application that was before Notyesi AJ.

[13] Mr Tyopo submitted that these were two distinct matters. He submitted that in the matter before Jolwana J the applicants sought a review of the decision for failing to recognize the second applicant as the headman of the area concerned and in the matter before Notyesi AJ the applicants sought a declaratory order and not a review. I drew his attention to cases of *Naptosa*[7] and *Lion Match*[8] as regards the distinction between a review and a declaratory order. Since he was not aware of these two decisions he was, understandably, unable to assist me in this regard.

[14] In my view the distinction between the present matter and that which was before Jolwana J is a distinction in form and not in substance. In the application before Jolwana J the applicants sought an order reviewing the decision of the respondents for refusing to recognize the first applicant (the second applicant in that case) as the rightful headman of the Ndungunyeni Administrative Area, Ngqeleni, in accordance with the recommendations by

[7] Footnote 4 supra
[8] Footnote 3. supra

the House of Traditional leaders dated 22 March 2017. In the present proceedings the declaratory order sought is in respect of the recognition as a headman of the same area and is based also on those recommendations dated 22 March 2017.

[15] It is necessary to mention that the recommendations of 22 March 2017 came about as a results of second respondent's referral of the claim of headmanship by the applicant to the House of Traditional Leaders to verify it.

[16] Mr Tyopo contended that the first applicant is not only relying on the recommendations but also on his heritage rights in accordance with customary law. I am not persuaded that anything makes a difference in this regard.

[17] It may appear that the relief sought in one matter is different from the other but they are both based on the same cause of action, namely the recognition of the first applicant as the headman of Ndungunyane Administrative area. Akin to the res judicata is the 'once and for all rule'. In

Evins v Shield Insurance Co Ltd[9] Cobbert JA said: 'This rule appears to have been introduced into our practice from English law . . . . Its introduction and the manner of its application by our Courts have been subjected to criticism . . . but it is a well-entrenched rule. Its purpose is to prevent a multiplicity of actions based upon a single cause of action and to ensure that there is an end to litigation. Closely allied to the "once and for all" rule is the principle of res judicata which establishes that, where a final judgment has been given in a matter by a competent court, then subsequent litigation between the same parties, or their privies, in regard to the same subject-matter and based upon the same cause of action is not permissible and, if attempted by one of them, can be met by the *exceptio rei judicatae vel litis finitae*. The object of this principle is to prevent the repetition of lawsuits, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions . . . . The claimant must sue for all his damages, accrued and prospective, arising from one cause of action, in one action and, once that action has been pursued to final judgment, that is the end of the matter.' I must mention that the 'once and for all rule' is merely mentioned here in passing and this tallies with introductory remarks made by Notyesi AJ in paragraph 1 of his judgment.

[9] 1980(2) SA 814 (A) at 835G-H

[18] Having read the judgment of Notyesi AJ I do not see another court coming to a different conclusion. On this ground as well there are no prospects of success on appeal.

[19] As far as the appeal against the costs order is concerned, the general rule is that costs must follow the event. Furthermore, the court hearing the matter has a discretion in relation to an order of costs. The appeal court will not interfere with that discretion unless the applicant can satisfy the court that an appeal court would reasonably find that exceptional circumstances exist that warrant such interference. In the absence of exceptional circumstances, the appeal would not have any reasonable prospect of success, and the application for leave to appeal will consequently have to be dismissed.

[20] In the result, the following order will issue:

The application for leave to appeal is dismissed with costs.

B R TOKOTA
ACTING DEPUTY JUDGE PRESIDENT EASTERN CAPE DIVISION

APPEARANCES:

Counsel for the Appellant	Mr M Tyopo	:
Instructed by M Tyopo attorneys		:
Counsel for the Respondent	:	A Msindo
Instructed by V V Msindo & Associates		:
Heard on	:	16 May 2024.
Judgment Delivered on	:	21 May 2024.