THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 865/2020

In the matter between:

FRANK MHLONGO	**FIRST APPELLANT**
RIEBS KHOZA	**SECOND APPELLANT**
DR SIBUYI	**THIRD APPELLANT**
PATRICK JONES	**FOURTH APPELLANT**

and

TRYPHINA MOKOENA NO	**FIRST RESPONDENT**
NOMSA MHLAWURI MANYIKE	**SECOND RESPONDENT**
MADODA ISAAC TJIE NO	**THIRD RESPONDENT**
TOBANI MICHAEL KHOZA	**FOURTH RESPONDENT**
THEMBA TIBANE NO	**FIFTH REPONDENT**
MASTER OF THE HIGH COURT, GAUTENG DIVISION PRETORIA	**SIXTH REPONDENT**
ATTORNEY RICHARD SPOOR OF THE FIRM RICHARD SPOOR ATTORNEYS INC	**SEVENTH RESPONDENT**
ATTORNEY WIEKUS DU TOIT OF THE FIRM WDT ATTORNEYS	**EIGHTH RESPONDENT**
ATTORNEY ERROL GOSS OF FIRM ERROL GOSS ATTORNEYS	**NINTH RESPONDENT**
THEBE CORRIDORS COMPANY (Pty) Ltd (Previously named Sithole Restoration Services)	**TENTH REPONDENT**
THE REGIONAL LAND CLAIMS COMMISSIONER, MPUMALANGA	**ELEVENTH RESPONDENT**
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**TWELFTH RESPONDENT**

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

Coram: MOCUMIE, MOLEMELA, MAKGOKA, MBATHA JJA and MUSI AJA

Heard: 25 February 2022

Delivered: 31 May 2022

Summary: Jurisdiction – section 21 of the Superior Courts Act 10 of 2013 – statute takes precedence over practice directives – order of the High Court relying on practice directive for ousting the jurisdiction of the High Court set aside.

ORDER

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

1 The appeal is upheld with costs.

2 The order of the Gauteng High Court, Pretoria, is set aside and replaced with the following:

'The eighth respondent's point in limine pertaining to jurisdiction is dismissed with costs.'

3 Clause 1.5 of Gauteng Division Practice Directive No 1 of 2015 is declared null and void *ab initio* and is set aside.

JUDGMENT

Molemela JA (Mocumie, Makgoka and Mbatha JJA and Musi AJA concurring):

Introduction

[1] The crisp issue in this appeal is whether it is 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 Gauteng Division of the High Court, Pretoria had jurisdiction to determine the appellants' application. The facts that gave rise to the appeal are succinctly set out in the succeeding paragraphs.

Background facts

[2] The appellants in this matter are beneficiaries of the Nhlangwini Community Trust (the Trust) and purported to be representing 78 other beneficiaries of the Trust. The first five respondents are the Trustees of the Trust (the Trustees); the sixth respondent is the Master of the High Court, Pretoria; the seventh respondent is a firm of attorneys which previously represented the Trustees, while the eighth respondent was a firm that legally represented them as at the time when the application was

launched. The ninth respondent is a firm of attorneys acting as the agent of the tenth respondent, a private company which had leased the Trust's property. 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, including the Trust's bank statements, 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 any monies that were due to the Trust, and demanded that the attorneys furnish them with the trust account journals relating to all the financial affairs of the Trust.

[3] The eighth respondent raised a point *in limine* (preliminary point) contending that the Gauteng Division 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[1] (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 emanating and arising from magisterial districts in the Mpumalanga province. 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.

[4] In upholding the point *in limine*, the high court inter alia alluded to the Practice Directive and quoted the clause which stipulated that the high court 'shall' cease to have jurisdiction in any matters emanating and arising in and from specified magisterial districts in Mpumalanga. More about that later. The high court, accordingly, found that it did not have the jurisdiction to adjudicate the application. Consequently, the merits of the matter were not considered.

[1] Notice issued by the Judge President, Gauteng, namely Government Notice no 956 issued and published on 1 September 2017.

[5] 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 this Court, on petition, which granted leave to appeal on a limited basis. The order granting leave limited the issues as follows:

'3.1 Whether the Gauteng Division of the High Court, Pretoria had jurisdiction to hear the application.

3.2 Whether the Judge President, Gauteng had the power in terms of s 7(1) of the Superior Courts Act 10 of 2013, when constituting circuit courts in Mpumalanga by way of the notice dated 1 September 2017, to exclude the jurisdiction of the Gauteng Division of the High Court in respect of the matters arising in the area of jurisdiction of those circuit courts, prior to the promulgation by the Minister of Justice and Constitutional Development of a notice in terms of s 6(3) of the Superior Courts Act in relation to the Mpumalanga Division of the High Court.'

[6] Asserting that the Minister of Justice and Constitutional Development (the Minister) had a direct and substantial interest in the outcome of this matter in light of paragraph 3.2 of this Court's order, which essentially called upon this Court to pronounce on the validity of a published Practice Directive and Notice which had been endorsed by the Chief Justice, the appellants brought an application joining the Minister as a co-respondent in this matter. The Minister did not oppose the application and indicated that he would abide the decision of the court. An affidavit was, however, filed by the Director-General: Court Services in the Department of Justice and Constitutional Development expressing certain views on the matter. The input given by the latter served to confirm that the Minister indeed had a substantial interest which warranted the granting of the application for joinder.[2] An order joining the Minister as the twelfth respondent was, accordingly, granted. I turn now to the issues that have to be determined in this matter.

[7] The starting point is the Practice Directive which persuaded the high court to conclude that it was not the appropriate forum for the adjudication of the application and finding instead that one of the two Mpumalanga circuit courts was the court clothed with the jurisdiction to entertain the matter. On 1 September 2017 the Judge President of the Gauteng Division of the High Court (the Judge President), within the

[2] See *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 659.

contemplation of s 7(1) of the Superior Courts Act, issued a Practice Directive[3] which purported to determine the jurisdictional boundaries of the Circuit Courts of the Mpumalanga Division.[4] Clause 1.5 of the notice reads as follows:

'1.5 The Gauteng Division of the High Court shall, with the coming into effect of this Notice, cease to have jurisdiction in any matters emanating and arising in and from the Magesterial Districts set out in parts A and B respectively.'[5]

[8] As mentioned before, the appellants rely on the provisions of s 21(1) and 21(2) of the Superior Courts Act as a basis for their contention that the High Court had the necessary jurisdiction to adjudicate their application. It is therefore necessary to juxtapose the provisions of the Practice Directive with the relevant provisions of the Superior Courts Act in order to assess whether there are any inconsistencies between the two. This exercise is necessary because, as explained by this Court in *The National Director of Public Prosecutions (Ex Parte Application)*,[6] '[p]ractice directives may not derogate from legislation, the common law or rules of court that have binding force . . .'. The salient provisions of the Superior Courts Act are set out in the next paragraph.

[9] Section 6(3)*(a)* of the Superior Courts Act provides that '[t]he Minister must, after consultation with the Judicial Service Commission [the JSC], by notice in the [Government] *Gazette*, determine the area under the jurisdiction of a Division, and may in the same manner amend or withdraw such notice'. In this regard it bears mentioning that the Minister 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 took effect on 1 May 2019. Until that date, the Gauteng Division also functioned as the Mpumalanga Division and had jurisdiction in the geographical area of Mpumalanga.

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[3] Government notice 956 published on 1 September 2017.

[4] On the same day (1 September 2017), the Chief Justice of the Republic of South Africa had, within the contemplation of s 8(3) read with s 5 of the Superior Courts Act 10 of 2013 also issued a Practice Directive which was published in Government Notice 955. Clause 1 thereof stipulated as follows:
'1. All action and motion proceedings including urgent applications as well as appeals in any area in the Mpumalanga province shall, with effect from 1 February 2016, be enrolled and heard at Mbombela and Middelburg Circuit Courts.'

[5] Part A listed Mbombela Areas of jurisdiction, while Part B listed Middelburg areas of jurisdiction.

[6] *The National Director of Public Prosecutions (Ex Parte Application)* [2021] ZASCA 142; 2022 (1) SACR 1 (SCA para 19.

Section 7 provides as follows:

'**7**. (1) The Judge President of a Division may by notice in the *Gazette* within the area under the jurisdiction of that Division establish circuit districts for the adjudication of civil or criminal matters, and may by like notice alter the boundaries of any such district.

(2) In each circuit district of the Division there must be held, at least twice a year and at such times and places as may be determined by the Judge President concerned, a court which must be presided over by a judge of that Division.

(3) A court referred to in subsection (2) is called a circuit court of the Division in question.'

Section 21 provides:

'**21**. (1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance. . .

. . .

(2) A Division also has jurisdiction over any person residing or being outside its area of jurisdiction who is joined as party to any cause in relation to which such court has jurisdiction or who in terms of a third party notice becomes a party to such a cause, if the said person resides or is within the area of jurisdiction of any other Division.

. . . .'

Section 50(2) of the Superior Courts Act provides:

'Notwithstanding section 6(1), the Gauteng Division shall also function as the Limpopo and Mpumalanga Divisions, respectively, until a notice published in terms of section 6(3) in respect of those Divisions comes into operation.'

The reference to 'Gauteng Divisions' was apparently intended to refer to both the Gauteng Division of the High Court, Pretoria, and the Gauteng Division of the High Court, Johannesburg.

Discussion

[10] The principles applicable to the interpretation of statutes are trite. As stated in *Cool Ideas 1186 CC v Hubbard and Another*,[7] '[a] fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. . .'. The words in the relevant sections of the Superior Courts Act are clear and unambiguous. Nothing in any of the clear and unambiguous provisions mentioned in the preceding paragraph suggests

[7] *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869; para 28.

that a particular Division does not retain jurisdiction in respect of matters which have been initiated in circuit courts falling within that Division's area of jurisdiction. On a proper interpretation and application of the provisions of s 21(2) of the Superior Courts Act, read with ss 7 and 50(2) respectively, 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 the areas which did not yet fall exclusively within the jurisdiction of any other Division.

[11] The position as at May 2018, when the application was launched, was that the High Court functioned as the Mpumalanga Division as envisaged in s 50(2) of the Superior Courts Act. As at the date of the publication of the Practice Directive (1 September 2017), the Minister had not yet constituted the Mpumalanga Division of the Gauteng High Court as a separate Division within the contemplation of s 6(3) of the Superior Courts Act. A significant common cause fact is that the Notice issued by the Minister establishing the area of jurisdiction of the Mpumalanga Division within the contemplation of s 6(3) only came into operation on 1 May 2019. This means that until 1 May 2019 the Gauteng High Court continued to retain its jurisdiction over Mbombela and Middelburg as circuit courts.

[12] As can be determined from the provisions of s 7 of the Superior Courts Act, the powers of a Judge President in relation to the establishment of circuit court districts and their boundaries are circumscribed by legislation; the Judge President cannot exercise any more power than that granted to him or her by legislation. It is clear that in terms of s 6(3) of the Superior Courts Act, only the Minister has the power to determine the jurisdictional areas of the various Divisions of the High Court. The fact that a Judge President, may, in terms of s 7(1) alter the boundaries of any circuit courts that have been established under a particular Division should not be equated with the power, granted exclusively to the Minister, to determine the area under the jurisdiction of that Division.

[13] It is 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 effect of clause 1.1 and 1.2 of the Practice Directive is that there is an overlap of jurisdiction between the high court and the Mbombela and Middelburg circuit courts. They have concurrent jurisdiction.[8] What is quite striking is that the Mbombela and Middelburg circuit courts were the circuit courts of the Gauteng Division, and ordinarily, the only judges that may preside in those courts are the judges of the Gauteng Division (see s 7(2) of the Superior Courts Act). All these circumstances lead me to conclude that the high court erred when it found that it had no jurisdiction to entertain the appellants' application. This conclusion addresses the first issue which this Court had to determine (paragraph 3.1 of the order granting leave to appeal), as set out in paragraph 5 of this judgment.

[14] With regard to the second issue set out in paragraph 3.2 of the order,[9] it follows 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 arising 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. In purporting to oust the jurisdiction of the Gauteng Divisions by dint of clause 1.5 of the Practice Directive, he acted beyond his powers, which conduct is invalid.[10] It follows that clause 1.5 of the Practice Directive ought to be declared null and void *ab initio*.

[15] As already mentioned, in its order, the high court dismissed the appellants' application on the basis of lack of jurisdiction. Apart from the fact that it was wrong as demonstrated above, the high court equally erred in dismissing the application. As regards the submission that the order dismissing the application was in any event

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[8] See para 33 of *Thobejane.*
[9] See para 5 of this judgment.
[10] *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the RSA* and Others 2000 (2) SA 674 (CC) para 50. *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005(6) BCLR 529 (CC) para 50.

erroneous because the high court had only adjudicated the points *in limine* and not the merits of the matter, it suffices to merely re-affirm the trite principle that an appropriate order to be granted when upholding a preliminary point like jurisdiction, is to strike the application off the roll and not to dismiss it, as the merits would not have been entertained. The high court's order can therefore not stand. With regard to costs, there is no basis to deviate from the general rule that costs follow the result.

[16] For all the reasons set out above, the following order is granted:

1 The appeal is upheld with costs.
2 The order of the Gauteng High Court, Pretoria, is set aside and replaced with the following:
3 'The eighth respondent's point in limine pertaining to jurisdiction is dismissed with costs.'
4 Clause 1.5 of Gauteng Division Practice Directive No 1 of 2015 is declared null and void *ab initio* and is set aside.

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M B MOLEMELA

JUDGE OF APPEAL

Makgoka JA (Mocumie, Molemela, Mbatha JJA and Musi AJA concurring)

[17] I agree with the order of the judgment prepared by my Colleague, Molemela JA (the first judgment) and the reasons underpinning it. I write separately to deal with two aspects. The first is the eighth respondent's reliance on ss 173 and 34 to support the judgment of the high court. Second, I deal with the eighth respondent's reliance on the decision in *First National Bank v Lukhele* and Seven Other Cases [2016] ZAGPPHC 616 (*Lukhele*) and consider 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* [2021] ZASCA 92; [2021] 3 All SA 812 (SCA); 2021 (6) SA 403 (SCA) (*Thobejane*). I consider these aspects, in turn.

Sections 173 and 34 arguments

[18] Counsel for the eighth respondent submitted, among others, that the impugned practice directive was justified by the court's power to regulate its own process in terms of s 173 of the Constitution, and that the objective of creating the two Mpumalanga circuit courts was to promote access to courts as envisaged in s 34 of the Constitution.

[19] Jurisdiction is a matter of law, and not of discretion or equity, which is what ss 173 and 34 are concerned with. In the present case, jurisdiction is governed by s 21 of the Superior Courts Act, which regulates the jurisdiction of the various divisions of the high court over persons and in relation to matters. Thus, whether the court has jurisdiction or not, is determined with reference to that section only. If it has jurisdiction, that is the end of the enquiry. The court does not need either s 173 or s 34 to justify exercising it. Similarly, if a court does not have jurisdiction, the enquiry ends there.

[20] As explained by the Constitutional Court in *S v Molaudzi*,[11] a court cannot use the s 173 power to assume jurisdiction that it does not otherwise have. Axiomatically, it cannot use the s 173 power to oust jurisdiction which it ordinarily has. The same applies with equal force to the right of access to courts guaranteed in s 34. The section has no place to the enquiry as to whether or not a court has jurisdiction. No reasons of equity could ever clothe a court with jurisdiction it does not have.

[21] It follows that the ss 173 and 34 considerations are totally irrelevant to the enquiry whether a court has jurisdiction or not. Equally irrelevant to the jurisdiction enquiry, are the objectives sought to be achieved through the practice directive. The eighth respondent's submissions on these two constitutional provisions therefore falter as a matter of law, and must be rejected on that basis alone.

Lukhele

[22] Counsel for the eighth respondent submitted that the high court was entitled to decline to exercise its jurisdiction over matters that can more conveniently be heard

[11] *S v Molaudzi* [2015] ZACC 20; 2015 (8) BCLR 904 (CC); 2015 (2) SACR 341 (CC) para 34.

by other courts or circuit courts, and that doing so is not akin to the exclusion of a court's jurisdiction. In my view, this submission is not properly conceptualised. The present case is not about a court declining to exercise its jurisdiction, as was the case in *Thobejane* and in *Lukhele*.[12] In the present case, the court's jurisdiction had been ousted by a practice directive. For that reason, *Lukhele,* like *Thobejane,* is unhelpful in determining the question in paragraph 3.2 of this Court's order granting leave to appeal.

[23] That notwithstanding, it is necessary to examine *Lukhele* closely, to determine whether its key holding withstand the scrutiny of this Court's decision in *Thobejane*. It is important for the Judges, practitioners and litigants in Mpumalanga to have clarity as to whether *Lukhele* is still authoritative in that division. The mere fact that counsel for the eighth respondent relied on it underscores this point.

[24] To recap, in that case, the Gauteng Division (functioning as Mpumalanga Division, Mbombela) had declined to determine matters within its jurisdiction on the basis that the matters would conveniently be dealt with by the circuit court in Middelburg where the defendants, who had not defended the actions, were resident. In its reasoning, the court held that in Mpumalanga, plaintiffs were obliged to institute actions in the circuit court closest to the defendant's place of residence. The court based this conclusion on ss 173 and 34 justifications.

[25] This Court in *Thobejane* rejected those justifications as a basis for a court to decline exercising its jurisdiction. Significantly, the court expressly rejected the proposition (a key holding in *Lukhele*) that a plaintiff had to institute action in a court closest to a defendant's place of residence. At para 25 the court said the following:

'Self-evidently, litigation begins by a plaintiff initiating a claim. Axiomatically, it must be the plaintiff who chooses a court of competent jurisdiction in just the same way that a game of cricket must begin by a ball being bowled. The batsman cannot begin. This elementary fact is

[12] In *Thobejane* this Court had to consider two judgments, respectively from the Gauteng and the Eastern Cape Divisions of the High Court. The Gauteng judgment is the *Thobejane* part of the judgment, where this Court had to decide whether a high court division could competently refuse to hear a matter within its jurisdiction on the basis that another court (such as a local division or a magistrates' court) had concurrent jurisdiction.

recognised as a rule of the common law, founded, as it is, on common sense. The right of a plaintiff to do so was recognised in a Full Court of the Gauteng Division in *Moosa v Moosa.* That Court relied on *Marth v Collier* where it was stated:

"The granting of an order for the transfer of legal proceedings from the Supreme Court to the Magistrates' Court, in the absence of a Plaintiff 's consent, would clearly infringe upon the latter's substantive right to choose the forum in which he or she wishes to institute proceedings. As little as our courts have the inherent power to create substantive law (See: the *Cerebos Foods* case (*supra*) at 173D; *Universal City Studios Inc & Others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) at 754E-755E) do they have the power, in the absence of statutory - or common law authorisation or legal precedent. . . to make orders which infringe upon the substantive rights of litigants or others (See: *Eynon v Du Toit* 1927 CPD 76; *E v E and Another* 1940 TPD 333), such as the right of a Plaintiff, as *dominus litis*, to decide in which of concurrent *fora* he or she wishes to enforce his or her rights."' (Footnotes omitted.)

[26] This Court also concluded, and made an order to that effect, that the main seat of a Division of a High Court is obliged to entertain matters that fall within the jurisdiction of a local seat of that Division because the main seat has concurrent jurisdiction.

[27] Given these findings, and to the extent contrary views were expressed in *Lukhele*, the latter must be considered to have been overturned by *Thobejane*. In the result, the eighth respondent's reliance on *Lukhele* was misplaced.

Conclusion

[28] Save for these brief observations, I concur in the order of the first judgment.

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TATI MAKGOKA

JUDGE OF APPEAL

Appearances:

For appellants:	J C Klopper
Instructed by:	DBM Attorneys, Centurion
	Symington De Kok, Bloemfontein

For 8th respondent:	J de Beer (with A C J van Dyk)
Instructed by:	Wiekus du Toit Attorneys, Mbombela
	Honey Attorneys, Bloemfontein