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**IN THE HIGH COURT OF SOUTH AFRICA,  
GAUTENG DIVISION, JOHANNESBURG**

**CASE NO: 2021/36333**

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

4/8/2022

In the matter between –

**THUSHENI, NONHLANHLA VERONICA**

**(IDENTITY NUMBER: [....])**

**APPLICANT**

**AND**

**MINISTER OF HOME AFFAIRS**

First Respondent

**THE MASTER OF HIGH COURT JOHANNESBURG**

Second Respondent

**ESTATE LATE: DLAMINI, SHADRACK MFANA (IDENTITY**

**NUMBER: [....])**

Third Respondent

**DLAMINI, MELUSI RONALD**

Fourth Respondent

**MAGUBANE, ABRAHAM**

Fifth Respondent

**PHIKE, ELIZABETH**

Sixth Respondent

**PHIKE, NTHOMBIKAYISE ANGELINE**

Seventh Respondent

**ANY OTHER INTERESTED MEMBER(S)**

**OF THE DECEASED'S FAMILY**

Eight Respondent

**JUDGMENT**

## MOORCROFT AJ:

### Summary

*Late registration of a customary marriage – Foreseeable disputes of facts incapable of resolution on the papers – application dismissed for this reason*

*Rule 6(5)(g) of Uniform Rules – dismissal – does not finally dispose of dispute*

*Application for leave to appeal – Section 17(1)(a)(i) and (ii) of the Superior Courts Act, 10 of 2013 – No reasonable prospects of success*

### Order

[1] In this application for leave to appeal I make the following order:

1. *The application for leave to appeal is dismissed;*
2. *The applicant is ordered to pay the costs of the application.*

[2] The reasons for the order follow below.

### Introduction

[3] The applicant sought an order condoning the late registration of the customary marriage between herself and the deceased Mr. Dlamini who passed away in July 2021, and that the Minister of Home Affairs (the first respondent) be ordered to register the customary marriage concluded on 2 May 2021, issue a customary marriage certificate, and to reflect the deceased's marital status as 'married' on his death certificate.

[4] The application was opposed by the sixth respondent, the daughter of the

deceased. After hearing argument I dismissed the application<sup>1</sup> with costs on 23 May 2022. The applicant brought an application for leave to appeal that was set down for argument on 8 July 2022.

[5] During argument I raised the question whether the dispute was *res iudicata* between the parties. After hearing submissions I invited both counsel to file further heads of argument dealing with the *res iudicata*. Counsel for the applicant and for the 6<sup>th</sup> respondent filed further heads of argument on 29 July 2022. I am indebted to counsel for heads submitted.

[6] Counsel are in agreement that the dispute is not *res iudicata*.

[7] I raised the issue of *res iudicata* because if the dispute were not *res iudicata* then the applicant would, if so advised, be at liberty to issue a summons for the relief claimed in the application. She would be in a position to do so in the proper forum, the trial court.

#### The judgment sought to be appealed against

[8] In the judgment I set out the parties' averments in paragraphs 5 to 15, dealt with the Recognition of Customary Marriages Act, 120 of 1998 in paragraphs 16 to 21, and concluded in paragraphs 22 and 23 that –

8.1 there were fundamental disputes of fact on the papers;

8.2 these disputes were foreseeable, and

8.3 the question whether a customary marriage was concluded cannot be

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<sup>1</sup> Reported on Saflii as *Thusheni vs Minister of Home Affairs and Others* [2022] ZAGPJHC 343.

answered with reference to the affidavits.<sup>2</sup>

[9] The judgment did not deal with and did not decide the competing versions of factual averments because it was not possible to do so.

[10] Mr Sibisi for the sixth respondent in his helpful heads referred me literature<sup>3</sup> as well as to case law, and concludes, correctly in my view, that the dismissal of the application does not render the dispute *res iudicata*. He referred me to *Mamadi and Another v Premier of Limpopo Province and Others*,<sup>4</sup> where Theron J<sup>5</sup> said:

“A dismissal in terms of rule 6(5)(g) does not preclude a litigant from proceeding by way of action, and thus does not finally dispose of a matter ...”<sup>6</sup>

[11] Section 17(1)(a)(i) and (ii) of the Superior Courts Act, 10 of 2013 provides that leave to appeal may only be given where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. Once such an opinion is formed leave may not be refused.

[12] It is now generally accepted that that the test for leave to appeal is more stringent under the Superior Courts Act, 10 of 2013 than it was under the repealed Supreme Court Act, 59 of 1959.<sup>7</sup> However, in *KwaZulu-Natal Law Society v Sharma*<sup>8</sup>

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<sup>2</sup> Rule 6(5)(g) of the Uniform Rules; Van Loggerenberg and Bertelsmann *Erasmus: Superior Court Practice* RS 17, 2021, D1-70; *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) 1162 and 1168; *Gounder v Top Spec Investments (Pty) Ltd* 2008 (5) SA 151 (SCA) paras 9 and 10.

<sup>3</sup> A. Dube & M Machaya ‘The Doctrine of Res Judicata Revisited: Molaudzi v The State’ (39) *Strategic Review for Southern Africa*.

<sup>4</sup> *Mamadi and Another v Premier of Limpopo Province and Others* [2022] ZACC 26 para 22.

<sup>5</sup> Zondo ACJ, Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Mlambo AJ, Tshiqi J and Unterhalter AJ concurring

<sup>6</sup> See also *Lombaard v Droppop CC* [2010] ZASCA 86; 2010 (5) SA 1 (SCA) para 26, last sentence.

<sup>7</sup> *Mont Chevaux Trust (IT 2012/28) v Tina Goosen* 2014 JDR 2325 (LCC), [2014] ZALCC 20 para 6; *S v Notshokovu* [2016] ZASCA 112 para 2. See also Van Loggerenberg and Bertelsmann *Erasmus: Superior Court Practice* A2-55; *The Acting National Director of Public Prosecution v Democratic Alliance* [2016] ZAGPPHC 489, JOL 36123 (GP) para 25; *South African Breweries (Pty) Ltd v Commissioner of the South African Revenue Services* [2017] ZAGPPHC 340 para 5; *Lakaje N.O*

Van Zyl J held that the test enunciated in *S v Smith*<sup>9</sup> still holds good:

*“In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.”*

[13] An applicant for leave to appeal must be mindful of the words of Wallis JA in *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd*:<sup>10</sup>

*“The need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit.”*

[14] The conclusion reached in the judgment that there were foreseeable disputes of fact appear from the papers, including the founding affidavit by the applicant.<sup>11</sup> I am of the view that there are no reasonable prospects of success on appeal. The application must be refused and it remains open to the applicant to proceed by trial if she so wished.

[15] I therefore make the order in paragraph 1 above.

**J MOORCROFT**  
**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG DIVISION**  
**JOHANNESBURG**

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*v MEC: Department of Health* [2019] JOL 45564 (FB) para 5; *Nwafor v Minister of Home Affairs* [2021] JOL 50310 (SCA), 2021 JDR 0948 (SCA) paras 25 and 26.

<sup>8</sup> *KwaZulu-Natal Law Society v Sharma* 2017 JDR 0753 (KZP), [2017] JOL 37724 (KZP) paras 29 to 30.

<sup>9</sup> *S v Smith* 2012 (1) SACR 567 (SCA) para 7.

<sup>10</sup> *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd* 2013 (6) SA 520 (SCA) para 24.

<sup>11</sup> Paras 31 to 37 of the founding affidavit, at page 001-23 to 001-26 on Caselines.

***Electronically submitted***

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **4 AUGUST 2022**.

COUNSEL FOR THE APPLICANT: M D MATSETELA

INSTRUCTED BY: OKAFOR MA ATTORNEYS INC

COUNSEL FOR 6<sup>th</sup> RESPONDENT: S F SIBISI

INSTRUCTED BY: NTSHONA INC

DATE OF THE HEARING: 8 JULY 2022  
and further heads filed on  
29 JULY 2022

DATE OF JUDGMENT: 4 AUGUST 2022