

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, MTHATHA**

CASE NO: 1075/2013

In the matter between

NOMATHAMSANQA CYNTHIA JOBE : APPLICANT

AND

BEATRICE TINKY TYESI : 1ST RESPONDENT

VUYANI VICTOR MSINDO : 2ND RESPONDENT

MASTER OF THE HIGH COURT : 3RD RESPONDENT

GWILIZA UNDERTAKERS : 4TH RESPONDENT

FIRST NATIONAL BANK, MTHATHA : 5TH RESPONDENT

JUDGMENT

MASETI, AJ:

[1] This is an application by the applicant for leave to appeal to the full Court of this Division against the judgment handed down by this Court on 18 September 2014.

[2] Leave to appeal is based on the legal and factual grounds set out in paragraphs 1 to 6 and additional paragraphs 1 to 4 of the amended application for leave to appeal. The matter was heard on 9 June 2015.

[3] The First Respondent opposed the application mainly on the ground that the provisions of Section 16 of the Superior Courts Act 10 of 2013 prohibit the hearing of the appeal from the judgment of two judges by the full Court and that the appeal should be noted directly to the Supreme Court of Appeal.

[4] None of the parties filed Heads of Argument. The judgment was reserved upon hearing argument.

THE FACTS

[5] The following are the grounds on which the judgment is sought to be impugned:

5.1. The Court a quo, erred in granting all the prayers sought by the Applicant in her counter-application but still dismiss same with the applicant to pay her own costs.

5.2. The Court a quo misdirected itself on the facts and evidence in finding that the applicant and the deceased agreed that the proprietary consequences of their marriage inter se would be that of a marriage concluded in community of property.

5.3. The Court a quo erred and misdirected itself in relying on the case of **Josephina Nangula Mofuka V Teofilus Mofuka** for its conclusion on the issue as to whether the proprietary consequences of the deceased and the First Applicant's marriage inter se, were that of a marriage concluded in community of property.

5.4. The Court a quo, erred in declaring invalid and setting aside the customary marriage between Vuyisile Archibald Tyesi and the First Respondent.

5.5. The Court a quo, erred in directing the Master of the High Court, when administering the estate of Vuyisile Archibald Tyesi, to dispose by Will of Vuyisile Archibald Tyesi only 50% of the joint estate and to give the other 50% to the only surviving spouse of the deceased, namely Mrs Beatrice Tinky Tyesi.

5.6. The Court a quo erred in finding that costs of the application be costs in the joint estate.

[6] The applicant further stated in his Notice of Appeal that during the hearing it will be argued that the applicant has reasonable prospects on appeal and that another Court may come to a different conclusion to the one reached by the Court a quo in that:

6.1. Having granted all the orders sought by the applicant, there was no basis, in law, for the dismissal of the counter-application by the Court a quo;

6.2. On the evidence before the Court a quo, there was no evidence to support the finding that the applicant and the deceased had an agreement that the

proprietary consequences of their marriage inter se would be that of marriage concluded in community of property.

6.3. The decision in **Josephina Nangula Mofuka V Teofilus Mofuka** is no authority for the conclusion reached by the Court a quo; and

6.4. In law, the marriage relationship between the late Vuyisile Archibald Tyesi and Mrs Beatrice Tinky Tyesi had the consequences of a marriage out of community of property and of profit and loss.

THE ISSUES

[7] The issues are whether there are reasonable prospects of success and whether another Court may come to a different conclusion.

THE LAW

[8] The application for leave to appeal is brought in terms of Section 16 of the Superior Courts Act No. 10 of 2013 and Rule 49 of the Uniform Rules of this Court.

[9] Section 16 (1) provides; “Subject to Section 15 (1), the Constitution and any other law:-

- (a) an appeal against any decision of a Division as a court of first instance lies upon leave having been granted-
 - (i) if the Court consisted of a single judge, either to the Supreme Court of Appeal or to a full Court of that Division, depending on the direction issued in terms of Section 17 (6); or

- (ii) if the Court consisted of more than one judge, to the Supreme Court of Appeal.”

[10] In the present case the application for leave to appeal does not comply with the provisions of Section 16 (1) (a) (ii) of the Superior Courts Act No. 10 of 2013 since there were two Judges who constituted the Court a quo, and if leave to appeal is granted, it should be directed to the Supreme Court of Appeal and not the full Court of this division.

[11] The application for leave to appeal complies with Rule 49 (1) (b) as it was lodged within the period prescribed by the Rule.

[12] **Erasmus** in his book titled “**Superior Court Practice**” (B1-356) in his commentary under Rule 49 (3) stated that there are four objects to be served by a Notice of Appeal namely:

- 12.1. to enable the Presiding Officer to frame his reasons for judgment.
- 12.2. to give the respondent an opportunity of abandoning the judgment.
- 12.3. to inform the respondent of the case he has to meet.
- 12.4. to notify the appeal court of the points to be raised. See **Kilian V Geregbode Uitenhage 1980 (1) SA 808 (A) at 815.**

Erasmus states that the requirements of the subrule are peremptory and an invalid notice of appeal cannot be validated by the Court of Appeal allowing an amendment (See **Van Aswegen Vs De Swardt Motors (Edms Bpk 1958 (1) SA 579 (O); Harvey Vs Brown 1964 (3) SA 381; T.ZOURAS Vs SA Wimpy (Pty) Ltd 1978 (3) SA 204 (W) at 205.**

[13] An appeal can be noted only against the judgment itself (i.e. the substantive order), not against the reasons for judgment; and a notice which purports to appeal against the reasons for judgment is bad. See **Hollard Vs Daysel 1970 (1) SA 90 (A) at 93E, LIPSCHITZ N.O. Vs SA AMBOUNASIONALE BOUVEREENING 1979 (1) SA 527 (T) at 529 H** and Erasmus B1-357.

[14] In **Harvey Vs Brown 1964 (3) SA 381 at 383 O' Hagan J** stated that the respondent in an appeal is entitled to be informed in the Notice of Appeal in clear and unambiguous terms exactly what case he must be prepared to meet on appeal.

[15] In **Himunchol Vs Moharom 1947 (4) SA 778 (N) at 780 Hathorn J.P.** ruled that a ground of appeal is bad if it is so widely expressed that it leaves the appellant free to canvas every finding of fact and every ruling of law made by the Court a quo in relation to the subject matter of the appeal; or which specifies the findings of fact or rulings of law so vaguely as to be of no value either to the Court or the respondent.

[16] In considering the reasonableness of the grounds of appeal, that is, the reasonable prospects of success and whether another Court may come to a different conclusion this Court has to address the question of law and facts in the following manner:

16.1. In addressing paragraph 7.1. above of the grounds of appeal, the appellant filed a Counter-application seeking a declaratory order to the validity of the Will and also seeking the same interdict sought by the applicant against her to be granted against the applicant. (See paragraph 5 of my brother Pakade J's judgment). The Will was declared valid in paragraph 39.1. of the judgment and

the other relief sought in the counter-application was dismissed in paragraph 39.4. Therefore there is absolutely nothing wrong with the judgment.

16.2. In addressing paragraph 7.2. above, the evidence reflected in paragraph 21 and its sub-paragraphs support the finding that the first respondent and the deceased had an agreement that the proprietary consequences of their marriage inter se would be that of a marriage in community of property.

16.3. This Court, in coming to its conclusion that the proprietary consequences of the marriage between first respondent and the deceased inter se were that of a marriage concluded in community of property, never relied on **Josephina's Case** which only had a persuasive effect but relied entirely in the Judgment of **Watermeyer CJ in Exparte Minister of Native Affairs in re Molefe Vs Molefe 1946 AD 315; judgment of Corbett JA in Exparte Spinazze and Another NNO 1985 (3) SA 650 (A) and; judgment of Stegman J. in Mathabathe 1987 (3) SA 45 (w) at 51C-D.** (See paragraphs 16.2., 17 and 18.1. of the judgment appealed against.

16.4. Paragraphs 30 to 32 of the judgment appealed against with reference to **Palesa N.O. Vs Moleko 2013 (4) All SA 166 (GSJ) and Motsoatsoa Vs Roro and Another 2011 (2) all SA 324 (GSJ)** support the finding by the Court a quo why the customary marriage allegedly contracted between the applicant and the deceased was declared null and void.

[17] From the aforesaid it is clear that the grounds of appeal are bad in law in that they are so widely expressed as to leave the appellant free to canvas every finding of fact and every ruling of law (See **Himunchol Moharom** cited in paragraph 17 above).

[18] The four objects to be served by a notice of appeal stated by **Erasmus** in paragraph 14 above have not been achieved.

[19] As stated by **O' Hagan J. in Harvey Vs Brown** cited in paragraph [16] supra, the respondent is entitled to be informed in the Notice of Appeal in clear and unambiguous terms exactly what case he must be prepared to meet on appeal. The present application for leave to appeal does not comply with this requirement.

[20] In the premises the application for leave to appeal against the judgment delivered by this Court on 18 September 2014 does not have any reasonable prospects of success.

[21] I now make the following order:

The application for leave to appeal is dismissed with costs.

P.L.C MASETI

ACTING JUDGE OF THE HIGH COURT

I CONCUR

L.P. PAKADE
JUDGE OF THE HIGH COURT

For the Applicant : MR M. BODLANI

Instructed by : L.G. NOGAGA ATTORNEYS
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For the First Respondent : MR V. KUNJU

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Date Heard : 09 JUNE 2015

Date Delivered : 03 SEPTEMBER 2015