

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : 683/2011

In the appeal between:-

<u>CHALI MATETENKI MARAI</u>	1 st Applicant
<u>CHALI LEEPO MARIA</u>	2 nd Applicant
<u>CHALI THABISO CHARLES</u>	3 rd Applicant
<u>CHALI TISETSO JULIA</u>	4 th Applicant
<u>CHALI YVONNE LERATO</u>	5 th Applicant

and

<u>RASELLO MASEFAKO LYDIA</u>	1 st Respondent
<u>NICOLAS ESIAS JANSE VAN RENSBURG</u>	2 nd Respondent
<u>SUSANNA MARIA COPPENHAGEN</u>	3 rd Respondent
<u>DIRECTOR GENERAL DEPARTMENT OF HOME AFFAIRS</u>	4 th Respondent
<u>MASTER OF THE HIGH COURT</u>	5 th Respondent
<u>REGISTRAR OF DEEDS, BLOEMFONTEIN</u>	6 th Respondent

HEARD ON: 10 OCTOBER 2011

JUDGMENT BY: RAMPAL, J

DELIVERED ON: 24 NOVEMBER 2011

[1] This matter is an application for leave to appeal. The applicant was the first respondent in the main application.

Besides her, there were five other respondents. The five-

some is not involved in these proceedings. There were five applicants in the main application. They are now the respondents in these proceedings. They all oppose this application. I shall refer to the parties as in convention.

- [2] The first respondent was aggrieved by my judgment in the main application. The judgment was delivered on 4 August 2011 in favour of the applicants. The order consisted of seven legs. The first leg of the seven legged order reads:

“100.1 The first respondent’s purported marriage to the late Masakale David Chali at Orkney in North West on 19 March 2005 is declared invalid and is hereby set aside as null and void *ab initio*.”

This is the only aspect of the order the first respondent wishes to appeal against.

- [3] There were thirteen grounds of appeal. Among others, the first respondent contended that I erred in finding:

- that the first respondent’s marriage to Mr. Rasello was, according to the founding affidavit,

a ground on which the applicants relied for the invalidity of the first respondent's marriage to the late M.D. Chali;

- that the first respondent had to deal with her questionable marital status in her answering affidavit, but failed to do so;
- that the first respondent was still married to Mr. Rasello at the time she purported to marry the late Mr. Chali;
- that the first applicant was entitled to rely on the new matter, in other words, the marital status of the first respondent, in the replying affidavit since such a matter was not initially so raised in the founding affidavit;
- that the first respondent had acknowledged on oath that she was lawfully married to Mr. Rasello at the time she purported to marry the late Mr. Chali.

[4] Mr. Pienaar argued, on behalf of the first respondent, on the strength of the misdirections relied upon by the first respondent, that there were reasonable prospects that an

appellate court would come to a different conclusion by finding that there was a valid customary marriage between the first respondent and Masakale David Chali, now deceased. He, therefore, urged me to grant the first respondent leave to appeal.

[5] Mr. Hlatshwayo, on behalf of the applicants, differed. He argued that the alleged customary marriage was clearly invalid from the very beginning and that no oral evidence could ever bring it to life. He submitted that the first respondent's case had no reasonable prospect of success on appeal. He, therefore, urged me to grant no leave to appeal to the first respondent.

[6] The crux of the first respondent's case or defence was that she, by virtue of her valid customary marriage, was the surviving spouse of a man who died intestate. This was a *factum probandum* of her answering affidavit. In their replying affidavit the applicants repudiated her alleged claim that she and the late M.D. Chali were lawfully married by custom. They then annexed thereto, as they were entitled to do in my view, certain documentary evidence. The paper

trail, which included prior written statements made by the first respondent herself under the sanction of an oath, strongly refuted the first respondent's claim. She, in no uncertain terms stated, after the death of M.D. Chali, that she had never divorced her first husband.

[7] I found an enormously huge inconsistency between the first respondent's prior statement and subsequent statement, in other words, the answering affidavit. In these circumstances, what useful practical purpose would be attained by referring the matter to trial for oral evidence? The damage has been done. The first respondent's credibility has been irredeemably shattered. There is no chance, however remote, that the first respondent's future testimony can redeem her.

[8] Even if I was wrong in finding, firstly, that the applicants were entitled to rely on new documentary evidence in the replying affidavit and secondly, that the first respondent's marital status was raised in the founding affidavit as an issue and thirdly, that the alleged marriage between the first respondent and the late M.D. Chali was null and void, the

applicants would not be precluded from raising these issues or from relying on the annexures to the replying affidavit if the parties were referred to trial. Once again the first respondent would find herself on shivering sand. The more she wiggles, the deeper she sinks. By finding that she failed to deal with her marital status, I did not thereby shift the burden of proof to her. She averred that she was married. Therefore it was also incumbent upon her to aver that she was legally competent to remarry. That issue arises *ex lege*.

[9] I listened to the debate, but I could find nothing new in the first respondent's argument. I am not persuaded that I committed any appealable misdirection as regards the law or the facts in this matter.

[10] Mr. Hlatshwayo argued, *in limine*, that seeing that the executor in the deceased estate of the late Masakale David Chali made a final decision on 6 July 2007 to the effect that the alleged customary marriage between the first respondent and the late M.D. Chali, was null and void, which decision the first respondent has never taken on review to be set aside and was confirmed by the court, the first respondent

was debarred from seeking this form of relief while the executor's decision still stands unchallenged.

[11] There was some substance in that argument as well, as there was on the merits. I am persuaded, as regards the merits, that there are no reasonable prospects of success if the matter should be allowed to go an appeal.

[12] In the absence of any appealable misdirections, I am inclined to refuse the respondent leave to appeal.

[13] Accordingly, I make the following order:

13.1 The first respondent is refused leave to appeal.

13.2 The application is dismissed.

13.3 The first respondent is directed to pay the costs.

M.H. RAMPAL, J

On behalf of applicants:

Attorney M. Hlatshwayo
Instructed by:
Hlatshwayo Mhayise Inc
VEREENIGING
and
Phatshoane Henney Inc

BLOEMFONTEIN

On behalf of first respondent:

Adv. C.D. Pienaar
Instructed by:
Stander & Partners
BLOEMFONTEIN

On behalf of second and third
respondents:

Adv. M.C. Louw
Instructed by:
Honey Attorneys
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