



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

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED:

14 AUGUST 2024

DATE

SIGNATURE

CASE NO: 021190/2024

In the matter between:

CHARMAINE NTSAKO N.O

First Applicant

KELETSO GLENDAAH NDABA N.O

Second Applicant

and

MAKHOSI MTHEMBU

First Respondent

THE MASTER OF THE HIGH COURT, PRETORIA

Second Respondent

THE REGISTRAR OF DEEDS, PRETORIA

Third Respondent

JUDGMENT

COWEN J

1. The applicants, Charmaine Ntsako NO and Keletso Glendah Ndaba NO, apply for leave to appeal against my judgment and orders delivered on 25 March 2024. The applicants were the first and second respondents in an urgent application instituted by Makhosi Mthembu in connection with the administration of the estate of the late James Ndaba.
2. I have considered the grounds of appeal and the submissions advanced by the parties. I am not satisfied that the applicants have met the requirements for leave to appeal set out in section 17(1)(a)(i) of the Superior Courts Act 10 of 2013¹ as interpreted in cases such as *Smith* and *Rattan NO*.²
3. Inasmuch the issues canvassed in the application for leave to appeal are traversed in my judgment, no purpose is served by repeating what is said there. However, certain arguments advanced in the application for leave to appeal do warrant a response, in

¹ 17 Leave to appeal

(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a) (i) the appeal would have a reasonable prospect of success; or
(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

² *S v Smith* 201291 SACR 567 (SCA) (*Smith*) para 7: '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.' *Four Wheel Drive Accessory Distributors CC v Rattan NO* 2019(3) SA 451 (SCA) (*Rattan NO*) at para 34 affirms *Smith* para 7.

part as the applicants misconstrue aspects of the judgment and the import of the orders.

4. First, it was submitted that the order precludes liquidation of estate assets. That is not correct. On its own terms, the order does not preclude lawful liquidation of estate assets.
5. Secondly, certain grounds of appeal are premised or partly premised on the assumption that the Court made findings or should have made findings regarding the validity of the alleged customary marriage. The assumption is not correct. This Court did not have to and did not determine that the customary marriage was valid: that was not the issue. Indeed, the executors did not make any submissions as to the applicable customary law on the facts before the Court. What was dealt with is lawful estate administration in the face of Mrs Mthembu's marriage certificate and related claims. Thus, the fact that the validity of the customary law marriage is disputed on affidavit and the fact that Mrs Mthembu sought final relief in motion proceedings,³ does not disentitle Mrs Mthembu to relief. Indeed, the existence of the dispute regarding the customary marriage supports her case in view of her marriage certificate.
6. Thirdly, the application for leave to appeal in part misconstrues the nature of Mrs Mthembu's claims, which are to a child's share and half share in the estate – as surviving spouse. Indeed, there is no dispute that at least her claim to a child's share is a claim as contemplated by section 29 of the Administration of Estates Act 66 of

³ The principles applicable to findings of fact are thus those articulated in *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) 623 (A) at 634H-635C.

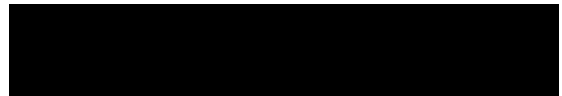
1965. I deal in the judgment with the existence of the claims, which are not seriously disputed in answer and the applicants accept that they have not rejected any claims.

7. Fourthly, the applicants are ultimately compelled to contend that because they believe that they may have reason to dispute the customary marriage, they can wholly disregard Mrs Mthembu's marriage certificate because it is only *prima facie* proof of a marriage. Such an approach would render the protections afforded by the Recognition of Customary Marriages Act 120 of 1998 nugatory in estate administration, with potentially dire consequences for parties to customary marriages, especially women, often rural women.
8. Fifthly, regarding ground 9, this Court did not refer the judgment to the Master on the basis of any impropriety or to compel any investigation. That relief was not sought and that is not the intended import of the order. The order is intended to ensure that the Master is apprised of the judgment, which is in the interests of justice, not least in circumstances where the Master is a party to the proceedings, though not participating at this stage. It is for the Master to assess on the findings in the judgment and the information before the Court whether any steps are warranted. With the benefit of hindsight, though mindful that the judgment was prepared in urgent circumstances, greater clarity in the judgment on this issue would have been desirable. The concerns referred to in paragraph 17 are the issues traversed in my judgment viewed against the background that the file is apparently missing in the Master's office. Finally, contrary to what the applicants suggest, this Court was and remains mindful that the papers established that Mrs Mthembu prosecuted unsuccessful proceedings to

remove the applicants as executors. However, very limited information was placed before the Court in that regard and paragraph 17 does not purport to deal with matters there traversed.

9. In the result, I decline to grant leave to appeal. Costs should follow the result. I make the following order:

9.1. The application for leave to appeal is dismissed with costs.



S COWEN

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Appearances

Counsel for Applicants:	Adv C Barrerio
Attorney for Applicants:	K B Seabi Attorneys
Counsel for 1 st and 2 nd Respondents:	Adv H Legoeba
Attorney for 1 st and 2 nd respondents:	Arthur Channon Attorneys Inc

Date heard:	14 May 2024
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Date of Judgment:	14 August 2024
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