



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

CASE NO: 2023-032349

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

DATE: 08/01/2025

SIGNATURE : 

In the matter between:

SESI IDAH MAHLANGU

and

PETER XESWAYO NDLOVU

WINNIE PRINCESS LUSENGA

MINISTER OF HOME AFFAIRS

Applicant / Appellant

First Respondent

Second Respondent

Third Respondent



JUDGMENT – APPLICATION FOR LEAVE TO APPEAL

LINGENFELDER, AJ

The appellant brought an application for a declaratory order that the civil marriage entered into between the first and second respondents is unlawful, null and void; and that the customary union between the applicant and the first respondent is valid and compelling the third respondent to register same and issue a marriage certificate to the appellant. The application was dismissed with costs, and the appellant has filed an application for leave to appeal against the order made.

Numerous attempts were made to arrange a date for the hearing of the application for leave to appeal, without any success. Counsel for the appellant and first respondent then advised that they were in agreement that the application can be heard on the papers, without the need of any further argument. I accordingly deal with the application for leave to appeal on the papers filed.

The appellant's version in the main application is that a valid customary union was entered into between herself and the first respondent on 1 October 2006. The first respondent undertook to do the necessary in terms of their traditional practices to conclude a customary union after the appellant found out in June 2006 that she was pregnant. The first respondent held a meeting with the appellant's family representatives, paid lobola and a celebration of the marriage was held with the traditional practice of slaughtering a sheep and dividing the meat between the families. The slaughtering of the sheep then completed the negotiations and the appellant was officially handed over to the first respondent's family. During 2009 the appellant found out that the first respondent was engaged to the second respondent. She returned to her family with her son, and later found out that the first respondent had entered into a civil marriage with the second respondent in May 2011. She requested the Department of Home Affairs to register the customary union and they then investigated the situation. The first respondent denied when he was contacted as part of the investigation that the appellant was



married to him by customary union. The first respondent in his answering affidavit denies that he entered into a customary union with the appellant. He admits to having paid lobola, but denied that a celebration or customary union took place thereafter. His version is that the slaughtering of the sheep referred to by the appellant was to cater for meat for his son's first birthday which fell on the same day. In terms of his Sepedi culture, celebration of the consummation of a marriage require both families to each slaughter a sheep and then exchange it. The first respondent and the second respondent entered into a civil marriage on 25 June 2011 and have been living together as husband and wife ever since this date.

The appellant did not file a replying affidavit dealing with the respondent's version, and the court was accordingly faced with different versions by the appellant and the first respondent, and various disputes of facts on the papers.

I dismissed the application with costs, on the basis that there was a factual dispute, and based on the matter of *Plascon Evans-rule*, as referred to in the matter of **National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) at par 26**, as quoted in the judgment.

The test to be applied in deciding whether to grant leave to appeal has been discussed and set out in detail with reference to all relevant judgments dealing with the requirements, in the matter of **Van Zyl v Steyn (83856/15) [2022] ZAGPPHC 723 (28 April 2022)**.

Sec 17(1)(a)(ii) of the Superior Courts Act, 10 of 2013 ("the Act") states:

"17(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;*

(b) ..."

I pause to say that it has not been made out in the application for leave to appeal that there is some “*other compelling reason*” why leave should be granted as provided in Sec 17(1)(b) of the Act, and accordingly the usual test as set out in subparagraph (a) is applicable.

As is stated in **MEC for Health, Eastern Cape v Mkhitha and Another [2016] ZASCA 176 (25 November 2016) Para 16-18**, leave to appeal “[16] *must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard.*

[17] *An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.*”

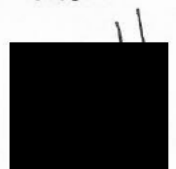
The appellant does not meet the requirements of Sec 17(1)(a) of the Act. There is no reasonable prospect of success on appeal, having regard to the factual disputes on the papers. The Constitutional Court has stated in **Mayelane v Ngwenyama and another 2013 ZACC 14; 2013 (4) SA 415 (CC); 2013 (8) BCLR 918 (CC)** that a court should be slow to decide matters of customary law on evidence alone and that expert evidence is required on the requirement of a celebration and the requirements for such a celebration.

In the matter of Mashisane v Mhlauli 903/2022) [2023] ZASCA 176 (14 December 2023), where the Supreme Court of Appeal approved the principle that motion proceedings are inappropriate in Family law and where a declaratory order on whether parties were married according to customary law, was sought. In its judgment on an application for leave to appeal against the court a quo's granting such relief, the following is stated at [13]:

"Heeding the Constitutional Court's warning, courts should be slow to decide matters of this nature on affidavits alone. In this case, expert evidence on the concept of 'consent' in both the Tsonga and Xhosa customary law should have been adduced by the respondent to establish her case that the parties had consented to, and were married under, customary law. This would have given the appellant the opportunity to adduce his own expert evidence, and, if necessary, a referral to trial or oral evidence to assist the court in deciding the issue. However, the manner in which the respondent elected to bring her case to court deprived the appellant, and the court, of the benefits of a thorough examination of this important issue.

The respondent in the present matter raised genuine disputes of fact, namely the reason for the celebration which was held, and that the celebration did not meet the requirements of a customary union celebration in terms of his traditions. As is stated in the Mayelane-matter above, a court should have the benefit of expert evidence on the customary requirements for a valid customary marriage to be concluded.

The appellant carries the duty to prove her version. She made her own burden more difficult by not filing a replying affidavit, and dealing with the disputes of fact raised in relation to the celebration and slaughtering of a sheep. The disputes of fact go to the core of the matter, namely whether the customary marriage was concluded as required in the Act, and in choosing not to file a replying affidavit to deal with the respondent's version, made it even more difficult for the court to make a proper examination of the facts. The appellant is a party who is interested in an existing, future or contingent right and the relief she sought was not academic or abstract. The declaratory she sought was directly linked to her legal status. She



wanted the court to determine that she was married. Although the same question could have been determined in divorce proceedings, I accept that the appellant was entitled to seek declaratory relief to determine her status, but this does not mean that she was entitled to the relief sought. However, her reasons for bringing the application so that she will be able to file for divorce proceedings after the marriage was registered, are not valid. Registration of a customary union is not a requirement for a valid marriage and she could have instituted divorce proceedings without such registration.

The disputes of facts should have been foreseeable to the appellant. She states in her affidavit that the respondent denied that they had entered into a customary union when he was contacted as part of the investigation., and in fact denied knowing her. It was therefore inappropriate to approach the court on motion proceedings, and she did so with the knowledge that factual disputes re the existence of the customary marriage were present.

Accordingly, I make the following order:

The application for leave to appeal is dismissed with costs.



LINGENFELDER

**ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA**
Electronically submitted therefore unsigned