



**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION: MTHATHA]**

CASE NO.1429/2022

In the matter between:

BABALWA NOMANDELA

Applicant

and

NONTEMBISO PRISCILLA MONDI

1st Respondent

MINISTER OF HOME AFFAIRS

2nd Respondent

**THE DIRECTOR GENERAL OF THE DEPARTMENT OF
HOME AFFAIRS**

3rd Respondent

JUDGMENT

JOLWANA J

[1] The applicant has approached this Court seeking a declarator the effect of which, if granted, would be the nullification of the marriage between the first respondent and the late Phillip Mondi. If successful in that main relief, she seeks an order directing the second respondent to expunge the marital records of Phillip Mondi (Phillip) and

the first respondent. Only the first respondent opposes this application, the other respondents having played no role in it and have elected to abide the decision of the court. Henceforth the first respondent shall be referred to simply as the respondent and the second and third respondents shall be referred to collectively as the department.

[2] The applicant is the mother of a minor child and it is on behalf of the said minor child that she has instituted these proceedings. She had a love relationship with Dr Khaya Mondi (Khaya) as a result of which the minor child was born. Khaya is the son of the late Phillip Mondi (Phillip) and the respondent and therefore the minor child is the grandson of Phillip and the respondent.

[3] When the minor child was born, the applicant and Khaya registered him at the department with the surname Mondi which is Khaya's surname as they intended to get married at some point in the future. Khaya made the minor child a dependant in his medical aid. The minor child was born on 11 September 2017 and shortly thereafter, just over three months after the birth of the minor child, two tragic events occurred, one almost immediately after the other. The first one was that Khaya sadly passed away on 23 December 2017. About eleven days after the passing of Khaya, and before the interment of his mortal remains, Phillip also sadly passed away on 3 January 2018.

[4] Khaya had introduced the applicant to his mother, the respondent. When Khaya and Phillip passed away, the applicant used her own money together with that of Khaya to pay for the funeral expenses for both of them. She withdrew Khaya's money using Khaya's bank card and gave it to the respondent to pay for Khaya's and Phillip's funeral expenses. During Khaya's lifetime the respondent visited the

applicant to see the minor child. The applicant accompanied Khaya when he visited his mother in Brakpan, Gauteng where she stayed at the time to inform her of his intention to marry the applicant.

[5] Khaya had taken a life insurance policy cover of R3 612 271.61 on his life and he had made his parents, the respondent and Phillip, beneficiaries in that insurance policy life cover in the event of his death. The applicant posits that it is that money that is at the core of the dispute between herself and the respondent. After the funeral of Khaya and Phillip the applicant and the respondent went together to seek legal advice from the applicant's current attorneys of record. The respondent needed assistance in claiming her portion of the proceeds of that insurance policy cover whereas the applicant needed legal advice regarding the rights of the minor child as the minor child was supported by Khaya during his lifetime. The applicant was advised to report the estate of Khaya with the Master of the High Court (the Master) in order for her to lodge a claim for the minor child.

[6] The applicant alleges that instead of claiming her portion of the money from the insurance company, the respondent claimed the whole amount under the pretext of being Phillip's wife. The claim for her portion was successful, however, the respondent was unable to successfully claim Phillip's portion. The applicant alleges that this was because when the respondent was asked about her surname as it appears in her identity document as Nongowenga as against Phillip's surname which is Mondi, she deposed to an affidavit in which she stated that she was not married to Phillip.

[7] The applicant further alleges that Phillip's siblings instructed a firm of attorneys to demand that a paternity test be done to determine the minor child's paternity

claiming that the minor child was not Khaya's biological child. It was also claimed on their behalf that if the paternity test established that the minor child was not Khaya's biological child, they would be entitled to the estate of Phillip. Before the paternity test could be done those attorneys' mandate was terminated. The firm of attorneys that had represented the respondent in case no. 3710/19 had also written a letter to the applicant's attorneys in which they claimed on behalf of the respondent, that Phillip had another child named Mpho and therefore Khaya had a sister. The applicant alleges that the respondent also lied in this regard for the purpose of ensuring that the portion due to the minor child would be inherited by Mpho.

[8] The applicant alleges that before the posthumous marriage certificate was issued, the department did not conduct any investigation. Therefore, in issuing the marriage certificate without any investigation, the department acted negligently and possibly in cahoots with the respondent. She, therefore, sought to have said marriage certificate declared unlawful and invalid. The applicant further alleges that the minor child is sickly and during Khaya's lifetime, he had been on his medical aid. She now has to use her own medical aid which is not enough as its funds get depleted before the end of her medical aid's annual cycle. She then has to buy some of the minor child's medication cash using her own money from time to time. On these bases, she alleges that she has to protect the interests of the minor child who cannot act on his own. She further alleges that Phillip's estate has been finalised but the Master is not able to authorise its distribution because of the respondent's claim to be Phillip's wife. These delays in the finalisation of Phillip's estate have placed her in a financially precarious position due to lack of financial support from Phillip's estate. These are some of the allegations made by the applicant as the basis for the relief sought in her notice of motion.

[9] The respondent opposes this application. She has filed an answering affidavit which, for some strange reason, has not been drawn conventionally to refer to each paragraph in the founding affidavit. In that answering affidavit she disputes the applicant's allegations and has also raised a point in *limine* in which she challenges the applicant's *locus standi in udicio*. This is on the basis that the applicant has, in the heading to the notice of motion and the founding affidavit, only reflected her names, and not reflected herself as acting on behalf of the minor child. Secondly, the applicant has indicated in her founding affidavit that she is acting as the mother and therefore the natural guardian of the minor child. The applicant makes the allegation that she has a clear right to protect the interests of the minor child who cannot act on his own. The applicant further alleges that she is suffering harm because her child is not being supported in circumstances in which the minor child is sickly and the applicant exhausts her medical aid and even buys medication sometimes. The respondent contends that there is no nexus between any of these allegations and the relief sought whose gravamen is the declaration of invalidity of the marriage between the respondent and Philip. The respondent further contends that even the applicant's allegation that the marriage should be declared invalid because it is intended to claim a benefit due to the minor child and is based on lies does not help. In this regard it was also argued on behalf of the respondent that to the extent that the minor child, as a grandson to Phillip, is entitled to lodge a claim with the executor of Phillip's estate, the applicant should do so. It is the executor of Phillip's estate who will determine the entitlement or otherwise of the minor child, to a benefit in Phillip's estate. The main point is that for the applicant to seek to invalidate the marriage between the grandparents of the minor child in order to protect the alleged entitlement of the minor child is too remote.

[10] In *Firm-O-Seal CC*¹ Ponnar JA restated the requirements for a litigant to establish *locus standi* as follows:

“*Locus standi in iudicio* is an access mechanism controlled by the court itself. Generally, the requirements for locus standi are these: the plaintiff must have an adequate interest in the subject matter of the litigation, usually described as a direct interest in the relief sought; the interest must not be too remote; the interest must be actual, not abstract or academic; and, it must be a current interest and not a hypothetical one. Standing is thus not just a procedural question, it is also a question of substance, concerning as it does the sufficiency of a litigant’s interest in the proceedings. The sufficiency of the interest depends on the particular facts in any given situation. The real enquiry being whether the events constitute a wrong as against the litigant.”

[11] As a general proposition, it is unfathomable for a girlfriend to challenge the validity of the marriage of the parents of her late boyfriend on behalf of her minor child. This, in circumstances in which there is no record of her boyfriend, the late Khaya, having questioned the marriage between his parents. It is even more difficult to understand a grandchild, after the death of his father, going to court, as the applicant does on behalf of the minor child, to challenge the marriage of his own grandparents. This, to my knowledge, is unprecedented. There is evidence in the form of written confirmation filed by or on behalf of Phillip’s siblings who explain that their brother, Phillip, was married to the respondent. There is also the evidence of at least two traditional leaders both of whom confirm that the respondent and Phillip were married in terms of customary law. It is not the applicant’s case that some or other requirements for a valid customary marriage were not met assuming that she, not being part of the Mondi family, would be sufficiently well versed with that family’s customary rites. Her case is that the marriage never existed, and it is based on lies.

¹ *Firm-O-Seal CC v Prinsloo & Van Eeden Inc and Another* 2024 (6) SA 52 (SCA) para 6.

[12] However, the basis on which she claims to have knowledge of the true facts despite not being part of that family, being just a girlfriend, is not fully canvassed in the papers. It seems to be based on some or other alleged inconsistencies in the respondent's averments in another case (case no. 3710/19) whose papers are not part of this case. The minor child's interests which the applicant contends she is protecting could either be inheritance or maintenance. These causes of action are jumbled up in the founding affidavit. They are not properly set out as they are both fleetingly referenced at best by being mentioned in passing as against asserting a right by being properly pleaded with sufficient degree of clarity. Most importantly it is not immediately apparent in the pleadings why either or both of these causes of action should clothe the applicant with *locus standi* for the relief sought. It is *inter alia*, on these bases that the respondent contends that the applicant's apparent cause of action is too remote to found *locus standi* to challenge the validity of her marriage with Phillip.

[13] The applicant's current attorneys of record were appointed executors of both estates, that is, the estate of Khaya and that of Phillip. The respondent refused to hand over Phillip's and Khaya's original identity documents to the said executors. This led to a court application under case no. 3710/2019 which was instituted in order to compel the respondent to hand over to the said executors, the original identity documents of Phillip and Khaya. The applicant alleges that in that application the respondent deposed to a supplementary affidavit in which she said that she was married to Phillip and attached a letter from the Chief of Hlubi Traditional Council who confirmed that the respondent was married to Phillip. However, the respondent had denied being married to Phillip in her answering affidavit in that case which contradicted what she later alleged in her supplementary affidavit. The respondent

made an application for the issuing of a marriage certificate to her by the department posthumously. In that application the respondent attached an affidavit deposed to by one Simon Mondi who confirmed that the respondent and Phillip were married to each other and that lobola consisting of three cows was paid in 1984. There was also a lobola letter in which the Mondi family appears to have been represented by one Mbulelo Mondi and Thanduxolo Mondi while the respondent's family was represented by one Thobile Nongowenga in the lobola negotiations. The said letter also confirmed that lobola consisted of three cows amongst other things. It appears in those documents that other traditional rites were also observed.

[14] All these documents were submitted to the department by the respondent to prove the existence of her marriage with Phillip. They therefore were the basis for the department to issue the marriage certificate. The fraud which the applicant alleges seems to be based on conjecture and not facts. The applicant herself, being aware of the alleged fraud which was allegedly committed to the prejudice of the minor child and herself was not reported to the police. The applicant alleges that all of the documents lodged with the department were based on lies as the marriage between Phillip and the respondent did not exist. She alleges that it was for this reason that she sought the relief for it to be declared invalid and that such lies were told for the purposes of claiming the benefits which the applicant claims are due to the minor child. She further alleges in her founding affidavit that none of Phillip's siblings confirmed the existence of the marriage as they did not participate in the confirmation of the existence of the marriage at the department. However, she did not attach any affidavit by any of Phillip's sisters to one or some of whom she was introduced by Khaya during his lifetime, as she alleges. She does not even indicate why she could not do so.

[15] There is another reason why the applicant's *locus standi* is tenuous at best. It is that it appears from the papers that the applicant was aware when she instituted these proceedings that there is an unresolved paternity issue in respect of the minor child. If it turns out, after a paternity test, that indeed the minor child is the biological child of Khaya, that will settle that specific issue. However, in the event that it turns out that the minor child is not the biological child of Khaya, not only will the minor child's entitlement to maintenance in Khaya's estate but also his entitlement to claim inheritance from Phillip's estate will also be untenable. To the extent that the paternity of the minor child is still shrouded in uncertainty, the *locus standi* of the applicant to seek the relief she seeks on behalf of the minor child is similarly untenable, even assuming she had a factual and legal basis to seek that relief. It is alleged in the applicant's founding affidavit that the paternity test cannot be done because Phillip had no male sibling. The proposition being made, as I understood it during oral submissions in court, was that females are unsuitable to determine the paternity of a child. I am not sure I understand what this means exactly but to the extent that the proposition is that as a scientific fact, a female person is not suitable to determine consanguinity and therefore only males are, I was not referred to any authority for that proposition. I must confess to being totally dumbfounded by the absurdity of that proposition.

[16] In all these circumstances, the first respondent's point in *limine* stands to be upheld as the applicant has failed to establish that she has the necessary *locus standi* to challenge the marriage of her boyfriend's parents. This is so even if she purportedly does so, as she claims to do, on behalf of the minor child as the minor child's paternity remains unresolved.

[17] There is another reason why the applicant cannot succeed. It is that even on the applicant's own showing, it is clear that there is a massive dispute of fact about the issue of the inheritance in Phillip's estate. The applicant alleges in her founding affidavit that as far back as the 13 July 2020 the siblings of Phillip instructed their attorneys to assert their right to inheritance together with the issue of the paternity of the minor child which she says they raised. Back then, a paternity test was demanded formally. That has not yet been attended to. Therefore, there is a factual dispute as to whether the siblings of Phillip as against the minor child are the correct heirs to inherit in Phillip's estate if the applicant's allegations are accepted for a moment. These proceedings are not about determining the issue of intestate succession in Phillip's estate, they are about the declaration of invalidity of the customary marriage between Phillip and the respondent. However, the declaration of invalidity of the marriage will have, as one of its consequences, the elimination of the minor child's grandmother (if the minor child is indeed Khaya's child) from the inheritance in her own husband's estate which marriage the applicant alleges, never existed.

[18] In her founding affidavit, the applicant has also annexed documents from traditional leaders, an application for the registration or enquiry into the existence of the customary marriage between Phillip and the respondent, a marriage certificate issued posthumously by the Department of Home Affairs, a lobola letter and an affidavit by one Simon Mbulelo Mondi who also confirms the existence of the marriage and details the lobola that was paid and some of the customary rituals that were observed by the Mondi family when the respondent allegedly got married customarily to Phillip. The applicant simply dismissing all this evidence which she was aware of as lies is not sufficient. At the very list, this evidence points to the

existence of a massive dispute of fact known to the applicant already when the application papers were issued. How the applicant and her attorneys ignored it and elected to institute motion proceedings is unfathomable.

[19] The respondent raised the issue of the dispute of fact in her answering affidavit very pointedly. She even attached a document signed by Phillip's siblings in which they all confirm that the respondent and their late brother, Phillip were married. Surprisingly, in her replying affidavit, the applicant again ignores this dispute of fact and again adopts a dismissive attitude with wild allegations of impropriety accusing them of an ulterior motive; clubbing together against her application; of possibly having been paid to give false evidence among other things. This, on applicant's version, they do by confirming the marriage between the respondent and Phillip. In any event, the point is that all of this points to the existence of a huge dispute of fact. Surprisingly, the applicant still elected not to apply for the referral of the matter to oral evidence in her replying affidavit. This was the second time this choice was made, the second occasion being after receiving the respondent's answering affidavit which, if she had any doubt in her mind about the existence of the dispute of fact, the answering affidavit made it abundantly clear beyond all doubt.

[20] The existence of a dispute of fact in motion proceedings is provided for in rule 6(5)(g) of the Uniform Rules of Court which reads:

“Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to

appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues or otherwise.”

[21] Recently, the Constitutional Court has had occasion to explain the principles applicable in dispute of fact situations, albeit in relation to a rule 53 application. In *Mamadi*², writing a unanimous judgment of the court, Theron J said:

“[43] Does a litigant who brings a review in terms of rule 53, and thus on motion, where disputes of fact are reasonably foreseeable, act in an impermissible way? Quite plainly not. Litigants are constitutionally entitled to make use of rule 53 in review proceedings, in order to properly give effect to their section 34 rights. It therefore cannot be that a litigant can be penalized through the use of rule 6(5)(g), merely because rule 53 was utilized. It follows that a court does not have a discretion under rule 6(5)(g) to dismiss an application brought in terms of rule 53 on the basis that reasonably anticipated disputes of fact arise on the papers. This is neither just - because it penalises a litigant for making use of the procedural advantages of rule 53 - nor does it facilitate an expeditious and inexpensive resolution of the dispute, because it forces a litigant to begin proceedings afresh by way of action.

[44] This does not mean that an applicant in a rule 53 application is entitled, as of right, to have a matter referred to oral evidence or trial. General principles governing the referral of a matter to oral evidence or trial remain applicable. Litigants should, as a general rule, apply for a referral to oral evidence or trial, where warranted, as soon as the affidavits have been exchanged. Where timeous application is not made, courts are, in general, entitled to proceed on the basis that the applicant has accepted that factual disputes will be resolved by application of *Plascon Evans*. Likewise, where an applicant relies on *Plascon Evans*, but fails to convince a court that its application can prevail by application of the rule, a court might justifiably refuse a belated application for referral to oral evidence. A court should however proceed in a rule 53 application with caution. An applicant might institute proceedings in good faith in terms of rule 53, in order to secure the advantages of the rule and on the basis that the application can properly be decided by application of *Plascon Evans*, only for the respondent to later show that this is not so. In these circumstances, provided the dispute of fact which emerges is genuine and far-

² Mamadi and Another v Premier of Limpopo Province and Others 2024 (1) SA 1 (CC) para 43-45.

reaching and the probabilities are sufficiently evenly balanced, referral to oral evidence or trial, as the case may be, will generally be appropriate.

[45] It bears emphasis, however, that litigants cannot permissibly apply for referral to oral evidence or trial “where the affidavits themselves, even if accepted, do not make out a clear case, but leave the case ambiguous, uncertain or fail to make out a cause of action.” In that event, the application should of course fail, without recourse to *Plascon Evans* or oral evidence. But where a case is properly made out, the disputes of fact are genuine, far-reaching and fundamental and cannot be resolved by application of *Plascon Evans*, the proper course in rule 53 proceedings is, in general, referral to oral evidence or trial. Dismissal without rendering a decision in these circumstances is inappropriate. Both rule 53 and the PAJA Rules render review by way of motion the default position. Determining a review application without making a final decision frustrates the purpose of expeditiously addressing unlawful administrative action. Put differently, where a review application is dismissed without rendering a final decision so as to compel a litigant to proceed by way of action this purpose is frustrated.”

[22] In this matter the applicant’s papers are not a model of clarity, and that is putting it mildly. The cause of action is poorly pleaded especially as it relates to the relief sought with the result that it is not immediately apparent from the papers whether the applicant seeks to enforce the minor child’s right to maintenance from Phillip’s estate or to inheritance. The averments seem to support a cause of action which only by stretching the interpretation of the applicant’s averments, could possibly be a claim of inheritance or maintenance in Phillip’s estate. In that case, the duty of support is not alleged or the basis for the maintenance claim. There is also an allusion to the minor child being entitled to inherit in Phillip’s estate by representation. Again, this is not properly pleaded regard being had to the relief sought. In any event, how any of that clothes the applicant with a *locus standi* to seek a declaration of invalidity of the marriage between Phillip and the respondent and therefore the marriage of her minor child’s grandparents is not properly pleaded. The minor child’s entitlement to maintenance or inheritance, even if it exists, does not per se clothe the mother of the

said minor child, being a girlfriend, with *locus standi* to challenge the validity of the marriage of her late boyfriend's parents. I am of the view that foundations of family relationships, in particular in customary marriages, would be rendered unstable and under constant threat if familial bonds in traditional settings could easily be challenged by girlfriends purportedly acting in the interests of their minor children in asserting their alleged rights to maintenance or inheritance in a deceased estate. This is totally undesirable in my view especially in circumstances in which in our country's rural and traditional settings, customary marriages tend to be concluded with little to no formal officiation or documentary evidence of their conclusion.

[23] There is another issue of concern in a matter like this which concerns the estate of a deceased person. The executor in the estate of the late Khaya Mondi has not been cited. Similarly, the executor of the estate late Phillip Mondi is not cited at all and yet they are the parties legally charged with the administration of both estates that appear to be at the centre of the dispute. It is unclear how far the executors have gone with the administration of these estates and what their views are on the issues raised by the applicant. Their views on the issue of the paternity of the minor child remain unknown. As I said earlier, if the minor child is proved not to be Khaya's biological child, his inheritance in Khaya's estate will become untenable. The Master of the High Court has not been cited, to the extent that this matter has as its genesis, the estate of Phillip Mondi and to the extent that the issue of the paternity of the minor child has not been resolved and is challenged. The Master has also not been served with the papers in this matter or requested to file a report which explains the status of these estates and what the Master's position is on any of the myriad of issues involved in administration of intestate estates where there are competing claims.

[24] This seems to fall foul with the clear provisions of rule 6(9) of the Uniform Rules of Court which reads:

“A copy of every application to court in connection with the estate of any person deceased or alleged to be a prodigal, or under any legal disability, mental or otherwise, must, before such application is filed with the registrar, be submitted to the Master for consideration and report; and if any person is to be suggested to the court for appointment as curator to property, such suggestion must likewise be submitted to the Master for report. Provided that the provisions of this subrule do not apply to any application under rule 57 except where that rule otherwise provides.”

No master's report has been filed and yet the applicant's entire case is about entitlement to inheritance in the estate of the late Phillip Mondi. This is besides the applicant's *locus standi* and the *Plascon Evans* rule which I have dealt with extensively hereinbefore. As far as the *Plascon Evans* rule is concerned, the respondent's version prevails where the respondent's version is not far-fetched.

[25] Recently, the implications of inappropriately instituting motion court proceedings and the court determining the matter on the respondent's version were recently restated by the Constitutional Court in *African Congress for Transformation*³ in which the court said:

“[94] The manner in which a dispute of fact may arise is well-known and has been authoritatively outlined in *Room Hire*. The present instance falls under the first of the three scenarios enumerated in *Room Hire*. The Commission has denied all the material allegations by the applicant relating to two central issues, the alleged malfunctioning of the OCNS and that this was what caused the applicants' non-compliance. The Commission has proceeded beyond mere denials and has put up positive facts to the contrary, and those facts are neither untenable nor far-fetched.

³ *African Congress for Transformation v Electoral Commission of South Africa; Labour Party of South Africa v Electoral Commission of South Africa and Others; Afrikan Alliance of Social Democrats v Electoral Commission of South Africa* 2024 (8) BCLR 987 (CC).

[95] Motion proceedings are unsuitable to decide probabilities. In instances where final relief is sought, motion proceedings are aimed at resolving issues of law based on common cause facts. And where disputes of fact arise, absent a referral for oral evidence, the *Plascon-Evans* approach, as amplified in *Wightman*, must be employed. There is no basis to reject the Commission's denial that these two applicants' failure to comply with the Election Timetable was not due to the malfunction of the OCNS, but due to their own procrastination and ineptitude. The Commission supported its denial with positive facts. There is thus a genuine dispute of fact on the papers."

[26] The respondent has not only denied that she was not married to Phillip, she has also asserted positively that she was married to Phillip in 1984 as a result of which their son, Khaya was born in 1986. Furthermore, she has, in a supplementary affidavit, also come up with positive facts supported by affidavits, one with signatures of all Phillip's biological sisters who say that she was customarily married to Phillip. Those positive facts are neither untenable nor far-fetched. There is thus a genuine dispute of fact on the papers. This would be so even if the paternity of the minor child was not placed in issue by anyone.

[27] In all these circumstances, and for all the reasons discussed above, the applicant has failed to make out a proper case for the relief sought in the notice of motion. It stands to reason that the applicant's application be dismissed. There is no reason why costs should not follow the result.

[28] In the results, the following order is issued:

1. The application is dismissed.
2. The applicant is ordered to pay costs on scale B.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances

Attorney for the applicant : M. Mantyi

Instructed by : Mantyi Attorneys

Mthatha

Counsel for the 1st respondent : A. Nase

Instructed by : Njuze Attorneys c/o Mbuto Nongqunga Inc.

Mthatha

Date head : 28 August 2025

Date delivered : 23 September 2025