

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 034446/19

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

12-12-2025

Date

Signature

In the matter between:

N. I. M.

Applicant

And

M. M. (born M)

Respondent

JUDGMENT

**THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY/ELECTRONICALLY AND SHALL
BE CIRCULATED TO THE PARTIES BY WAY OF E- MAIL/ UPLOADING ON CASELINES
AND/OR COURT ONLINE. ITS DATE OF HAND
DOWN SHALL BE DEEMED TO BE DECEMBER 12, 2025**

NTANGA AJ:

Introduction

- [1] This matter appeared before me as an application for leave to appeal the orders set out in the application for leave to appeal and the part of the judgment pertaining to those orders granted by this Court, issued and delivered on October 10, 2025. The application is opposed by the Respondent.
- [2] The Applicant applied for leave to appeal to the Supreme Court of Appeal, alternatively, to the Full Court of the Gauteng Division, Johannesburg against the orders set out in the application for leave to appeal and part of judgment delivered on October 10, 2025. I considered the grounds for leave to appeal, heads of argument and oral arguments by Counsels for both parties. I am grateful to both Counsels as their submissions played an important role in assisting the Court.
- [3] The Applicant's grounds for leave to appeal can be summarized as follows:
- 3.1 that the Acting Judge erred in finding that the Plaintiff and the Defendant entered into a valid customary law marriage on or about May 14, 2011;
- 3.2 that the learned Acting Judge misdirected himself in impermissibly declaring that the civil marriage entered into between the Plaintiff and the Defendant on January 5, 2017 to be invalid;
- 3.3 that the learned Acting Judge erred in finding that the antenuptial contract concluded between the Plaintiff and the Defendant on or about December 21, 2016 is invalid and unenforceable, alternatively void, alternatively voidable and has been validly cancelled;
- 3.4 that the learned Acting Judge misdirected himself in finding that the parties should have complied with Section 21 of the Matrimonial Property Act of 1984 (to change their matrimonial property system from in community of property to out of community of property) or with Section 88 of the Deeds Registries

Act 47 of 1937 to register their antenuptial contract postnuptially;

3.5 that the learned Acting Judge erred in awarding the Plaintiff spousal maintenance;

3.6 that the learned Acting Judge erred with regard to his assessment of the Plaintiff's evidence and finding that she was truthful, answered questions fairly and honestly and was straight forward and that her evidence may be relied on; and

3.7 that the learned Acting Judge ought to have rejected the Plaintiff's evidence and accepted the Defendant's evidence on all material issues referred to.

Submissions

- [4] Applicant argued that this is a matter of a question of law of general application. It was argued that the issues concluded in the main judgment are of considerable importance. It was further argued that, if reasonable prospects of success is established, leave to appeal should be granted to the Supreme Court of Appeal because the decision made in the main judgment is an important question of law.
- [5] The Applicant further argued that parties who are competent to be married to one another in terms of customary law, and if not already married, there is no requirement for judicial oversight to change the matrimonial regime. Considering the decision of *J.R.M v V.V.C. and Others*¹, Applicant submitted that this is a matter that should be referred to the Supreme Court of Appeal on interpretation of Section 10 of the Recognition of Customary Marriages Act². The Applicant further argued that if the Legislature had intended judicial oversight, that would have been clearly indicated and Section 10(2) of the Recognition of Customary

¹ *J.R.M v V.V.C. and Others* (25007/2007) ZAGPPHC 547; [2024] 3 All SA 853 (GP) (10 June 2024).

² Recognition of Customary Marriages Act 120 of 1998.

Marriages Act is unambiguous and should be applied as is.

- [6] On whether the parties were married in terms of customary marriage, the Applicant argued that neither of the parties knew that they were married in community of property. The Respondent only became aware of this when she consulted with her legal representatives in preparation for the divorce proceedings. This was submitted to substantiate the Applicant's averment that he has prospects of success in the appeal.
- [7] The Applicant argued that the Court erred in declaring that a valid customary marriage was entered into, having regard to what was pleaded by the Respondent and that she did not plead consent for the parties to be married in terms of customary law. It was further argued that the Court has a duty to examine the practice of the community and the Respondent omitted to plead which customary law was applicable and she bears the onus to prove that the marriage was negotiated and celebrated.
- [8] The Applicant argued that the Respondent did not plead evidence as to why she relied on the provisions of Section 7 of the Divorce Act³ and argued that if the need is not shown, the Respondent's case should fail. Entitlement to maintenance first must be shown before a decision is made. Applicant argued that there was no factual basis for the Respondent's claim for maintenance. It was argued that the Court erred in awarding maintenance as the Plaintiff failed to show need, quantum and duration. The Applicant argued that substantial amounts are paid regularly to the Respondent.
- [9] Respondent argued that the Applicant raised new points that were not pleaded and this was not adduced as evidence during trial proceedings. It was argued that the Applicant's case was that the customary rituals were undertaken to appease the families and elders. The Respondent argued that the Applicant has introduced a new dimension of appeasing the Respondent's family. The Respondent argued that the Applicant has never made a case that certain rights were never followed, it was argued that all the things that were said by the

³ Divorce Act 70 of 1979.

Respondent to have been done were never in dispute. The Respondent argued that there was no need to call experts or collateral evidence to prove something that was not in dispute. The Court was drawn to view the customary law in the common law prism. It was argued that the Court was correct to state that customary law must reclaim its position among existing legal positions. The Respondent argued that the Applicant has no prospects of success on appeal.

- [10] The Respondent dealt with the issue of whether there are compelling reasons for the appeal to be heard, including conflicting judgments on the matter under consideration. She argued that the Court was bound by the document before it and the Applicant did not indicate in his application for leave to appeal that there are compelling reasons for the appeal to be heard.
- [11] When dealing with the submission relating to Section 10(2) of the Recognition of Customary Marriages Act, the Respondent argued that this provision contemplates a marriage in terms of customary law and the Applicant denied that he was married to the Respondent in terms of customary law. Section 10(2) of the Recognition of Customary Marriages Act requires that there must be a customary marriage in existence before it can be applicable.
- [12] The Respondent argued that the issue of consent should not be accorded the ordinary interpretation. It was argued that the Applicant demonstrated by state of mind and physical presence that he consented. The Respondent further argued that the Applicant seems to want to remove the significance of family role in a customary marriage, whilst a marriage in customary law involves the families. The Respondent argued that the Court was correct in finding that the Applicant consented to be married in terms of customary law.
- [13] The Respondent argued that the order declaring the civil marriage between the parties invalid became superfluous, once the Court had found that the parties were married to each other in terms of customary law. It was argued that by operation of law, the second marriage is non-existent, based on the principle of effectiveness, the Court cannot allow two marriages to co-exist. The Court having found that the parties are married to each other in terms of customary union,

there cannot be a situation where it will allow existence of separate and distinct legal marriages with conflicting proprietary consequences.

- [14] Regarding spousal maintenance, the Respondent argued that during trial proceedings, she went at great length to set out her needs and averred that her career was put on hold by the Applicant. She explained her income, expenditure, health issues, household expenses and amount coming in and out of her bank account and the Court determined a reasonable amount for spousal maintenance. Given the Respondent's current age, her prime time as an actress is gone.

Legal Principles on Leave to Appeal and analysis

- [15] Section 17(1) of the Superior Courts Act⁴ sets out the test for granting leave to appeal as follows:

"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;

..."

- [16] In *Acting National Director of Public Prosecutions and Others v Democratic Alliance and Others*⁵ the court followed the Land Claims Court judgment in *Mont*

⁴ Superior Courts Act 10 of 2013.

⁵ *Acting National Director of Public Prosecutions and Others v Democratic Alliance and Others* (19577/09) [2016] ZAGPPHC 489 (24 June 2016).

Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others⁶ and stated that:

“The Superior Courts Act has raised the bar for granting leave to appeal in Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others, Bertelsmann J held as follows:

‘It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see Van Heerden v Cronwright & Others 1985 (2) SA 342 (T) at 343H. The use of the word “would” in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against’ ...”.

[17] The court in Acting National Director of Public Prosecutions and Others v Democratic Alliance and Others⁷ further stated that:

“When the Court deals with an application for leave to appeal, leave may only be given if we are of the opinion that the appeal would have reasonable prospects of success or if there are some other compelling reasons”.

[18] In Cook v Morrison⁸ the Supreme Court of Appeal stated that:

“The existence of reasonable prospects of success is a necessary but insufficient precondition for the granting of special leave. Something more, by way of special circumstances, is needed. These may include that the appeal raises a substantial point of law; or that the prospects of success are so strong that a refusal of leave would result in a manifest denial of justice; or that the matter is of very great importance to the parties or to the public. This is not a closed list”.

⁶ The Mont Chevaux Trust (IT 2012/28) v Tina Goosen & 18 Others (LCC14R/2014). See also MEC for Health, Eastern Cape v Mkhitha and Another (1221/2015) [2016] ZASCA 176 (25 November 2016).

⁷ See note 5 supra.

⁸ Cook v Morrison 2019 (5) SA 51 SCA.

[19] In *Ramakatsa and Others v African National Congress and Another*⁹ the Supreme Court of Appeal stated that:

“Turning the focus to the relevant provisions of the Superior Courts Act..., leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice. This court in Caratco¹⁰, concerning the provisions of s 17(1)(a)(ii) of the SCA Act pointed out that if the court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this court correctly added that ‘but here too the merits remain vitally important and are often decisive’ ...”.

[20] The Court summed up the test for prospects of success in *Modingwana v Body Corporate Amber Hill*¹¹ as follows:

“Considering the statutory and regulatory matrix, three questions for consideration arise in the application for leave to appeal. These questions are not distinct but interrelated. The first question is whether the applicant filed a proper notice of application for leave to appeal which concisely and succinctly set out the grounds upon which leave to appeal is sought. The second question is whether the appeal would have a reasonable prospect of success or whether there are compelling reasons that exist why the appeal should be heard such as the interests of justice. The third question is whether the application for leave to appeal sets out expressly why the default position of an appeal to a full court of the division should not prevail, as well as the questions of law or fact or other

⁹ *Ramakatsa and Others v African National Congress and Another* (Case No. 724/2019) [2021] ZASCA 31 (31 March 2021).

¹⁰ See *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* [2020] 2020 (5) SA 35 (SCA).

¹¹ *Modingwana v Body Corporate Amber Hill* (Leave to Appeal) (23514/202) [2024] ZAGPPHC (11 September 2024).

considerations involved that dictate that the matter should be decided by the SCA”.

[21] The Court must satisfy itself whether the requirements of Section 17(1)(a) have been met in this application for leave to appeal. Considering the Applicant’s prospects of success on appeal, the first issue is whether the parties were married to each other in terms of customary marriage. In the main judgment I pointed out that the dispute lies on whether the parties intended to enter into a customary marriage.¹² It is further pointed out in the main judgment that the answer lies in Section 3(1) of the Recognition of Customary Marriages Act.¹³ In the argument for leave to appeal the Applicant persisted with his dispute of consent to be married in terms of customary marriage, he substantiated this by making reference to the engagement to which in his view was an indication that he intended to be married to the Respondent in terms of civil marriage. He also referred to the fact that they later entered into an antenuptial contract which culminated in a civil marriage.

[22] The Applicant argued that, in the absence of consent, there cannot be a valid customary marriage between himself and the Respondent. This is however disputed by the Respondent who argued that, taking into account the totality of evidence, which includes the participation by the Applicant in the practice of the customary rites, as well as his active participation thereto, demonstrated consent on his part. The critical issue therefore is whether there was consent by both parties to be married in terms of customary marriage. This goes to the heart of whether the Applicant has prospects of success should another Court find that there was no intention of being married in terms of customary law.

Conclusion

[23] The Applicant in an application for leave to appeal must demonstrate the existence of prospects of success or compelling reasons for the appeal to be heard, including conflicting judgments on the matter under consideration. Having

¹² See para 87 of the main judgment.

¹³ See para 88 of the main judgment.

considered the submissions and legal authority, I am satisfied that the Applicant has met the threshold for leave to appeal to be granted. I am persuaded that another court upon consideration of the issues raised in the application for leave to appeal may come to a different conclusion.

[24] Another issue for consideration is the Applicant's submission that this matter invokes a question of law, and that the effect of the main judgment is of a general application. This includes the argument that issues concluded in the main judgment are of considerable importance. This in my view falls within the ambit of compelling reasons for the appeal to be heard.

[25] During argument of application for leave to appeal, the issue of conflicting judgments also came up. This Court is aware of the decision of *N.P v L.P*¹⁴ where the Court considered the issue of whether the parties were married to one another in terms of customary law and whether the antenuptial contract entered into between the parties was valid and enforceable. When dealing with the conclusion of both a customary and civil marriage, the Court held a view that the individuals may not view these dual marriages as creating separate and distinct legal marriages. It was finally concluded that the intention is often to conclude a marriage which is then celebrated in different forms and the customary marriages are often described as a "process" rather than a single legal event.¹⁵ This is a classical case of conflicting judgments on the subject matter and meets the requirements of Section 17(1) (a)(ii) of the Superior Courts Act. This contrasts with the position taken in the main judgment in the instant case, where I stated that customary law should not be treated as secondary or subsidiary to any other law applied in our country.¹⁶ I am satisfied that this meets the test for granting of leave to appeal.

[26] Section 17(6)(a) of the Superior Courts Act¹⁷ provides that:

¹⁴ *N.P v L.P* (557/2019) [2024] ZALMPPHC 208 (5 June 2024). See also Reilly Nchadi Tumelo Mphosi v Theophilus Ramakokomo Mphosi, Limpopo High Court, Polokwane, Case No. 1142/2014 at para 20.

¹⁵ See note 14 *supra* at para 8.

¹⁶ See para 85 of the main judgment.

¹⁷ See note 4 *supra*.

“If leave is granted under subsection (2)(a) or (b) to appeal against a decision of a Division as a court of first instance consisting of a single judge, the judge or judges granting leave must direct that the appeal be heard by a full court of that Division, unless they consider-

- (i) that the decision to be appealed involves a question of law of importance, whether because of its general application or otherwise, or in respect of which a decision of the Supreme Court of Appeal is required to resolve differences of opinion; or
- (ii) that the administration of justice, either generally or in the particular case, requires consideration by the Supreme Court of Appeal of the decision, in which case they must direct that the appeal be heard by the Supreme Court of Appeal”.

[27] The default position is to grant leave to appeal to the Full Court of the Division, however, it seems to me that the issues raised in this application for leave to appeal fit within the ambit of Section 17(6)(a) of the Superior Court Act and there is a need for the Supreme Court of Appeal to finally resolve the issues, in light of the question of law of importance and general application, including the conflicting judgments on the subject matter. The Supreme Court of Appeal in this instance should be requested to resolve the issues of different opinions.

Costs

[28] The Applicant argued for a costs order against the Respondent in relation to postponement of the matter on November 24, 2024 due to the late filing of the Respondent’s supplementary heads. The Applicant sought postponement of the proceedings to file a reply to the Respondent’s supplementary heads. Considering the issues involved in this matter, I do not think it is necessary to deal with the award of a costs order at this stage, the appropriate order should be costs in the appeal.

[29] I therefore make the following order:

1. The Applicant (Defendant in the action) is granted leave to appeal to the Supreme Court of Appeal against the following orders and part of the judgment pertaining to those orders granted by Acting Judge Ntanga on October 10, 2025:

- 1.1 Declaring that:

- 1.1.1 the Plaintiff and the Defendant entered into a valid customary law marriage on or about May 14, 2011;

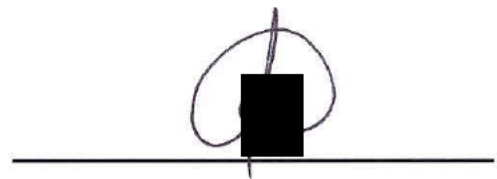
- 1.1.2 the customary law marriage between the Plaintiff and Defendant is in community of property and of profit and loss; and

- 1.1.3 the antenuptial contract concluded between the Plaintiff and the Defendant on or about December 21, 2016, attached to the Plaintiff's particulars of claim as Annexure "A", is invalid and unenforceable, alternatively void, alternatively voidable and has been validly cancelled;

- 1.1.4 the civil marriage entered into between the Plaintiff and Defendant on January 5, 2017 is declared invalid;

- 1.2 Division of the joint estate;

- 1.3 A receiver and liquidator be nominated by the parties is hereby appointed;
- 1.4 The Defendant shall pay spousal maintenance to the Plaintiff until her death or remarriage, whichever occurs first, in the sum of R67 167,00 per month, payable on or before the 1st day of every month into a bank account to be nominated by the Plaintiff, and which amount will escalate yearly on the anniversary date of this order at a rate equal to the average rate of the Consumer Price Index for the preceding 12 months; and
- 1.5 The Defendant is ordered to pay the Plaintiff's costs including costs of the Rule 43 application as well as costs of two counsel on a party and party Scale C.
2. Costs of the application for leave to appeal are costs in the cause in the appeal.



M NTANGA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Date of Hearing: November 28, 2025
Date of Judgment: December 12, 2025

Appearances

Applicant's Counsel: Adv B Fourie SC
Adv S Georgiou
Adv Ledwaba
Instructed by: KS Dinaka Attorneys

Respondent's Counsel: Adv TJ Machaba SC
Instructed by: Jerry Nkeli & Associates Inc.