

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

**Reportable
Case no: 1808/2023**

In the matter between:

ZIFIKILE KUNENE

APPLICANT

and

**MONALISA BANGAZA
RESPONDENT**

FIRST

AVBOB FUNERAL SERVICES – MTHATHA

SECOND RESPONDENT

**ANY MEMBER OF THE SOUTH AFRICAN
POLICE SERVICES**

THIRD RESPONDENT

Date heard: 8 March 2024

Date delivered: 9 April 2024

JUDGMENT

Notyesi AJ

Introduction

[1] On 4 July 2023, this Court dismissed an application launched by the applicant against the first respondent, in terms wherein she was challenging the validity of a customary marriage entered into between her late father and the first respondent. In that application, the applicant was contending that the marriage between her father and the first respondent was not compliant with the provisions of section 3(1)(b) of the Customary Marriages Act, 120 of 1988 (“the Act”). Upon analysis of the evidence

and the documents filed, this Court became satisfied that the provisions of section 3(1)(b) were complied with and that the customary marriage was valid.

[2] Unhappy with the findings of the Court, the applicant has launched an application for leave to appeal the dismissal of the main application. The application is founded on numerous grounds. Although the application for leave to appeal was initially set down for hearing on 9 February 2024, it turned out that the notice of application for leave to appeal was defective and that the applicant needed to file condonation for the late launch of the application for leave to appeal. This Court heard the leave to appeal on 8 March 2024 after granting the condonation application. I have considered all the grounds set out by the applicant in the application for leave to appeal.

Legal framework

[3] Section 17(1) of the Superior Courts Act 10 of 2013¹ provides as follows:

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

- (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) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.’

[4] Previously, the test applied in an application for leave was whether there were reasonable prospects that another court may come to a different conclusion.² It is now only granted if a court would come to a different conclusion. This is gleaned from section 17(1) itself. In *The Mont Chevaux Trust v Tina Goosen and 18 Others*³ Bertelsmann J held as follows:

‘It is clear that the threshold for granting leave to appeal 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

¹ Superior Courts Act 10 of 2013

² *Commissioner of Inland Revenue v Tuck* 1989 (4) 888 (T) at 890B

³ *The Mont Chevaux Trust v Tina Goosen and 18 Others* [2014] JDR 2325 (LCC) at para 6

conclusion, see *Van Heerden v Crownwright & Others*. 1985 (2) SA 342 (T) at 342H. 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.’

[5] In *Smith v The State Plasket AJA* (as he then was) held that the test is now more stringent. He held as follows:

‘what the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, 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 of appeal.’

[6] It follows that an applicant now faces a higher and more stringent threshold, in terms of the Superior Courts Act compared to the provisions of the repealed Superior Court Act 59 of 1959.

[7] Mr *Mapoma*, counsel for the applicant, had submitted that there are prospects of success, alternatively, that there are conflicting judgments regarding the requirements for a valid customary marriage under section 3(1)(b). He contended that the appeal should be granted in order to settle the law regarding the form of handover and celebration of a customary marriage. I disagree. In *Mbungela & Another v Mkabi & Others*⁴, Deputy Chief Justice Maya held –

‘[C]ustomary law is defined in s 1 of the Act as “customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples”. But s 3(1)(b) does not stipulate the requirements of customary law which must be met to validate a customary marriage. The reason for this is not far to seek. It is established that customary law is a dynamic, flexible system, which continuously evolves within the context of its values and norms, consistently with the Constitution, so as to meet the changing needs of the people who live by its norms. The system, therefore, requires its content to be determined

⁴ *Mbungela & Another v Mkabi & Others* [2019] ZASCA 134; 2020 (1) SA 41 (SCA); [2020] 1 All SA 42 (SCA) at para 17

with reference to both the history and the present practice of the community concerned. As this Court has pointed out, although the various African cultures generally observe the same customs and rituals, it is not unusual to find variations and even ambiguities in their local practice because of the pluralistic nature of African society. Thus the legislature left it open for the various communities to give content to s 3(1)(b) in accordance with their lived experiences.’

[8] On the basis of the above, it is inconceivable that the Courts would define with precision the form of handing over of a bride and the celebration of a customary marriage. In the judgment, this Court had found that both the deceased and the first respondent were above the age of 18 years and that they agreed to marry in terms of customary law. In other words, the deceased and the first respondent consented to their customary marriage. This Court also found that the deceased had asked for his family members to be his emissaries and that if they refused, he would ask Dr Nuku and Mr Bovungana to meet with Amajwara family as his emissaries.

[9] It is common cause that, indeed, when the members of the deceased’s family refused to be emissaries, Dr Nuku and Mr Bovungana were appointed by the deceased as his emissaries. The lobola was negotiated between the two families and it was agreed to. A whopping amount of R35 000 in total was paid as lobola by the deceased, represented by the emissaries, Dr Nuku and Mr Bovungana. The first respondent was then permitted to go ahead with the marriage to the deceased. In other words, the undisputed evidence is that the two families agreed about the customary marriage of the deceased and the first respondent. There are minutes which evidence the lobola negotiations and the agreements that were reached by the two families.

[10] The contention that Dr Nuku and Mr Bovungana are not the family members of the deceased’s family, has been rejected by this Court. The deceased had made it known that if none of his direct family are available to be his emissaries, then he would send Dr Nuku and Mr Bovungana as the emissaries. That evidence is undisputed. More significantly, the objective evidence submitted by the first respondent in her papers, shows that the family had accepted her as the customary wife of the deceased. There is a memorial service programme which states that the deceased has left behind his wife, Qhayiyaletu, and children. Regarding the performance of *utsiki*, all witnesses of the applicant have testified that on 26 November 2022, there was a ceremony at the homestead of the deceased. During

that ceremony, the deceased informed all his family members that he was performing *utsiki* ritual for his wife, the first respondent.

[11] In my view, the performance of *utsiki* ritual was not even a requirement for the validity of the customary marriage. In this case, the performance of the celebration on 26 November 2022, with utterances of the deceased that he was celebrating the customary marriage of the deceased, was a further indication of compliance with S3(1)(b) of the Act.

[12] The criticism in the notice of appeal that this Court has concluded that all witnesses agreed that on 26 November 2022, there was an *utsiki* ceremony at the deceased's family, where the first respondent was introduced as the wife of the deceased and given the name of Qhayiyaletu is unfounded. In all confirmatory affidavits attached to the applicant's founding affidavit, it is acknowledged that on 26 November 2022, there was a ceremony at the deceased's home. The first respondent was introduced as a wife by the deceased is common cause. What I understand to be the dispute by the applicant's witnesses, is whether the deceased was of sound mind when he performed the ritual and paid the lobola for the first respondent. There was no evidence filed to suggest that the deceased was of unsound mind. In my view, such medical evidence would have been at odds with the common cause evidence that the deceased informed his relatives that he wants to pay lobola for the first respondent and that if they do not avail themselves, he would appoint Dr Nuku and Mr Bovungana to be his emissaries. In addition to that, the fact that the date of 26 November 2022 was set by the deceased, and that he announced to his family members that he is performing *utsiki* for his new wife, the first respondent, should put beyond doubt that the deceased knew what he was doing. It should be borne in mind that the deceased and the first respondent had a relationship long before the lobola negotiations and performance of the *utsiki* ritual.

[13] For all the above reasons and given the overwhelming evidence before court, the proposed leave to appeal has no reasonable prospects of success. I also found no compelling reasons why the appeal should be heard. The Supreme Court of Appeal has confirmed, in various court decisions, that Customary Law is a living law of the people. In *Mbungela and Another v Mkabi and Others*⁵ it was held –

⁵ *Mbungela & Another v Mkabi & Others* supra

‘The importance of the observance of traditional customs and usages that constitute and define the provenance of African culture cannot be understated. Neither can the value of the custom of bridal transfer be denied. But it must be also recognised that an inflexible rule that there is no valid customary marriage if just this one ritual has not been observed, even if the other requirements of s 3(1) of the Act, especially spousal consent, have been met, in circumstances such as the present, could yield untenable results.’

[14] In *Tsambo v Sengadi*⁶, it was held –

‘It is evident from the foregoing passage that strict compliance with rituals has, in the past, been waived. The authorities cited by the respondent, mentioned earlier in the judgment, also attest to that. Clearly, customs have never been static. They develop and change along with the society in which they are practised. Given the obligation imposed on the courts to give effect to the principle of living customary law, it follows ineluctably that the failure to strictly comply with all rituals and ceremonies that were historically observed cannot invalidate a marriage that has otherwise been negotiated, concluded or celebrated in accordance with customary law.’

[15] The application for leave to appeal must fail.

Costs

[16] In the main application, the court exercised its discretion and decided that each party should pay its own costs. This had involved a consideration that the applicant is the daughter of the deceased who had relied on advices of other family members as she was not present when the marriage was concluded. During the hearing of the leave to appeal, Mr *Sintwa*, counsel for the first respondent, persuaded me that costs should follow the results. Mr *Mapoma*, counsel for the applicant, did not contend otherwise. I agree that this is a case where the general rule on costs should be followed. There was an application for condonation which I had granted. In a condonation application, the applicant is seeking indulgence of the court and is liable for costs. For all the reasons, the costs shall be awarded in favour of the first respondent.

Conclusion

[17] For all the reasons stated above, the leave to appeal has no prospects of success and there are no compelling reasons for the grant of the leave to appeal. In

⁶ *Tsambo v Sengadi* [2020] ZASCA 46 para 18

the circumstances, the leave to appeal must fail and the applicant should bear the costs of the application for leave to appeal and condonation application.

Order

[18] In the result, the following order is made –

- (1) Condonation application is granted.
- (2) The applicant shall pay costs for condonation.
- (3) The application for leave to appeal is dismissed with costs.

M NOTYESI

ACTING JUDGE OF THE HIGH COURT, EASTERN CAPE DIVISION

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