

**REPUBLIC OF SOUTH AFRICA**



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

**CASE NO: 2020/11024**

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

A handwritten signature in black ink, appearing to read "Siwendu J.", is written over a dotted line.

**SIGNATURE**

**DATE: 8 November 2021**

In the matter between:

**MOSES MUXE MASHISANE**

Applicant

And

**NOSIPHIWE LINDA MHLAULI**

Respondent

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**JUDGMENT - LEAVE TO APPEAL**

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SIWENDU J

[1] The applicant (respondent *a quo*) appeals against the court's judgment dated 11 June 2021 confirming the customary marriage between the applicant and the respondent, and the order declaring the ante-nuptial contract registered 7 October

2019 after the marriage null and void.

- [2] Adv Rosenberg SC, a newly appointed counsel appeared for the applicant at the hearing of the application for leave to appeal.
- [3] She contended that the applicant and the respondent (applicant *a quo*) had discussed and agreed that it would be in their best interest to enter into an ante nuptial contract in order to protect their various interests in the relationship. The argument is that on the facts, the parties had an oral agreement to enter into an ante nuptial contract before the marriage. The oral ante-nuptial contract was common cause. The parties had agreed that they would not marry in community of property.
- [4] On this score, it was submitted that I should have followed the decision in *SMS v VRS* and found there was a valid and enforceable oral ante-nuptial contract. I pause to mention that this is a substantially different case than the one argued before me. The facts extracted from the respondent's replying affidavit were not considered in their full context and import.
- [5] The applicant's case was premised on a denial of the customary marriage and a denial of an intention to marry by customary rites throughout. The respondent had stated in his answering affidavit that:

*"Save to state that the conversation between me and the applicant happened in the context of the up-coming civil marriage; I admit the contents of this paragraph.*

*This was not the first time we had spoken about what would happen to my assets in the event of my death as we had these discussions very early in our relationship in April 2019*

*It was due to these very discussions that we agreed that a customary marriage would not be in our interest for the reasons stated in this affidavit.”*

[6] Consistent with his denial of the intention to enter into a customary marriage and the denial that he had entered in one, his version was that parties discussed and contemplated a civil marriage to take place in November 2020, the following year. He claimed that the basis for concluding the ante nuptial contract registered in October 2019 was in contemplation of a civil marriage still to be concluded.

[7] There was no civil marriage concluded between the parties in November 2020.

[8] I find that the denial of the customary marriage is of significance to the applicants' case and his attempt to enforce the ante nuptial contract. In effect, the applicant seeks to impermissibly substitute one martial regime for another without setting out a proper foundation in his answering affidavit and without first complying with requisite requirements for the change.

[9] On the version advanced by the applicant, it would be difficult to enforce an ante-nuptial for a non- existent marriage.

[10] Ms Rosenberg SC agreed that in terms of Section 17(1)(a)(i) and (ii) of the Superior Courts Act 10 of 2013, the test for granting an application for leave to appeal is whether the appeal would have reasonable prospects of success, or whether there are compelling reasons why the appeal should be heard. In

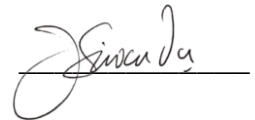
*Smith v S (475/10) 201 (15 March 2011)* Plasket AJA (as he then was) held that:

"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."

[11] Based on the aforesaid, the application falls to be dismissed with costs.

Accordingly, I make the following order:

- a. The application is dismissed with costs.



**T SIWENDU**

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

*This judgement was handed down electronically by circulation to the parties and/or parties representatives by email and being uploaded to Case Lines. The date and time for hand down is deemed to be 10h00 on 8 November 2021*

Date of Hearing: 20 October 2021

Date of Judgment: 8 November 2021

Counsel for Applicant: Adv RR Rosenberg SC

With her: Advocates L Makapela and S Qagana

Attorneys: Victor Nkwashu Attorneys Inc

Counsel for Respondent: Adv C Thompson

Attorneys: Martin Vermaak Attorneys