

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

**CASE NO: 2020/28304**

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

..... **06/05/2024**

**SIGNATURE**

**DATE**

In the matter between:

**MAKHOSINE QUINTIN SELEME**

(Identity Number: 8[...])

**APPLICANT**

and

**DEPARTMENT OF HOME AFFAIRS**

**1<sup>st</sup> RESPONDENT**

**THE MASTER OF THE HIGH COURT**

**2<sup>nd</sup> RESPONDENT**

**LESIBA FRANS MAKGAKGA**

**3<sup>rd</sup> RESPONDENT**

**LEAVE TO APPEAL JUDGMENT**

**MANOIM J:**

[1] This is an application to appeal a decision I made on 18 November 2022 in which I dismissed the applicants' application in which he sought an order for the first respondent to register a customary marriage between him and the late Makgaka

Bella Sebethi (“the deceased”). The application was opposed by the third respondent who is the father of the deceased.

[2] It will be noted from the dates that this appeal appears to have been brought late and without an application for condonation. This point was raised by the third respondent. In the course of the hearing of the leave application, the applicant explained that the appeal had been noted in time and loaded on to court online. Physical service of the application had been late but that was due to the December closure. Thereafter there was delay in having the matter set down but that appears to have been a problem with the court’s registry and is not the fault of the applicant. I am satisfied that the applicant had done his best to bring the appeal in time and the delay was not due to any fault on his behalf.

[3] I turn then to the merits of the application for leave.

[4] The crisp question in the case was whether the applicant and the deceased had entered into a customary marriage in terms of Recognition of Customary Marriages Act 120 of 1998 (“the Act”). If they had I could have granted the order. The question turned on whether the applicant had made out a case in terms of section 3 of the Act which states:

*Requirements for validity of customary marriages*

*3.(1) For a customary marriage entered into after the commencement of this to be valid*

*(a) the prospective spouses*

*(i) must both be above the age of 18 years, and*

*ii) must both consent to be married to each other under customary law, and*

*(b) the marriage must be negotiated and entered into or celebrated in accordance with Customary Law”.*

[5] I held that:

*“There is no dispute that the applicant has made out a case on the first two requirements set out in section 3(1)(a). The question is whether the third, in terms of section 3(1)(b), has been met.”*

[6] The applicant argues that I was too rigid in my approach to the facts. One of the facts I took into account was that the parties had not held a celebration that accorded with tradition. Ms Moyo who appeared for the applicant argued that in terms of 3(1)(b) there are two options. An applicant can make out a case that a marriage was negotiated and entered into in terms of customary law and in the alternative, can argue that it has been celebrated in accordance with customary law. She argued that the applicant had made out his case on the first leg viz. that the marriage had been ‘*entered into and negotiated... in accordance with customary law.*’.

[7] I do not need to decide whether this approach to the interpretation is correct. But even if the applicant was only required in this case to establish that he and the deceased's marriage was one “*...negotiated and entered into ...in accordance with customary law*” I do not consider he met the requirements.

[8] On the facts the third respondent had shown that the applicants' family had arrived unexpectedly and that this negotiation which took place if it is that was not one that met the requirements of customary law as senior members of the deceased family were not present. Granted an agreement of sorts was recorded in rough fashion which included what payment had to be made out for lobola. But even such a tentative document is not sufficiently probative in the face of evidence that senior family members who would have formed part of the negotiation were not present. It was quite clear why there were not. The applicant and his family had arrived unexpectedly.

[9] Thus even on a narrow reading of the section the applicant did not make out his case on the papers. Nor if this deficiency could be overlooked, which I do not accept it can, was there any other evidence of the proof of the marriage in terms of customary law on the facts. Thus, it was not a case of my taking too rigid approach - it was that on all the available facts the case pointed against the existence of a customary marriage. The applicant had put up facts on co-habitation. But these were rebutted by the third respondent and an affidavit by a child of the deceased who was now an adult and gave an affidavit.

[10] In short although there might be an alternative version for each facts put up on which I relied cumulatively the case favoured that of the third respondent viz. that there was no proof of compliance with section 3(1)(b). Indeed, the third respondent went further to assert that there had not even been proof of section 3(1)(a) (ii) but I need not go that far.

[11] What I pointed out in my judgment was that given the disputes the applicant should not have proceeded by way of motion. Nor did he seek to refer the matter to oral evidence. Having made that election and given the disputes of fact the applicant's case was not made out on the papers. I am satisfied that no other court would come to a different conclusion which is the test on leave to appeal. The test now is more demanding than it was previously.<sup>1</sup>

[12] The application is dismissed with costs.

**ORDER:-**

[13] In the result the following order is made:

1. The application for leave to appeal is dismissed;
2. The applicant is liable for the costs of the third respondent.

**N. MANOIM  
JUDGE OF THE HIGH COURT  
GAUTENG DIVISION  
JOHANNESBURG**

Date of hearing: 24 April 2024

Date of judgment: 06 May 2024

Appearances:

Counsel for the Applicant:

S Moyo

Instructed by.

Mashabela Attorneys Inc.

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<sup>1</sup> *Mont Chevaux Trust v Goosen* 2014 JDR 2325 (LCC).

Counsel for the First Respondent:

M G Manaka

Instructed by:

JM Cornelius Attorneys