IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2024/016199
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED. No
T ENGELBRECHT
30 May 2025

In the matter between:

RHUKANANI JOYCE MNISI	**FIRST APPLICANT**
WISANI ANGEL MALULEKE	**SECOND APPLICANT**
and	
ZODWA LYDIA LUTHULI	**FIRST RESPONDENT**
DEPARTMENT OF HOME AFFAIRS	**SECOND RESPONDENT**
THE MASTER OF THE HIGH COURT JOHANNESBURG (Estate No 014877/2023)	**THIRD RESPONDENT**

This order is made an Order of Court by the Judge whose name is reflected herein, duly stamped by the Registrar of the Court and is submitted electronically to the Parties/their legal representatives by email. The Order is further uploaded to the

electronic file of this matter on Caselines by the Judge his/her secretary. The date of this Order is deemed to be 30 May 2025..

JUDGMENT

ENGELBRECHT, AJ

Introduction

[1] This is an application for the rescission and setting aside of an order granted on 15 November 2023 by Judge Nkutha-Nkontwana in terms of Rule 42(1) and/or common law for the following further relief of which the first relief is declaratory of nature:

1. *That the customary marriage between the First Respondent, LUTHULI ZODWA LYDIA, Identity Number 9[…] and the deceased MZAMANI PATRICK MALULEKE of Identity Number 7[…] contracted on 6 September 2014 is declared null and void.*
2. *That the Department of Home Affairs is directed and ordered to forthwith cancel, revoke and expunge from its record marriage certificate issued in favour of the First Respondent, ZODWA LYDIA LUTHULI of Identity Number 9[…].*
3. *That the Third Respondent is hereby directed to withdraw the Letters of Executorship issued in favour of the First Respondent under Estate Number 014877/2023 dated 11 November 20923 within 10 days of receiving this order.*
4. *That the First Respondent disclose all funds collected and received by her as representative of the deceased, MZAMANI PATRICK MALULEKE and to pay all such funds collected from any situation or individual into the trust account of the Applicant's attorneys, Mabasa C.L. Attorney Inc., until the estate banking account has been opened for administration of the estate of the deceased, MZAMANI PATRICK MALULEKE within 10 days of this order.*
5. *That the First Respondent be ordered to pay costs of this application*

[2] The First Respondent opposed the matter and requests that the matter be dismissed with punitive costs. The First Respondent also brought the following *points in limine*:

[2.1] Non-compliance of the practice directive in bringing the interlocutory applications on the same number,

[2.2] Non-joinder of Victory Shumani Mulaudzi based on the allegation that the deceased was married to her;

[2.3] and the non-joinder of the First Respondent in her capacity as Executrix for the relief so requested in prayer 4, as she is to be ordered to repay all funds so collected in her capacity as Executrix, where she is only cited in her personal capacity.

[3] It is alleged that the Second Respondent has filed a Notice to Abide, although I cannot find the same on Caselines.

[4] The issues to be determined are as outlined in the Joint Practise note and the heads of both parties and during the argument:

[4.1] Whether the *points in limine* should be upheld or dismissed.

[4.2] Whether the Applicants have made a case for rescission and set aside the order, or declared the nullity of the First Respondent's customary marriage with the deceased Mzamani Patrick Maluleke.

[4.3] Whether the First Respondent was obliged to cite and involve the First Applicant in her initial application, which dealt with the registration of the customary marriage.

[4.4] In terms of the Notice of Motion, I also have to make a ruling on whether or not the First Respondent is to disclose and repay all funds so obtained in her capacity as the Executrix in the deceased estate of the deceased, Mzamani Patrick Maluleke.

FACTUAL MATRIX

[5] The First Respondent alleges that she entered into a customary marriage on 6 September 2014 with the Applicant's son, Mzamani Patrick Maluleke.

[5.1] Mzamanai Patrick Maluleke passed away on 16 June 2023(“the deceased.”)

[5.2] On 20 June 2023, the First Applicant asked the First Respondent to bring the lobola letter and the birth certificate of the minor child born from the relationship between the deceased and the First Respondent.

[5.3] On 21 June 2023, the First Applicant, the deceased’s father and uncle gave the lobola letter back and informed the First Respondent that the Government Employment Pension Fund (“GEPF”) does not recognise the lobola letter. Therefore, the Maluleke family do not recognise her as the deceased’s wife. These facts were just denied in a bare denial by the Applicants.

[5.4] The First Respondent brought an application for the registration of customary marriage to the deceased on 30 June 2023. An order was granted on 15 November 2023.

[5.5] On 20 November 2023, the First Respondent was appointed as Executrix of the estate of the deceased, Mzamani Oatrick Msluleke.

[5.6] On 08 February 2024 the First and Second Applicants issued this application for rescission to have the order so granted in November 2023 rescinded.

APPLICANT’S CASE

[6] The First Applicant is the biological mother of the deceased, and the Second Applicant is the biological daughter of the deceased who has a financial interest in the deceased's estate.

[6.1] The First Applicant allege that she has a direct interest in the matter when the First Respondent brought an application for the registration of the customary marriage between the First Respondent and the deceased and should have been joined in that matter. Therefore, it is alleged that the order was erroneously granted.

[6.2] The Applicants alleged that no valid customary marriage was concluded between the First Respondent and the deceased as the deceased was already married in terms of customary law to Victory Shumani Mulaudzi on 25 September 2010(“Shumani”). Shumani did not provide a confirmatory

affidavit in these proceedings, and she has remarried and is residing with her new husband.

[6.3] Applicants also alleged that it is trite that family members are involved in negotiations for such customary marriages. Therefore, these family members must be cited and involved in such an application for registering customary marriages.

[6.4] The First Applicant alleges that she did not know about the lobola letter and the undated letter from the Maluleke family. First Applicant asserts that she only knew the First Respondent as the deceased's girlfriend and not as husband and wife.

[6.5] The First Applicant further alleges that when the deceased died, the records in the Department of Home Affairs showed that he was never married. This, they allege, is incorrect as he was married to Victoria Shumani Mlaudzi in terms of customary marriage on 25 September 2010, which was negotiated, agreed upon and concluded between the Maluleke and Mulaudzi families at Limpopo. This marriage was never terminated and the parties were never divorced. The Applicants attached a document dated 25 September 2010 to the Founding Affidavit as proof of this marriage.

[6.6] The Applicants alleged that the Second Applicant, as the daughter of the deceased, filed an objection to the appointment of the First Respondent as Executrix at the Master of the High Court. It is stated

[6.7] The Maluleke family disputes that any negotiations for a customary marriage between the First Respondent and the deceased ever took place. It is further alleged that the First Respondent must have been aware that the Maluleke family does not accept that she was married to the deceased since 21 June 2023, before she issued the application for the validity of the customary marriage. According to the Applicants, the two families were not involved and therefore the First Respondent did not conclude a civil or customary marriage. As a result of this dispute, which she should have been aware of before the application, she should have cited the Maluleke family in her papers. It is also alleged that Eric Maluleke(“Eric”’) confirmed to the First Applicant that he does not know any negotiations for such a marriage. Eric did not file a confirmatory affidavit.

[6.8] The Applicants then refer to the affidavits used in support of the First Respondent's application for the registration of the customary marriage by Patrick Vuthari Sithole (“Patrick”) (who is not a member of the Maluleke family but a friend of the deceased) and Tsakane Sabina Mukethoni(“’Sabina”’). The Applicants allege that these people are not representatives of the Maluleke family and have never been sent to represent the family and/or as go-betweens for the lobola negotiation. The First Applicant alleges that she had a consultation with both of them, and both disputed that the signatures on these affidavits are their signatures. Patrick filed a confirmatory affidavit that he has opened a criminal complaint under case number 241/1/2024 as his signature was forged. However, Sabina never confirmed this.

[6.9] The Applicants also referred to the GEPF(Government Employees Pension Fund) as the deceased was a member of the South African Police, which did not recognise the First Respondent’s lobola letter.

[6.9] The Applicants allege that the First Respondent was to cite existing spouses and involve persons with sufficient interest in terms of Section 7(4)(b) of the Recognition of Customary Marriage Act, Act 120 of 1998.

[6.10] The Applicants also refer to Rule 6(2) of the uniform Rules of Court, which obligates the First Respondent to cite and involve the First Applicant in the application for the registration of the customary marriage. As a result of these rules and the section in the Act, it is then argued that the argument of the First Respondent that there was no need to cite the First Applicant in those proceedings lacks substance and ought to be rejected. As a result of the failure of the First Respondent to include the First Applicant, the necessary facts were not included in this court when the matter was heard.

[6.11] In the heads of Advocate Khosa, it is stated that I should take judicial notice that in cases of registration of customary marriage post death of a spouse a member of the deceased spouse must be cited and involved in the matter with reference to two matters.

[6.12] Applicants alleged that had the court been made aware of these facts that this was not the deceased’s first and only customary marriage and that there was no consent from the first customary wife, such an order would not have been granted.

[6.13] The Applicants allege that a reasonable explanation was provided. The application is bona fide and the Applicants have a bona fide defence to the Respondent's order, which prima facie has a prospect of success.

FIRST RESPONDENTS' CASE

[7] Only the Department of Home Affairs was cited in the application for the registration of the customary marriage. It was argued that the First Applicant is not an interested party and should not have been joined in the application for the Registration of the Customary Marriage by the First Respondent.

[7.1] The First Respondent requested joinder of Shumani, one of the alleged customary wives of the deceased and the First Respondent as Executrix as part of their *points in limine*. The reasoning for the joinder of the First Respondent in her capacity as Executrix is about the relief sought against the First Respondent to disclose all funds collected and to pay the same over to the First Applicant's attorneys of record, which she could do in her capacity as Executrix.

[7.2] The First Respondent states that she met the deceased in 2013 and started cohabiting with him in 2014. The deceased passed away on 15 June 2023. The First Respondent approached the scene with her mother Elizabeth Luthuli, and Sakhile Mthetwa, who both provided confirmatory affidavits. Upon removal of the deceased's body, the First Applicant indicated to the First Respondent's mother, Elizabeth that the First Respondent had to sit on the mattress for the period of mourning. This is the custom where only a wife is allowed to sit from 15 June to 21 June 2023.

[7.3] On 20 June 2023, the First Applicant asked the First Respondent for the lobola letter and birth certificate of the minor child, as this was requested by the police station where the deceased was employed. On the return of the deceased's father and the deceased's uncle from the police station the First Respondent was informed that the GEPF does not accept her lobola letter. Therefore the Maluleke family do not recognise her as the deceased's wife.

[7.4] On the day of the burial of the deceased, the First Respondent was called inside her marital home by Colonel Litlhakanyane with her Aunt, Constance Thokoa("Constance"'), the First Applicant, the deceased's two

major daughters and their mothers, where they were requested to go to the Kliptown Police Station on 26 June 2023. Constance also deposed to a confirmatory affidavit. The First Applicant was also asked to attend but refused, stating that she had no business with the deceased's money.

[7.5] At the Kliptown Police Station the First Respondent found Shumani, Molly Nwaila("Molly") being the other alleged wife of the deceased, Wisani Maluleke (the Second Applicant) and Phindile Maluleke. It was confirmed that Shumani and Molly had no lobola letters, and the First Respondent was requested to sign documents and provide her bank statements and affidavits from the lobola delegates from both sides of the family. Patrick, Constance, Molefe Richard and Sabina then provided affidavits and Patrick gave the First Respondent a copy of his identity document. A confirmatory affidavit from the police officer who commissioned Patrick's affidavit on 29 June 2023 is also attached to these papers. The First Respondent states that Patrick contacted her in July 2024 to accompany him to withdraw all his affidavits, as he said they would kill him. Sabina indicated to the First Respondent that he collect her and requested that she withdraw her affidavits, which she refused to do.

[7.6] From this, the First Respondent believed that she was the sole spouse of the deceased.

[7.7] The First Respondent approached the Second Respondent to have the marriage registered, where they refused which resulted in the application for the late registration of the customary The order in the application for the declaratory order for the registration of the customary marriage was granted after careful consideration of all the facts of such customary marriage in 2023, with the support of delegates from the deceased's family and her own family. The fact that the Applicants were not cited cannot make the order so granted defective.

[7.8] The First Respondent also deals with claiming benefits from the deceased's employer, where the First Respondent's legal representative requested all documents, including an affidavit by Colonel Litlhakanyane("Colonel"). In this affidavit, the Colonel confirmed that the First Applicant was at this meeting, that she stated that he paid lobola for three women, but that only one lobola letter was provided. The First Respondent

also stated that Shumani is married in community of property and resides with her husband.

[7.9] Applicants have shown no grounds for rescission of the order. In the Answering Affidavit, all applicable documentation is attached to prove that the customary marriage occurred. The First Applicant alleged that the deceased was married to Victory Shumani Mulaudzi on 25 September 2010 but she failed to attach any confirmatory affidavit from Shumani to her papers.

ANALYSIS

POINTS IN LIMINE

[8] Non-compliance with the practice directive in bringing the interlocutory applications on the same number as the main application. In ***Grootboom v National Prosecuting Authority and Another 2014(2) SA 68 (CC) at Par 32*** the apex court explained the rules of court directives as follows:

> ***"*** *I need to remind practitioners that the Rules and Court Directives serve a necessary purpose. Their primary aim is to ensure that the business of our Courts is run effectively and efficiently; invariably, this will lead to the orderly management of our Courts. Rolls which in turn will bring about the expeditious disposal of cases in the most cost-effective manner. This is particularly important given the ever-increasing cost in litigation, which if left unchecked, will make access to justice too expensive"*.
>
> [8.1] It must be noted that the Applicants were not parties to the main application for the registration of the customary marriage. Therefore, I am of the opinion that this point in limine does not apply to these proceedings. *Point in limine* on the non-compliance with the Practise Directive is dismissed.

[9] Non-joinder of Victory Shumani Mulaudzi based on the allegation that the deceased was married to her. The Applicants claim that the deceased was married to Victory Shumani Mulaudzi as his first customary wife, who should have consented to the second or third customary marriage, which it is alleged she never did with specific reference only to the marriage to the First Respondent. The Applicants then allege that the First Respondent's marriage is *null and void* due to the lack of consent from the first wife without providing any confirmatory affidavit from Shumani or joining

her or asking for any relief against her or on her behalf. In Erasmus Superior Court Practise 2nd Edition, Volume 2 Page D1 - 124N it is stated that non-joinder is the failure of an Applicant to join a particular party with another whom he is suing in circumstances where the law requires that both should be sued together or the failure of an Applicant to join with himself as co-applicant another person whom the law requires should be joined when suing a particular Respondent.

[9.1] The question as to whether all necessary parties had been joined does not depend upon the nature of the subject matter but upon the manner in which and the extent to which the court's order may affect the interest of a third party. (***Amalgamated Engineering Union v Minster of Labour 1949(3) SA 627 (A) at 657***)

[9.2] The test is whether or not a party has a direct and substantial interest in the subject matter of the application, that is a legal interest in the subject matter which may be affected prejudicially by the judgment of the court. See ***Henri Viljoen (Pty Ltd v Awerbuch Bros 1953 (2) SA 151 (o) at 168-170.***

[9.3] In my view, Shumani's joinder is not required by law in this application, and Shumani does not have a substantial and direct interest in the judgment requested by the Applicants. The *point in limine* on non-joinder of Victory Shumani Mulaudzi is dismissed. However, the consent that she had to provide, which is alleged, was not provided, is used as a significant reason why the rescission is requested, which will be dealt with hereunder.

[10] Non-joinder of the First Respondent in her capacity as Executrix for the relief so requested in prayer 4, as she is to be ordered to repay all funds so collected in her capacity as Executrix, where she is only cited in her personal capacity.

[10.1] The powers and duties of the duly appointed Executrix in the deceased's estate are derived from the Administration of Estates Act 66 of 1965. Therefore, the First Respondent is also to be joined in her capacity as Executor for the relief so requested in prayer 4 of the Notice of Motion to be granted. In the event that the First Respondent has accessed funds, it would be in her capacity as Executrix and not in her personal capacity.

[10.2] The *Point in Limine* about the non-joinder of the First Respondent as Executrix is granted with specific reference to the relief so requested in prayer 4 of the Notice of Motion.

RESCISSION

[11] This matter is foremost a rescission application of the order granted on 15 November 2023 in terms of Rule 42(1) as it is alleged that it was erroneously granted where specific facts were not placed before this court. If this order is granted, then the declaratory order to declare the customary marriage null and void and the further relief is to be considered.

[11.1] Rule 42(1)(a) provides as follows:

"The court may, in addition to any other power it may have, mero motu or upon the application of any party affected, rescind, vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby".

]11.2] In **Matseke v Maine (M198/2020)[2024] ZANWHC 13 (26 January 2024)** it was held that an application that places reliance on Rule 42(1) (a) for rescission must show and prove firstly that the order sought to be rescinded was granted in his absence and secondly that the same was erroneously granted. Once these two requirements are met, the enquiry is not complete. The court will then be entitled to exercise its discretion and, in doing so, consider considerations of fairness and justice. In other words, a court is not compelled to rescind an order or judgment, but has a discretion which discretion can only be exercised judicially.

[11.3] In terms of ***Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003(6) SA 1 (SCA) at p. 7 and Lodhi Properties Investments CC and Another v Bondev Developments (Pty) Ltd 2007 (6) SA 87 (SCA) ([2007)] ZASCA 85*** the following principles govern rescissions in terms of this rule:

[11.3.1] The rule must be understood against the common-law background.

[11.3.2] The basic principle of the common law is that once a judgment has been granted, the judge becomes functus officii, but certain exceptions of Rule 42(1)(a) are one.

[11.3.3] the rule caters to a mistake in the proceedings.

[11.3.4] the mistake may either appear on the proceedings record or become apparent from the information made available in an application for rescission.

[11.3.5]a judgment cannot be said to have been granted erroneously in the light of a subsequently disclosed defence which was not known or raised at the time of the default judgment.

[11.4] In ***Zuma v Secretary of Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State and Others,***[1] the Constitutional Court had to decide and determine whether or not Mr. Zuma, the Applicant, had met and satisfied the requirements for the recission of judgment either in terms of Rule 42(1) or the common law. The court summarised the legal position and correct approach as follows:

"*It should be pointed out that once an applicant has met the requirements for recission, a court is merely endowed with a discretion to rescind the order. The precise wording of Rule 42, after all, postulates that the court "may" not "must" rescind or vary its order- the rule is merely an empowering section and does not compel the court to set aside or rescind anything. This discretion must be exercised judicially.*

[11.5] The Applicants argue that the First Respondent had to join the First Applicant n her application to register the customary marriage as she has a direct and substantial interest to these proceedings and refer to section 7(4) (b) of the Recognition of Customary Marriages Act ("The Act") and Rule 6(2) of the Superior Court rules as motivation on why they had to be joined.

[11.5.1] Section 7(4) of the Act deals with the proprietary consequences of the customary marriage and the contractual capacity of spouses. Section 7(4) reads as follows:

"(a) *Spouses in a customary marriage entered into before the commencement of the Act may apply to court jointly for leave to change the matrimonial property system which applies to their marriage or marriages and the court may if satisfied order that the matrimonial property system applicable*

[1] 2021(11) BCLR 1263 (C C)

to such marriage or marriages will no longer apply and authorise the parties to such marriage or marriages to enter into a written contract in terms of which the future matrimonial property system of their marriage or marriages will be regulated on conditions determined by the court.

(b) In the case of a husband who is a spouse in more than one customary marriage, all persons having a sufficient interest in the matter and, in particular, the applicant's existing spouse or spouse, must be joined in the proceedings."

[11.5.2] Section 7(4(b) cannot be interpreted to mean that the Applicant must be joined in an application for a declaratory order to register a customary marriage.

[12] It is trite in motion proceedings that when an applicant seeks final relief, as in this case the rule established in Plascon Evans Paints Ltd v Van Riebeeck Paints 1984(3) SA 632(A) at 634 H- I that when a dispute of fact arises on the papers, such final order may only be granted if the facts averred by the Applicant which have been admitted to by the Respondent together with the facts averred by the Respondent justify such an order.

[13] To satisfy the requirement that such order was erroneously granted, an Applicant must demonstrate, on a balance of probabilities, that at the time the orders were given, there were material facts that the court was unaware of, and that had these facts been known to the court, the order would not have been granted. .

[14] The Applicants alleged that the First Respondent did (1) not join the other two wives of the deceased or at least refer to them and stated that the marriage between the deceased and herself were their first marriages which is untrue (2) that the Maluleke family were not involved in the negotiations of this marriage, the people who deposed to affidavits were not representative of the Maluleke family and (3) the allegation that the first wife did not consent to the marriage with the First Respondent and therefore, there is no customary marriage between the First Respondent and the deceased.

[14.1] The First Respondent alleges that a customary marriage did take place between herself and the deceased. In terms of Section 3 of the Recognition of

Customary Marriages Act 120 of 1998. The requirements for such a marriage are:

[14.1.1] *The prospective spouses must both be above 18 years*,

Both parties were above 18 years of age.

[14.1.2] *Both parties must consent to be married*, and

Both parties consented to the marriage.

[14.1.3] *Marriage must be negotiated, entered and celebrated following customary law*.

[14.1.4] In the matter of Moropane v Southon [2014] ZASCA 76 (29 May 2014) the Supreme Court of appeal held that:

"It is clear from the above section that these are the only three basic statutory requirements for the validity of a customary marriage".

[14.1.5] In the matter of Maluleke v The Minister of Home Affairs 2008 JDR 0426 (W) at par 13

"'*What was in dispute was whether a valid marriage had been entered into and celebrated. The Court held that, as a result of the evolution of customary practices and because the Act does not define the term, the court, in my view, has to look at several factors which might assist in determining whether the parties have entered into a customary marriage. The term entered into is normally used to denote a contract. The question, therefore, is whether the second defendant and the deceased agreed that they were married. Such an agreement may either be explicit or tacit."*

[15] According to the First Respondent, before the conclusion of the marriage in 2014, a letter was sent from the Maluleke family dated 6 September 2014, indicating that the family wishes to meet with the First Respondent's family to negotiate the marriage. I have no other evidence than the word of the First Applicant that the Maluleke family did not negotiate this document despite the confirmatory affidavit of Sabina, Valencia and Patrick, who now wants to withdraw the same.

[15.1] The First Applicant disputes this letter as she alleges that this never happened and that the Maluleke family never sent such a letter. Without confirmatory affidavits from Eric or Daniel Maluleke, who were involved in the negotiations as per the lobola letter and in light of the conflicting versions of

the parties, I am left to consider the probabilities to determine which version is more probable.

[15.2] According to the Applicants, the deceased paid lobola to three wives with whom he had children. It is confirmed that no lobola letters were available from either Shumani or Molly to the South African Police Services in the statement by the Colonel. Shumani and Molly indicated that their respective marriages were so long ago that they no longer had the lobola letters. Therefore, the First Respondent indicated that she accepted that she was the sole spouse which is stated in her application for the registration of the customary marriage. Two lobola confirmation letters were submitted on behalf of Molly and none for Shumani. First Applicant also submitted a lobola letter and alleged that the same was on behalf of Shumani. A proper perusal of this letter does not show any witnesses from the two families, which the Applicants alleged must be involved in these negotiations.

[15.3] The Applicants also alleged that it is customary for the first wife, Shumani, to consent to the marriage of the First Respondent. It is trite that Shumani did not provide a confirmation and is not a party to these proceedings, even if it is to confirm this allegation by the Applicants. The First Applicant alleges that she is certain it never happened, as she is unaware of such consent. The First Respondent correctly argued that this allegation cannot be accepted without a confirmatory affidavit from Shumani as the same is hearsay and therefore inadmissible.

[15.4] I disagree with the argument that the reference to hearsay should be disregarded, as the First Respondent does not ask for the paragraphs where this is stated in the Founding Affidavit to be struck. Hearsay evidence is dealt with in Section 3(1(c) of the Law of Evidence Amendment Act, 45 of 1988, which read as follows:

Subject to the provision of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless:

(c) the court, having regard to

(i) The nature of the proceedings

(ii) Nature of the evidence

(iii) Purpose for which the evidence is tendered

(iv) Probative value of the evidence

(v) Reason why the person does not give the evidence upon whose credibility the probative value of such evidence depends

(vi) *Any prejudice for a party which the admission of such evidence might entail and any other factor which should on the opinion of the court be taken into account.*

[15.4] These are civil proceedings. If it is accepted that Shumani is the first wife and the first wife's consent is needed, I believe the only person who can confirm whether she granted such consent is Shumani herself. There is no reason provided on why Shumani, who did attend the police station after the death of the deceased, whose daughter is the Second Applicant, could not give a confirmation. The purpose of such evidence is clearly to convince the court that the Tsonga customs have not been followed where the first wife's consent is to be obtained. The First Applicant also refers to Molly to be the alleged second customary wife. There is no reference to Shumani's suspected consent to this customary marriage. Therefore, there is no reason for such hearsay evidence to be admitted.

[15.5] The First Applicant also alleged that she was not a part of any celebrations or lobola negotiations, although she did not attach any confirmatory affidavits from the parties allegedly involved in the lobola negotiations. First Respondent alleged that Sabina indicated that before the lobola negotiations took place, the First Applicant approached her and told her of the deceased's intention to be married to the First Respondent and handed over an amount of money for the lobola negotiations. These allegations by the First Respondent were just denied, constituting a bare denial. Sabina did provide a confirmatory affidavit attached to the papers, but no such affidavits are attached from Eric or Daniel by the Applicants.

[15.6] Sabina also indicated that on the date of the lobola negotiations, she had a meeting with Daniel Mkhabela("Daniel"), Eric Maluleke(""Eric") and the First Applicant, where the First Applicant handed her an amount of R 5,000.00 to count as that was to be paid towards the lobola. After counting it she gave it to Daniel, the deceased's brother.

[15.7] The First Applicant was then left behind and Sabina, Daniel and Eric then proceeded to the First Respondent's parents' house, where Patrick joined

them. The First Applicant alleged that Eric disputes that he was involved but no confirmatory affidavit was provided from Eric Maluleke.

[15.8] The deceased and the First Respondent were both over 18 years of age, and the marriage was negotiated by Daniel, Eric and Sabina Mukethoni (‘’Sabina”) and Patrick Vhuthari(“Patrick”) and Sabina and Patrick both provided affidavits confirming that they were involved. Now that the relationship with the First Applicant turned sour, Patrick has withdrawn his affidavit, and the First Respondent indicated that he told her that he was threatened.

[15.9]Affidavits of Valencia Tiyiselani Mnisi, who is the First Applicant's daughter, are attached to the Answering Affidavit confirming the lobola negotiations and that she was in the presence of her aunt Sabina Mokhetoni, who also deposed to a confirmatory affidavit. Despite referring to her admitting that it is not her signature on the confirmatory affidavit by the Fist Applicant, Sabina has not withdrawn same.

[15.10]After the conclusion of the lobola negotiations, they all had food prepared by the First Respondent’s family and thereafter, the First Applicant and other members of the deceased’s family and Patrick left with her as they had prepared a Tsonga meal for the deceased’s family, neighbours and friends.

[15.11] Lobola was set at R 22 000,00 and they paid R 5,000.00. Sabina indicated that that was regarded as Kupfala Rihlaku, which meant the bride now belongs to the Maluleke family.

[15.12] In confirmation of these celebrations, numerous affidavits are attached to the First Respondent’ Answering Affidavit confirming the lobola negotiations, the attendance at the lobola negotiations by the First Applicant and attendance of the First Applicant at the celebrations thereafter of the customary marriage.

[15.13] The First Respondent and the deceased were together since 2014 until he was killed in 2023. On the funeral policy of the deceased, the First Respondent is noted as the “spouse”, and I do not accept the argument that the insurance service provider could not just write the “child’s mother” as argued on behalf of the Applicants. This is the deceased's policy, and I have no other evidence before me that the deceased did not provide the information

to the service provider stipulating that the First Respondent is his spouse. I cannot accept the argument that it should have read mother of child or anything other than what is stated in this document.

[15.14] Even if the First Respondent indicated that she is one of three customary wives, I believe the order in the unopposed court for the registration of the customary marriage would still be granted. I find a customary marriage between the First Respondent and the deceased occurred. Therefore, I do not believe that the order was erroneously granted and it would not be fair and just to rescind this order.

[15.15] I can also not find that the First Applicant has any legal interest in the relief sought and should have been joined.

[15.6] The First Applicant alleged that the deceased died testate, which the First Respondent denied. Therefore, if that is true, the estate will have to be divided in terms of the Intestate Deceased Estate Act, 81 of 1987, which provides rules to determine how such an estate is to be divided.

[16] The First Respondent indicated in her Answering Affidavit that when she approached the Second Respondent to register the customary marriage, they refused. Therefore she had to approach court, In the matter of ***Khashane v Minister of Home Affairs 2024 (5) SA 242*** Judge Khwinana specifically addressed the registration of marriages where one of the parties are deceased and the Second Respondent refuses despite being provided with all necessary and applicable documentation finding that this conduct by the Second Respondent is unacceptable as that is against the purpose of the Act.

[17] Even if the matter is not considered in terms of Rule 42(1) and brought under the common law, "*good cause*" must be shown, which is synonymous with the clause "*sufficient cause*".

[17.1] Chetty v Law Society, Transvaal 1985(2) SA 756 (A) and ZUMA SUPRA this essentially entails proof of two requirements, which are (1) a reasonable and satisfactory explanation for its default and (2) that on the merits, the party has a bona fide defence which carries some prospects or probability of success.

[17.2] Under the common law, a judgment can be set aside on grounds of fraud, ***justus error***, in certain exceptional circumstances when new documents have been discovered and also where the judgment had been granted by default. .

[17.3] Good cause means that the application is bona fide and not made with the mere intention to delay the Respondent's claim. The court may also take into consideration any prejudice to the parties. The court has a wide discretion in evaluating good cause in order to ensure that justice is done between the parties.

[17.4] I am not satisfied that the Applicants have a bona fide defence that would entitle the Applicants to a rescission of this order. The defence so stated by the Applicants lacks confirmation from the essential parties needed to confirm the Applicants' allegations.

[18] As a result of the reasons for not granting the rescission order as stated above, I do not have to deal with the declaratory order to declare the marriage null and void. I am further of the opinion that the remainder of the relief was not motivated by the Applicants.

ORDER

[19] Therefore, the following order is made.

[19.1] The application is dismissed with costs on Party and Party Scale B, including the costs of Counsel.

ENGELBRECHT T
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION

Delivered: This judgment and order were prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the order is deemed to be the 30 May 2025.

Appearances:

For the Applicant:	Advocate A Khosa
For the Respondent:	Mr B Mokgothu
Date of Hearing:	17 March 2025
Date of Judgment:	30 May 2025