

SOUTH AFRICA / JUDGMENT

Mashisane v Mhlauli (2020/11024)

[2021] ZAGPJHC 645 (8 November 2021)

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COURT

South Gauteng High Court, Johannesburg

BEFORE

T Siwendu

CASE / FILE NUMBER

2020/11024

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2020/11024

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

NOT REVISED

In the matter between:

MOSES MUXE MASHISANE Applicant

And

NOSIPHIWE LINDA MHLAULI Respondent

JUDGMENT - LEAVE TO APPEAL

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 upcoming 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

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Prepared on 10 October 2026 · Esheria