

SOUTH AFRICA / JUDGMENT

Mnqayane v Miya and Another (3342/2018) [2020] ZAFSHC 147 (2 July 2020) [2020] ZAFSHC 147

COURT

Free State High Court, Bloemfontein

BEFORE

Naidoo

CASE / FILE NUMBER

3342/2018

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IN

THE HIGH COURT OF SOUTH AFRICA,
FREE

STATE DIVISION, BLOEMFONTEIN

Case

number: 3342/2018

In

the matter between

SIKHOLWANGUYE

MAXIN

MNQAYANE Applicant

and

JOHANNAH

MMAMOEKETSI MIYA First

Respondent

DEPARTMENT

OF HOME AFFAIRS Second

Respondent

CORAM:

NAIDOO,

J

HEARD

ON: Written

Heads of Argument filed on 18 May 2020 and 2
June 2020

JUDGMENT

DELIVERED ON: 2 JULY 2020

[1] This is an application for leave to appeal against the judgment handed down by this court on 3 February 2020. The application for leave to appeal was served and filed on 18 February 2020, and the respondent's notice to oppose the application was served on 24 February 2020. The parties sought a date on which the matter could be argued. I was informed that there was difficulty in obtaining a date that suited the court and the parties, so they were invited to file Heads of Argument in order that the matter may be considered in Chambers, which is a practice in this Division. The court requested that the Heads of Argument be filed by 4 March 2020. It appears this date was also not suitable to the parties due to other commitments. They requested to be allowed a date in the second term of this year. They were requested to inform my Registrar of the earliest date in the second term. Nothing further was heard from them until the applicant filed his Heads of Argument on 18 May 2020 and thereafter, the respondent filed her heads on 2 June 2020. Mr JT Mteyisi is on record for the applicant and Mr LG Fixane for the respondent.

[2] The two main grounds on which the application is based are that:

2.1 leave to appeal should be granted as there are reasonable prospects of success on appeal, and

2.2 the dispute regarding the handing over of the bride in a customary marriage is a compelling reason why the matter should be heard in terms of section 17(1)(a)(ii) of the Superior Courts Act 10 of 2013.

[3] The test to be applied in an application for leave to appeal is regulated by section 17 of the Superior Courts' Act 10 of 2013 (the Act). Section 17(1)(a) is of relevance in this matter and provides:

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

(a)

(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;

(my emphasis and underlining)

[4] Section 17 has changed the position somewhat in respect of the test to be applied. Previously, an applicant was merely required to show that there is a reasonable possibility that a court, differently constituted, may come to a different conclusion than the court a quo. The test in terms of section 17 requires the applicant to show that there is a reasonable prospect of success and not merely a possibility. In the matter of *Matoto v Free State Gambling and Liquor Authority* (4629/2015) [2017] ZAFSHC 80 (8June 2017), a decision

emanating from this Division, my colleague, Daffue J, said at paragraph 5, and I agree, that:

“There can be no doubt that the bar for granting leave to appeal has been raised. Previously, the test was whether there was a reasonable prospect that another court might come to a different conclusion. Now, the use of the word “would” indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against. See Acting National Director of Public Prosecutions and Others v Democratic Alliance (19577/2009) [201]6 ZAGPPHC 489 (24 June 2016). The use by the legislature of the word “only”, emphasised supra, is a further indication of a more stringent test.”

Daffue J reiterated this view in his judgment in *D Kuhn Ferrie+1 v Wesrup Beleggings CC*, case number 1264/2012, delivered on 30 May 2019. Similar views were expressed in *Ntsoereng +1 v Sebofi +1*, *In Re: Sebofi v Ntsoereng* 4518/2012) [2016] ZAFSHC 153 (7 July 2016), and *The Mont Chevaux Trust v Tina Goosen +18* 2014 JDR LCC at para [6]. See also *Starways Trading 21 CC v Pearl Island 714 (Pty) Ltd* [2017] All SA 568 (WCC) at 572, para [10]; *Notshokovu v S* (157/15) [2016] ZASCA 112 (7 September 2016)

- [5] In amplification of his grounds of appeal, the applicant dissects and disagrees with each point of reasoning, in relation to the handing over of the bride, which led to the order that was finally made. I do not intend to traverse any of those points of dissension, as the judgment speaks for itself. A detailed analysis and evaluation of the evidence led by each party was undertaken, and I do not believe that this matter has any prospect of success on appeal. The applicant asserts that there were discrepancies between the respondent’s version in her Founding Affidavit and her viva voce evidence. These were dealt with either by her legal representative or the court during her testimony in court. The respondent and her witnesses made a good impression on me, as opposed to the applicant and his witnesses. The reasons for this are set out in detail in the

judgment.

- [6] As I indicated in the judgment, the applicant and his witnesses gave long-winded explanations of the elaborate customs that had to be observed in the handing over of the bride, and that non- observance of such customs had the consequence that the customary marriage was not properly concluded. This is dealt with in my judgment. The decision of the Supreme Court of Appeal in *Mbungela and Another v Mkabi and Others*, handed down on 30 September 2019 and reported at 2020(1) SA 41 (SCA) is applicable in this matter and this court is bound by that decision. That case is not distinguishable from this matter, in respect of the impact and consequences of the bride transfer, as argued by the applicant.
- [7] The applicant has not shown that another court would differ from my judgment in this matter, nor has he made out any case for the matter to be dealt with in terms of section 17(1) (a)(ii) of the Superior Courts Act 10 of 2013. In short, I am not satisfied that this matter would have a reasonable prospect of success on appeal. The application for leave to appeal lacks merit.

[8] In the circumstances, the following order is made:

The application for leave to appeal is dismissed with costs

S. NAIDOO J

On behalf of Applicant: Mr LG Fixane

Instructed by: FIXANE ATTORNEYS

(Ref: LG Fixane/ MIY1/0001)

On behalf of Respondent: JT Mteyisi

Instructed by: MTEYISI ATTORNEYS

c/o MCINTYRE AND VAN DER POST

(Ref: MNQ481)

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Prepared on 12 October 2026 · Esheria