THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 903/2022

In the matter between:

MOSES MUXE MASHISANE **APPELLANT**

and

NOSIPHIWE LINDA MHLAULI **RESPONDENT**

Neutral citation: *Mashisane v Mhlauli* (903/2022) [2023] ZASCA 176 (14 December 2023)

Coram: MBATHA, MOTHLE, HUGHES and WEINER JJA and KEIGHTLEY AJA

Heard: 8 November 2023

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email publication on the Supreme Court of Appeal website and by release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 14 December 2023**.**

Summary: Family law – customary law – civil procedure – declaratory relief sought on whether parties married according to customary law – dispute of fact – motion proceedings inappropriate.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Siwendu J, sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the high court is set aside and replaced with the following:

'The application is dismissed with costs.'

JUDGMENT

Weiner JA (Mbatha, Mothle, Hughes JJA and Keightley AJA concurring):

Introduction

[1] The respondent, Ms Mhlauli, sought declaratory relief in the high court that she and the appellant, Mr Mashisane, had concluded a valid customary marriage as envisaged in s 3 of the Recognition of Customary Marriages Act 120 of 1998 (the RCMA), and that they were married in community of property, profit and loss (in COP). She also sought an order declaring that the ante-nuptial contract (ANC) concluded between the parties was null and void. Although no detail was set out in the founding affidavit as to what the basis for this declaration was, it appears that the reason is that there was non-compliance with s 89 of the Deeds Registries Act 47 of

1937 (the DRA) (read with ss 86 and 87)[1] because it was not registered post-nuptially (after the customary marriage) with the leave of the court, in terms of s 21 of the Matrimonial Property Act 88 of 1984 (the MPA).[2]

[2] The Gauteng Division of the High Court, Johannesburg (the high court) granted the order, and thereafter refused leave to appeal. The matter comes before us with the leave of this Court.

[3] The respondent had sought the relief, as the appellant disputed that he had consented to a customary marriage, or that he was married in terms of customary law. The appellant did not dispute that the parties had participated in certain traditional customs and celebrations (the traditional customs), after the conclusion of the lobolo contract. However, he contended that the purpose was only to embrace the parties' traditional customs. The appellant remained adamant that he had never consented to be married under customary law, or by civil law, in COP. His case was

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[1] Section 86 of the DRA provides that antenuptial contracts must be registered. It provides that:
'An antenuptial contract executed before and not registered at the commencement of this Act or executed after the commencement of this Act, shall be registered in the manner and within the time mentioned in section eighty-seven, and unless so registered shall be of no force or effect as against any person who is not a party thereto.'
Section 87 of the DRA provides for the manner and time of registration of antenuptial contracts. It provides that:
'(1) An antenuptial contract executed in the Republic shall be attested by a notary and shall be registered in a deeds registry within three months after the date of its execution or within such extended period as the court may on application allow.'
Section 89 of the DRA provides that:
'(1) The provisions of sections 86 and 87 shall *mutatis mutandis* apply in respect of-
(a) an order under section 20 of the Matrimonial Property Act, 1984, as if that order were a notarial deed; and
(b) a contract in terms of section 21 of the Matrimonial Property Act, 1984.

[2] Section 21 of the MPA provides for a change of matrimonial property system. It provides that:
'(1) A husband and wife, whether married before or after the commencement of this Act, may jointly apply to a court for leave to change the matrimonial property system, including the marital power, which applies to their marriage, and the court may, if satisfied that –
(a) there are sound reasons for the proposed change;
(b) sufficient notice of the proposed change has been given to all the creditors of the spouses; and
(c) no other person will be prejudiced by the proposed change,
order that such matrimonial property system shall no longer apply to their marriage and authorize them to enter into a notarial contract by which their future matrimonial property system is regulated on such conditions as the court may think fit.'

that the parties had, from inception of their relationship in April 2019, intended to be married by civil law and out of community of property.

[4] The respondent disputes that this was their intention. She contends that all the required traditional customs occurred and that they intended, and entered into, a customary marriage. It is common cause that the customary marriage was never registered in terms of s 4 of the RCMA.[3] The issue as to whether the customary marriage was to be one in or out of community of property, is one which the respondent appears to vacillate upon, as will be demonstrated below.

[5] The appellant raised two issues. Firstly, in regard to consent to be married in terms of customary law and in COP, there were material disputes of fact which could not be decided on the papers; and secondly, and ancillary to that, that declaratory relief was not appropriate in the circumstances.

[6] Section 3(1) of the RCMA provides:

'3. Requirements for validity of customary marriages.

(1) For a customary marriage entered into after the commencement of this Act 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.'

[3] Sections 4(1) and (2) of the RCMA provide that:
'(1) The spouses of a customary marriage have a duty to ensure that their marriage is registered.
(2) Either spouse may apply to the registering officer in the prescribed form for the registration of his or her customary marriage and must furnish the registering officer with the prescribed information and any additional information which the registering officer may require in order to satisfy himself or herself as to the existence of the marriage.'

[7] As appears from s 3(1)*(a)*(ii), consent to be married under customary law is a separate requirement. Accordingly, negotiations and celebrations alone do not signal the conclusion of a customary marriage. They cannot oust the requirement of consent. A distinction must also be drawn between consent to marry in general and the more specific consent to be married under customary law. As stated above, section 3(1)*(a)(*ii) requires specific consent to be married under customary law.

Background

[8] It appears to be common cause that shortly after the parties met, they began a romantic relationship. According to the appellant, in April 2019, they discussed marriage. They agreed that they did not want to marry under customary law because of the consequences of such marital regime. They decided that they would be married out of community of property with an ANC to protect their various interests. The respondent had her own business and was a shareholder in another business venture. The appellant had four children from previous relationships who would be affected if the parties were married in COP. The appellant wished to protect the financial interests of his children. The appellant also wanted to protect his assets against any claims by his ex-wives in the event of his death. It was not in dispute that the respondent had many debts that she had incurred before she met the appellant, which were settled by the appellant. According to the appellant, all of these factors led to their decision that they would not be married by customary law, as the default position under that regime was a marriage in COP. The respondent admits the discussions, but denies that an agreement to that effect was concluded in April 2019.

[9] It is not disputed by the appellant that the parties observed certain of the traditional customs. According to the appellant, this was solely to show respect to

their families and ancestors and was a precursor to the parties entering into a civil marriage with an ANC.

[10] In essence, the appellant insists that both parties wanted a civil marriage with an ANC which would provide for the marital regime to be out of community of property. On the contrary, the respondent, although, in her replying affidavit appears to concede that she agreed to be married out of community of property, now contends for a customary marriage and for the ANC to be declared invalid, with the result that the marriage would be in COP. The disputes are material and go to the very core of the matter.

[11] The appellant refers to the events which took place leading up to the conclusion of the ANC, which they had discussed in April 2019, when they first met and well before the traditional customs were observed. After the traditional customs were concluded, the parties attended consultations with lawyers. The ANC was thereafter executed and registered. It provided that, inter alia, there would be no COP between the parties and that the accrual system would be applicable to their marriage. The appellant agreed to donate to the respondent a fifty percent share in his property in Bryanston and a Mercedes-Benz motor vehicle. The appellant contends that, after the ANC was executed, a date was set for the civil marriage for November 2020, which is denied by the respondent. The relationship, however, broke down before then.

[12] It is common cause that the appellant is Tsonga and the respondent is Xhosa. Although this point may not have been explicitly canvassed in the affidavits, there was no evidence as to whether their rules of customary law are the same, or indeed what those rules require. This Court needs to have regard to what was said in

Mayelane v Ngwenyama and Another,[4] where the Constitutional Court set out the precautions that a court should heed when dealing with customary law. That case concerned the requirement of consent of a customary wife for her husband to enter into a further customary marriage. The Constitutional Court held that:

'. . . The mere assertion by a party of the existence of a rule of customary law may not be enough to establish that rule as one of law. Determination of customary law is a question of law, as is determination of the common law. It was contended that because Ms Mayelane made a factual averment in her papers that *Xitsonga* customary law required her consent for the validity of her husband's marriage to Ms Ngwenyama, and because Ms Ngwenyama failed to rebut or reject that averment, Ms Mayelane's averment regarding *Xitsonga* customary law had been sufficiently proved…

. . . First, a Court is obliged to satisfy itself, as a matter of law, on the content of customary law . . . It is incumbent on our Courts to take steps to satisfy themselves as to the content of customary law and, where necessary, to evaluate local custom in order to ascertain the content of the relevant legal rule.

Second, Courts must understand concepts such as "consent" to further customary marriages within the framework of customary law and must be careful not to impose common-law or other understandings of that concept. Courts must also not assume that such a notion as "consent" will have a universal meaning across all sources of law.

. . .

It should also be borne in mind that customary law is not uniform. A particular custom may have one of various acceptable manifestations of a consent requirement . . .'[5]

[13] Heeding the Constitutional Court's warning, courts should be slow to decide matters of this nature on affidavits alone. In this case, expert evidence on the concept of 'consent' in both the Tsonga and Xhosa customary law should have been adduced by the respondent to establish her case that the parties had consented to, and were

[4] *Mayelane v Ngwenyama and Another (Womens' Legal Centre Trust and others as amici curiae)* [2013] ZACC 14; 2013 (4) SA 415 (CC); 2013 (8) BCLR 918 (CC).
[5] Ibid paras 47-51.

married under, customary law. This would have given the appellant the opportunity to adduce his own expert evidence, and, if necessary, a referral to trial or oral evidence to assist the court in deciding the issue. However, the manner in which the respondent elected to bring her case to court deprived the appellant, and the court, of the benefits of a thorough examination of this important issue.

[14] The same can be said of the factual issue of whether the appellant consented to be married in COP under customary law or whether the parties had agreed to a civil marriage with an ANC. The appellant raised genuine disputes of fact on this issue. He explained the reasons for the traditional customs having been observed and expressly disputed that this offered evidence of his consent to be married under customary law rather than by way of a civil marriage.

[15] This case falls squarely within the ambit of the *Plascon-Evans* rule,[6] as enunciated in *Wightman t/a JW Construction v Headfour (Pty) Ltd*,[7] where this Court held:

'A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed.'[8]

[16] It was the respondent's duty to prove her version. She made her own burden more difficult, and exacerbated the factual disputes by raising different versions and introducing new evidence in her replying affidavit. The respondent's stance vacillates from one version to another, often contradicting herself. The relief she

[6] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623 (A).
[7] *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA).
[8] Ibid para 13.

sought was to declare the customary marriage valid, and for the ANC to be declared invalid. But, in her replying affidavit, she did not deny that the parties wanted to be married out of community of property and executed the ANC for that purpose.

[17] This leads to the second issue raised by the appellant, namely the submission that it was inappropriate to seek declaratory relief, in the circumstances of this case. Further, that the court *a quo* exercised its discretion improperly by granting the relief. There are two aspects to this argument which were succinctly dealt with in *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd*.[9] In *Cordiant*,[10] this Court in dealing with s 19(1)*(a)*(iii) of the Supreme Court Act 59 of 1959 (the predecessor to s 21(1)*(a)*) referred to *Durban City Council v Association of Building Societies*,[11] where Watermeyer JA with reference to a section worded in identical terms stated that '[t]he question whether or not an order should be made under this section has to be examined in two stages. First the Court must be satisfied that the applicant is a person interested in an "existing, future or contingent right or obligation", and then, if satisfied on that point, the Court must decide whether the case is a proper one for the exercise of the discretion conferred on it'.[12]

[18] The respondent is a party who is interested in an 'existing, future or contingent right'. The relief she sought was not academic or abstract. The declarator she sought was directly linked to her legal status. She wanted the court to determine that she was married, that the marriage was under customary law, and that it was a marriage in COP. Although the same question could have been determined in divorce

[9] *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* [2005] ZASCA 50; [2006] 1 All SA 103 (SCA); 2005 (6) SA 205 (SCA).
[10] Ibid para 16.
[11] *Durban City Council v Association of Building Societies* 1942 AD 27.
[12] Ibid at 32.

proceedings, the respondent was entitled to seek declaratory relief to determine her status. This does not mean, however, that the respondent was necessarily entitled to the relief that was granted. This Court must consider the second stage of the inquiry, namely whether the high court, in granting such relief, properly and judicially exercised the discretion conferred on it.

[19] The high court found no irresoluble disputes of fact and accordingly based its decision to grant the declaratory relief on that basis. As I have demonstrated above, the disputes of fact in this case go to the very core of the matter – firstly, the appellant's consent, not only to be married, but to be married according to customary law and, secondly, the validity of the ANC.

[20] The high court declared the ANC to be null and void. The high court found that the parties' decision to enter into the ANC was only discussed after the customary marriage had been concluded. It was, however, common cause that the decision to ensure that their marriage was one out of community of property with an ANC, was discussed as early as April 2019. The appellant in his answering affidavit refers to this discussion as follows:

'119 I reiterate that the [respondent] and I discussed and agreed that it would be in our best interest to enter into an ANC in order to protect our various interests in the relationship as we had discussed at the beginning of our romantic relationship in April 2019.

120 I admit that in terms of the ANC:

120.1 I agreed to donate half a share of my Bryanston house to the [respondent].

120.2 I agreed to donate one motor vehicle to the [respondent].'

The respondent, in her replying affidavit, admitted the contents of those paragraphs.

[21] The appellant thus contends, and this aspect is not disputed, that the parties always intended to enter into a marriage out of community of property (and for the

donation of a half share in the appellant's Bryanston house and a motor vehicle). This agreement was contained in the ANC. Thus, even if a customary marriage was concluded, as alleged by the respondent, a court dealing with this matter at a trial, might well recognize the post-nuptial execution of a notarial contract, which would have a substantive bearing on the consequences on a divorce between the parties. This issue was not considered by the high court in declaring that the ANC was invalid. In fact, the setting aside of the ANC appears to go against the versions of both parties as to how they wanted their marital regime to be governed.

[22] The factual disputes in this matter relating to both consent and the consequences of the ANC are 'first and foremost a fact-based enquiry'.[13] In *Clear Enterprises (Pty) Ltd v Commissioner for the South African Revenue Services and Others*,[14] Ponnan JA stated that 'absent an undisputed factual substratum, it would be extremely difficult to define the limits of the declaratory relief that should issue'.

[23] I am of the view that the high court did not properly exercise its discretion in granting the declaratory relief, as the disputes in the matter could not be decided on the affidavits. In this case, the more appropriate process would have been for the respondent to institute a divorce as provided for in s 8 of the RCMA,[15] where her claim that the parties were married according to customary law and the consequences

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[13] *Clear Enterprises (Pty) Ltd v Commissioner for the South African Revenue Services and Others* [2011] ZASCA 164 (SCA) para 16.
[14] Ibid.
[15] Sections 8(1) and (4)*(a)* of the RCMA provide that:
'(1) A customary marriage may only be dissolved by a court by a decree of divorce on the ground of the irretrievable breakdown of the marriage.
. . .
(4) A court granting a decree for the dissolution of a customary marriage has –
(a) the powers contemplated in sections 7, 8, 9 and 10 of the Divorce Act, 1979, and section 24(1) of the Matrimonial Property Act, 1984 (Act No. 88 of 1984).'

thereof would have been properly ventilated at trial. This Court is therefore at large to set aside the order.

[24] In regard to the order to be granted, two statements of the respondent point to the fact that the disputes of fact referred to were anticipated prior to the launch of the application. First, in her founding affidavit, she alleges that the parties began experiencing problems in March 2020. The respondent obtained legal advice that the ANC was invalid, as it had been executed after the customary marriage had been concluded. In seeking the relief which she does, she stated that '[t]he applicant will continue to be prejudiced for as long as the respondent is allowed to continue *to claim that there is no marriage between the parties*, and / or to illegally enforce the antenuptial contract'. (Emphasis added.) Thus, the respondent was aware of the appellant's stance – he had not consented to be married under customary law, in COP; he insisted on a civil marriage with an ANC.

[25] Second, in regard to why the customary marriage was not registered, within the three-month period or at all,[16] the respondent provides conflicting versions. In the founding affidavit, she simply stated that it was not registered. In the replying affidavit, her reason is that the parties chose to hide the fact of the customary marriage, as it was cheaper to simply conclude an ANC. Further, she states that the appellant changed his mind that the customary marriage was valid and, therefore, the customary marriage was not registered.

[16] Section 4(3)*(b)* of the RCMA provides that:
'(3) A customary marriage—
(b) entered into after the commencement of this Act, must be registered within a period of three months after the conclusion of the marriage or within such longer period as the Minister may from time to time prescribe by notice in the *Gazette*.'

[26] On the facts set out above, it seems clear that the respondent not only approached the high court using motion proceedings, which were wholly inappropriate in the present case, but did so with the knowledge that such factual disputes were present. In *Gounder v Top Spec Investments (Pty) Ltd*,[17] this Court emphasised that in electing to proceed by way of motion, with knowledge of existing disputes of fact, an applicant risks having their application dismissed, rather than being referred to evidence or trial. In my view, that principle applies in the present case.

[27] In the result, the following order is granted:

1 The appeal is upheld with costs.

2 The order of the high court is set aside and replaced with the following:

'The application is dismissed with costs.'

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S E WEINER

JUDGE OF APPEAL

[17] *Gounder v Top Spec Investments (Pty) Ltd* [2008] ZASCA 52; [2008] 3 All SA 376 (SCA); 2008 (5) SA 151 (SCA) para 10.

Appearances

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Instructed by:	Martin Vermaak Attorneys, Johannesburg
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