THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 14 December 2023

Status: Immediate

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Mashisane v Mhlauli (903/2022) [2023] ZASCA 176 (14 December 2023)

Today, the Supreme Court of Appeal (SCA) upheld an appeal with costs against the judgment of the Gauteng Division of the High Court, Johannesburg, per Siwendu J (the high court), which granted declaratory relief sought by the respondent. The respondent, Ms Mhlauli, had 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.

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. His case was 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. The respondent disputed that that was their intention. She contended that all the required traditional customs occurred and that they intended, and entered into, a customary marriage. It was common cause that the customary marriage was never registered in terms of s 4 of the RCMA.

The issues before the SCA were, firstly, in regard to consent to be married in terms of customary law and in COP, whether there were material disputes of fact which could not be decided on the papers; and secondly, and ancillary to that, whether declaratory relief was not appropriate in the circumstances.

The SCA found that the disputes were material and went 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. The appellant raised genuine disputes of fact. He explained the reasons for the traditional customs having been observed and expressly disputed that that offered evidence of his consent to be married under customary law and in community of property, rather than by way of a civil marriage with an ANC. This case thus fell squarely within the ambit of the *Plascon-Evans* rule.

The SCA found further 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, where her claim that the parties were married according to customary law and the

consequences thereof would have been properly ventilated at trial. The SCA therefore found that it was at large to set aside the order of the high court.

Accordingly, the SCA dismissed the respondent's application, rather than it being referred to evidence or trial in the high court. This was because on the facts the SCA found that the respondent not only approached the high court using motion proceedings, which were wholly inappropriate in this case, but did so with the knowledge that such factual disputes were present.

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