



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case No: 1062/2022

In the matter between:

QUEEN SIBONGILE WINNIFRED ZULU

APPELLANT

and

QUEEN BUHLE MATHE

FIRST RESPONDENT

EXECUTOR OF THE ESTATE OF

LATE QUEEN SHIYIWE MANTFOMBI

DLAMINI

SECOND RESPONDENT

QUEEN THANDEKILE JANE NDLOVU

THIRD RESPONDENT

QUEEN NOMPUMELELO MCHIZA

FOURTH RESPONDENT

QUEEN ZOLA ZELUSIWE MAFU

FIFTH RESPONDENT

PRINCESS THEMBI NDLOVU

SIXTH RESPONDENT

PRINCE MBONISI ZULU

SEVENTH RESPONDENT

PRINCE THULANI ZULU

EIGHTH RESPONDENT

PRINCESS LINDI ZULU

NINETH RESPONDENT

PRINCE VULINDLELA ZULU

TENTH RESPONDENT

PRINCE MXOLISI ZULU

ELEVENTH RESPONDENT

PRINCE MATHUBA ZULU

TWELFTH RESPONDENT

QUEEN MAVIS ZUNGU

THIRTEENTH RESPONDENT

OTHER PERSONS WHO MAY BE

MEMBERS OF *UMNDENI WESILO*

FOURTEENTH RESPONDENT

MEMBERS OF THE ROYAL FAMILY

FIFTEENTH RESPONDENT

SIPHO JEROME NGWENYA
PREMIER OF KWAZULU-NATAL
PRESIDENT OF THE REPUBLIC
OF SOUTH AFRICA
THE MASTER OF THE HIGH COURT
SANLAM TRUST (PTY) LIMITED

SIXTEENTH RESPONDENT
SEVENTEENTH RESPONDENT

EIGHTEENTH RESPONDENT
NINETEENTH RESPONDENT
TWENTIETH RESPONDENT

Neutral citation: *Queen Sibongile Winnifred Zulu v Queen Buhle Mathe and Others*
 (1062/2022) [2024] ZASCA 22 (08 March 2024)

Coram: MAKGOKA and MBATHA JJA, and MUSI AJA

Heard: 13 November 2023

Delivered: 08 March 2024

Summary: Family law – administration of deceased estate – Marriage Act 25 of 1961 – whether consequences of civil marriage precluded husband from concluding further marriages with other persons.

Declaratory relief – refusal by high court – whether desirable to interfere with high court’s discretion.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Madondo AJP, sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel where so employed.

JUDGMENT

Mbatha JA and Musi AJA (Makgoka JA concurring):

[1] The aftermath of the death of King Goodwill Zwelithini kaBhekuzulu Zulu (the late Isilo)¹ was unfortunately marred by litigation between members of the Zulu Royal Family. This appeal is a sequel to one of the legal disputes.

[2] Queen (Indlovukazi)² Sibongile Winnifred Zulu (the appellant Queen) appeals against the judgment and order of the KwaZulu-Natal Division of the High Court, Pietermaritzburg (the high court). The appellant Queen had sought a declaratory order stating that she was married to the late Isilo in terms of civil law, in community of property and profit and loss and that the late Isilo was precluded from entering into customary marriages with other persons while the marriage between them subsisted. The high court dismissed the application. The appellant Queen now appeals with the leave of this Court.

¹ Isilo is a Zulu word for king. The Zulu kings are respectfully known as Isilo Samabandla Onke.

² Indlovukazi is a Zulu word for the Queen of the Zulu nation.

[3] The background is briefly this. The appellant Queen and the late Isilo entered into a marriage in community of property and profit and loss on 27 December 1969, in accordance with s 22 of the Black Administration Act 38 of 1927 read with the Marriage Act 25 of 1961 (the Marriage Act). The marriage still subsisted at the time of the Isilo's death.

[4] During the subsistence of the civil marriage, the late Isilo entered into customary marriages with the second respondent, the late Queen Shiyiwe Mantfombi Dlamini (the late Queen), and the first, third, fourth and fifth respondent Queens. The late Queen passed on shortly after the late Isilo, and her estate is represented in these proceedings by its appointed executor. The sixth to fifteenth respondents are members of the Zulu Royal Family. Their citations related only to the interdictory relief of the declaration, endorsement, proclamation and appointment of the late Queen or any of the other respondent Queens as Ibambabukhosi (Regent) or successor to the throne as Isilo samaZulu, pending the final relief sought in the application. No relief was sought against them in this application.

[5] The sixteenth respondent, Mr Jerome Ngwenya, is the former Chairperson of the Ingonyama Trust, and was cited on the basis that he was assigned specific duties in terms of the provisions of the Last Will and Testament (Will) of the late Isilo. The seventeenth and eighteenth respondents, namely, the Premier of KwaZulu-Natal (the Premier) and the President of the Republic of South Africa, respectively, were cited for purposes of interdicting and restraining them from enforcing any decisions and taking any steps following the decisions taken by the sixth to twelfth respondents. Further ancillary relief was sought against the Premier, which relief is not germane to the subject matter of this appeal.

[6] The nineteenth respondent, the Master of the High Court, KwaZulu-Natal was cited in her capacity as the person who oversees the winding up of deceased estates in

the province. The twentieth respondent, Sanlam Trust (Pty) Limited, was cited in its capacity as the executors and administrators of the estate nominated in the last will and testament of the late Isilo. The application by the appellant Queen was opposed only by the first to the fifth respondents (the respondent Queens).

[7] In his Will (the validity of which is the subject of another dispute), the late Isilo prefaced the devolution of his estate by making an introductory statement. He stated that the notion of marriage in community of property and profit and loss was foreign to the Zulu people, regardless of their social and economic standing. He went on to say that no Zulu king had ever got married to one wife by civil rights, in community of property, because of the very nature of the Zulu laws and culture. He stated that a traditional marriage denotes a marriage according to custom. He acknowledged that he was no exception to this, and as a result, he was married to six Queens during his lifetime.

[8] Although the nature and proprietary consequences of the marriage between the late Isilo and the appellant Queen were initially disputed, all the respondents Queens before the high court admitted the validity of the marriage and that it was in community of property, and consequently, with profit and loss. However, the respondent Queens disputed that the subsistence of the civil marriage between the appellant Queen and the late Isilo precluded the late Isilo from validly entering into customary marriages with them.

[9] The issue in the appeal is whether the high court exercised its discretion properly in dismissing the application. The appellant Queen argued that the concession by the Queen respondents that the late Isilo and the appellant Queen were married in community of property was sufficient reason for the high court to issue a declaratory order. The appellant Queen further contended that the civil marriage between her and the late Isilo precluded him from entering into further valid marriages

with other persons whether by civil or customary law. As a result, a declaratory order to that effect should have been granted in her favour.

[10] The respondent Queens contended that the dispute relating to the validity of the marriage between the appellant Queen and the late Isilo fell away immediately prior to the hearing. This rendered the issue moot. Consequently, there is no dispute as to the nature, status and propriety consequences of the marriage between the late Isilo and the appellant Queen. No practical effect would be achieved by the determination of the questions posed in this matter. There is no dispute that the appellant Queen's marriage was in community of property and of profit and loss. On the question of whether the late Isilo was precluded from marrying any other person during the subsistence of his marriage with the appellant Queen, the respondent Queens opposed that relief too. They submitted that the relief is legally incompetent, as the appellant Queen had not sought an order declaring the late Isilo's customary marriages to them invalid. They submitted that the said customary marriages remain extant as they are deemed to be valid in terms of s 2 of the Recognition of Customary Marriages Act 120 of 1998 (the Recognition Act).³

[11] In *Lueven Metals v Commissioner for SARS*,⁴ this Court, with regard to declaratory orders, succinctly recognised that:

‘Section 21(1)(c) of the Superior Courts Act 10 of 2013 provides a statutory basis for the grant of declaratory orders without removing the common law jurisdiction to do so. It is a discretionary remedy. The question whether or not relief should be granted under the section has to be examined

³ Section 2 of this Act reads as follows:

‘Recognition of customary marriages. —

(1) A marriage which is a valid marriage at customary law and existing at the commencement of this Act is for all purposes recognised as a marriage.

(2) A customary marriage entered into after the commencement of this Act, which complies with the requirements of this Act, is for all purposes recognised as a marriage.

(3) If a person is a spouse in more than one customary marriage, all valid customary marriages entered into before the commencement of this Act are for all purposes recognised as marriages.

(4) If a person is a spouse in more than one customary marriage, all such marriages entered into after the commencement of this Act, which comply with the provisions of this Act, are for all purposes recognised as marriages.’

⁴ *Lueven Metals (Pty) Ltd v Commissioner for the South African Revenue Service* [2023] ZASCA 144 para 12.

in two stages, in the first place, the jurisdictional facts have to be established. When this has been done, the court must decide whether the case is a proper one for the exercise of its discretion. Thus, even if the jurisdictional requirements are met, an applicant does not have an entitlement to an order. It is for such applicant to show that the circumstances justify the grant of an order.’

[12] The jurisdictional facts that have to be established are whether the applicant has an interest in an existing, future or contingent right or obligation.⁵ If the court is so satisfied that such interest exists, it is required to consider whether the order for a declaratory relief should be granted. The court considers whether an applicant in seeking such an order has a standing in terms of s 38 of the Constitution. In addition, the doctrine of ripeness is at issue, as consideration is given to whether prejudice has already resulted or is inevitable, irrespective of whether the action is complete or not. The doctrine of ripeness may also require an enquiry as to whether alternative remedies have been exhausted. This is termed a premature action. As aforesaid, s 21(1)(c) of the Superior Courts Act 10 of 2013 enjoins the high court ‘in its discretion and at the instance of any interested person to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination’. In addition, a court will not grant a declaratory order on moot or academic issues, as this would conflict with the doctrine of effectiveness.

[13] When deciding whether it is appropriate to grant declaratory relief in a particular case, the court exercises a wide or loose discretion. It does not follow that the court must exercise its discretion in favour of an applicant that has established the jurisdictional facts. The discretion is exercised in the light of all relevant considerations. In *Cordiant v Daimler-Chrysler (Cordiant)*,⁶ this Court emphasised that it does not mean that, once the party has satisfied the requirement of an existing,

⁵ *Cordiant Trading CC v Daimler-Chrysler Financial Services (Pty) Limited* [2005] ZASCA 50; [2006] 1 All SA 103 (SCA); 2005 (6) SA 205 (SCA) para 18.

⁶ *Ibid* para 16

future, or contingent right or obligation, that is the end of the enquiry. The court must still decide whether it should refuse or grant the order, and whether it is a proper one for the exercise of that court's discretion. This does not mean that the court is obliged to grant the declaratory order, but it must consider whether it should grant or refuse the order sought. The test whether a court of appeal is entitled to interfere with the exercise of a wide discretion is now settled. It is that, in the absence of misdirection or irregularity, a court of appeal would ordinarily not be entitled to substitute its discretion for that of a lower Court.⁷

[14] It is trite that, despite the jurisdictional factors being proved, the Court may exercise its discretion against an applicant if the declaratory relief would be abstract, academic or hypothetical. The court may also refuse to grant a declaratory order if it would not present a tangible advantage to an applicant. Additionally, the court may refuse to grant a declaratory order when the subject matter of the order sought had been definitively determined by a court or the legislature.

[15] In *Knox D'Arcy v Jameson*,⁸ it was pointed out that a court has a wide discretion at which 'seems to mean no more than that the Court is entitled to have regard to a number of disparate and incommensurate features in coming to a decision'. In *Media Workers Association of South Africa v Press Corporation of South Africa Ltd*,⁹ this Court said the following about a wide discretion:

'It does not involve a choice between permissible alternatives. In respect of such a judgment a Court of appeal may, in principle, well come to a different conclusion from that reached by the Court a quo on the merits of the matter.'

⁷ See *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) para 88.

⁸ *Knox D'Arcy Ltd and Others v Jameson and Others* [1996] ZASCA 58; [1996] 3 All SA 669 (A); 1996 (4) SA 348 (A) at 361H-I.

⁹ *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd* [1992] ZASCA 149; [1992] 2 All SA 453 (A); 1992 (4) SA 791 (A) at 800F.

[16] A declaratory order is a flexible remedy that need not be accompanied by consequential relief.¹⁰ However, in *Adbro Investment Co. Ltd v Minister of the Interior*,¹¹ it was found that:

‘... a proper case for a purely declaratory order is not made out if the result is merely a decision on a matter which is really of academic interest to the applicant. ...some tangible and justifiable advantage in relation to the applicant’s position with reference to an existing future or contingent legal right or obligation must appear to flow from the grant of the declaratory order sought.’

Furthermore, in *J T Publishing (Pty) Ltd v Minister of Safety and Security (J T Publishing)*,¹² the Constitutional Court said:

‘I interpose that enquiry because a declaratory order is a discretionary remedy, in the sense that the claim lodged by an interested party for such order does not in itself oblige the Court handling the matter to respond to the question which it poses, even when that looks like being capable of a ready answer. A corollary is the judicial policy governing the discretion thus vested in the Courts, a well-established and uniformly observed policy that directs them not to exercise it in favour of deciding points that are merely abstract, academic or hypothetical ones.’

[17] The high court found that there was incontrovertible evidence that the late Isilo and the appellant Queen were married in community of property and profit and loss. Additionally, it found that the late Isilo conceded, in an affidavit deposed to before making his Will that he and the appellant Queen were married in community of property. It therefore found that no practical effect would be achieved by declaring that the late Isilo was married to the appellant Queen in community of property and of profit and loss. Accordingly, the high court dismissed the application with costs.

[18] The appellant Queen submitted that the high court erred in finding that, before it could grant declaratory relief, there must be a live dispute between the parties about the marriage and its consequences. In amplification, the appellant Queen argued that

¹⁰ *Rail Commuters Action Group v Transnet LTD t/a Metrorail* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) para 107.

¹¹ *Adbro Investment Co. Ltd v Minister of the Interior and Others* 1961 (3) SA 283 (T) at 285C-D.

¹² *JT Publishing (Pty) Ltd v Minister of Safety and Security* [1996] ZACC 23; 1996 (12) BCLR 1599; 1997 (3) SA 514 (CC) para 15.

the high court overlooked the fact that the absence of an existing or concrete dispute was no longer a prerequisite for the granting of a declaratory order. On the question whether there should be a live dispute between the parties for the court to grant a declaratory order, the high court did not regard a live dispute between the parties as a prerequisite but as one of the factors, together with others, that it should consider for the exercise of its discretion. It clearly stated that if there was a dispute between the parties, it must be alleged as one of the factors which the court will take into account in considering whether to exercise its discretion in the favour of the applicant. This approach cannot be faulted.¹³

[19] The appellant Queen submitted that the high court erred in finding that before granting a declaratory order, it was necessary for her to show that she had a right that was actually infringed. We agree. The actual infringement of a right is not a jurisdictional fact that must be established to trigger the exercise of the discretion to grant or refuse declaratory relief. The threshold is much lower than an actual infringement of a right. As explained in *Cordiant*:¹⁴

‘[O]nce the applicant has satisfied the court that he/she is interested in an “existing, future or contingent right or obligation”, the court is obliged by the subsection to exercise its discretion.’

[20] A misdirection occurred in relation to the first leg of the enquiry: the jurisdictional fact. This is not fatal to the second leg, which is the actual exercise of the discretion. The question still remains whether the high court exercised its discretion properly. The misdirection did not impact negatively or taint the exercise of the discretion. In *Reinecke v Incorporated General Insurance Ltd*,¹⁵ this Court accepted that ‘even if it appeared that the learned Judge had misdirected himself in the exercise of his discretion, this Court would not allow the appeal if the order appealed from is, notwithstanding the misdirection, clearly consistent with the proper

¹³ *Ex Parte Nell* 1963 (1) SA 754 (A) at 760A-C.

¹⁴ *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* [2005] ZASCA 50; [2006] 1 All SA 103 (SCA); 2005 (6) SA 205 (SCA) para 17.

¹⁵ *Reinecke v Incorporated General Insurance Ltd* 1974 (2) SA 84 (A) at 99C-E.

exercise of a judicial discretion’. This Court should then examine the merits and ‘[b]ring a judicial discretion to bear upon the question whether or not the case is a proper one for the granting of a declaratory order’.¹⁶

[21] There is no challenge to the validity of the respondent Queens’ marriages to the late Isilo. The appellant Queen stated that she did not want to cause friction or ructions, nor deny the late Isilo’s children their birthright in the Zulu Royal Family. Her case was that the customary marriages between the late Isilo are only recognised to the extent of the Recognition Act.

[22] We reiterate what the respondent Queens stated in their composite answering affidavit:

‘I note that the applicant Queen does not seek any order declaring the King’s customary marriages as invalid. The implications of this is that the customary marriages remain valid, as they are deemed to be valid by the Recognition of Customary Marriages Act, in s 2 and have legal consequences.’

[23] The appellant Queen did not dispute this in reply. She however, unsuccessfully attempted to amend her relief, at the high court, to include the challenge to the validity of the aforesaid marriages. This was not her pleaded case. Had she changed her mind she should have timeously amended her papers. This, in fact, had the effect of seeking relief not sought in the founding papers.

[24] Taking cognizance of the aforementioned averments, the high court correctly found that the failure to challenge the validity of the marriages was consciously made by the appellant Queen. As a result, she could not, at the last minute, raise something not in her papers.

¹⁶ *Association for Voluntary Sterilization of South Africa v Standard Trust Limited and Others* [2023] ZASCA 87 para 11.

[25] The winding up of the estate and the distribution thereof was no longer a live issue before the high court with the unfortunate passing away of the late Queen. The high court correctly found that the appellant Queen should not have sought interdictory relief as she had not established a clear right that was infringed and needed protection, nor had she sought the declaration of invalidity of the other customary marriages to the late Isilo. There was also no contention that those marriages were not legally concluded in terms of the Recognition Act.

[26] Furthermore, the winding up of the late Isilo's estate has not even yet commenced. There was no suggestion that the executor of the estate would distribute the estate in any manner prejudicial to her. In any event, the estate would be wound up under the supervision of the Master of the High Court. The process of winding up of an estate also has safeguards in terms of the Administration of Estates Act 66 of 1965 for the protection of persons who have claims against any deceased estate. Should this not be adhered to, the appellant Queen is not without remedy.

[27] It is common ground that the late Isilo was married to the appellant Queen in community of property and profit and loss. The proprietary consequences of the marriage were also admitted. The law on the subject matter is clear. The high court correctly did not deem it necessary and equitable to grant a declaratory order under such circumstances. It is for this reason that it concluded that no practical effect would be achieved by a determination that the late Isilo was married to the appellant Queen as she claimed. The 'purpose envisaged' by the appellant Queen had been achieved. The dependants and beneficiaries of the late Isilo's estate, by virtue of the concession and overwhelming proof, know exactly what their rights are in relation to the late Isilo's estate. There was nothing to determine or clarify by way of a declaratory order. In essence, the appellant Queen wants a declaratory order that is merely abstract, academic or hypothetical.

[28] The appellant Queen's main ground of complaint was that the late Isilo, having concluded a civil marriage with her, was precluded in terms of the Marriage Act, from marrying any other person during the subsistence of that marriage. But if this is so, and we make no finding in this regard, it is a consequence of the marriage regime between the late Isilo and the appellant Queen. The effect of a civil marriage on customary marriages flows by operation of law. It is not something a court needs to give a declaratory order on. Policy considerations, as mentioned in *J T Publishing* above, militate against courts giving advisory opinions to litigants. The appellant Queen has not demonstrated any tangible and justifiable advantage in relation to her position, with reference to an existing future or contingent legal right or obligation, which would flow from the grant of the declaratory order sought.

[29] In all the circumstances, despite the misdirection we pointed out earlier, the high court properly exercised its discretion by refusing to grant the declaratory relief. The appeal ought to be dismissed and there is no reason why costs should not follow the result. All the opposing parties, except the first respondent, employed at least two counsel. We are of the view that the employment of two counsel was warranted, given the issues in dispute. The costs order should reflect this.

[30] Accordingly, the following order is made:

The appeal is dismissed with costs, including the costs of two counsel where so employed.

YT MBATHA
JUDGE OF APPEAL

C MUSI
ACTING JUDGE OF APPEAL

Appearances:

For the appellant:	J Pammenter SC with N Xulu
Instructed by:	BM Thusini Inc., Vryheid Peyper & Botha Attorneys, Bloemfontein
For second respondent:	TG Madonsela SC with T Palmer
Instructed by:	Strauss Daly Inc., Durban Bezuidenhouts Inc, Bloemfontein
For third, fourth, fifth, thirteenth and sixteenth respondents:	I L Topping SC
Instructed by:	Ngcamu Inc., Pietermaritzburg Webbers attorneys, Bloemfontein.