REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 42772/2019

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

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SIGNATURE **DATE**

In the matter between:

PEARL NOSIPHO TAFU MODISE	**Applicant**
And	
THE MASTER OF THE HIGH COURT OF SOUTH AFRICA	**First Respondent**
IZAK JOHANNES DE VILLIERS N.O	**Second Respondent**
ABRAHAM MARTHINUS SPIES N.O	**Third Respondent**
THE INTERNATIONAL PENTECOST HOLINESS CHURCH	**Fourth Respondent**
THE MINISTER OF JUSTICE AND CONSTITUTIONAL	**Fifth Respondent**
DEVELOPMENT MIRRIAM NKONE MODISE	**Sixth Respondent**
JULIA WINNIFRED MODISE	**Seventh Respondent**
JENETTE KHUMALO	**Eighth Respondent**
TSHEPISO MODISE	**Ninth Respondent**
SEBITSE BERTHA LUCIA MABASELA	**Tenth Respondent**

FREDERICK LEONARD GOITSIMANG MODISE **Eleventh Respondent**

JUDGMENT ON LEAVE TO APPEAL

MATOJANE J

[1] The applicant seeks leave to appeal the judgement and order of this court handed down on 4 November 2021. Leave is sought to appeal to the Full Court of this division alternatively to the Supreme Court of appeal (SCA). Leave to appeal is sought in terms of section 17(1)(a)(i) of the Superior Courts Act 10 of 2013 (Superior Courts Act).

[2] Section 17(1) of the Superior Courts Act provides that leave to appeal may only be granted 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"

[3] It is now trite that in considering the application for leave to appeal, a higher threshold needs to be met before leave to appeal could be granted. There must exist more than just a mere possibility that another court would find differently on both the facts and the law. Plasket AJA in Smith v S[1] held that:

> "What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. 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."

[4] The crux of the appeal is whether the applicant is a surviving spouse of a polygamous marriage contracted in accordance with the International Pentecostal

[1] 2012 (1) SACR 567 (SCA) at para 7

Holiness Church ("IPHC") religious rights and as such, whether she is entitled to the benefits envisioned by the Act, in particular the effect it has on a widow's potion on intestacy and the Maintenance of surviving spouses Act 27 of 1990 (“MSSA”). She sought an order for the declaration of invalidity of section 1(4)(f) of the Interstate Succession Act 81 of 1997 ("the Act") in so far as it excludes her.

[5] The first ground on which leave to appeal is sought is that the court erred in finding that the appellant's marriage to the deceased was illegal and unenforceable. The applicant argues that the court refused to give effect to the marriage because it relied on affidavits purportedly deposed to by the late Mr Modise and the applicant, which were not commissioned and dated as a result, it could not be agreed that the deceased and the applicant deposed to same.

[6] It is a basic rule of our law that an order of a court of law stands until set aside by a court of competent jurisdiction. Until that is done, the court order must be obeyed, even if it may be wrong[2]. Froneman J in *Magidimisi v Premier of the Eastern Cape and Others*[3] emphasized that:

"in a constitutional democracy based on the rule of law final and definitive court orders must be complied with by private citizens and the state alike. Without that fundamental commitment constitutional democracy and the rule of law cannot survive in the long run. The reality is as stark as that.

[7] The duty to obey court orders is a constitutional imperative. Section 165(5) of the Constitution provides that an order or decision issued by a court binds all persons to whom and organs of state to which it applies. Courts bears a constitutional duty to ensure that court orders are adhered to and enforced, allowing court orders to be ignored will compromise the constitutional mandate of the courts and the rule of law. It follows that whether the decision was right or wrong on the merits does not affect the binding force of the order, which stands until it is set aside on appeal or review by a competent court with jurisdiction.

[8] On 16 February 2012, the sixth respondent, the "first wife" of the deceased, launched an urgent application under case no 05963/2012 in which she sought to

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[2] Department of transport v Tassimo (Pty) Ltd with 2017 (2) SA, *Moodley v Kenmont School and Others* (para 36), Whitehead and Another v Trustees of the Insolvent Estate of Dennis Charles Riekert and Others(567/2019) ZASCA 124 (7 October2020

[3] (2180/04 , ECJ031/06) [2006] ZAECHC 20 (25 April 2006)

interdict the planned marriage between the applicant and the late Mr Modise, which was scheduled to take place on 26 February 2012.

[9] In terms of the court order granted on 23 February 2012, the deceased and the applicant were ordered not to enter into any marriage whilst the marriage between the deceased and the sixth respondent was still in existence. Contrary to the court order and on 26 February 2012, the applicant and the deceased purported to enter into a polygamous marriage in accordance with the IPHC religious rights during the existence of the deceased marriage to the sixth respondent. This conduct by the applicant has had the effect of nullifying the order made by this court on the 23 February 2012.

[10] Such a marriage is a nullity as it was expressly prohibited by the court order. Ponnan JA in Motala NO and Others[4] relying on Schierhout v Minister of Justice 1926 AD 99 held:

> "…It is after all a fundamental principle of our law that a thing done contrary to a direct prohibition of the law is void and of no force and effect. Being a nullity a pronouncement to that effect was unnecessary. Nor did it first have to be set aside by a court of equal standing

[11] It does not avail the applicant to contend that the affidavits of the deceased and herself that served before the court on 23 February 2012 were not properly commissioned when she elected not to take the court in her confidence and explain why she elected not to have the order rescinded or set aside.

[12] Even if I am wrong in my finding that the applicant's purported marriage to the deceased was void *ab initio* and of no effect, it is clear from all the facts in this matter that the purported marriage was unlawful as the deceased was already married to the sixth respondent in community of property at the time it was entered into. It follows, therefore, that the applicant cannot be deemed a "spouse" or "survivor" for the purposes of section 1 of the Interstate Succession Act and is not entitled to inherit a child's portion of the deceased estate.

[13] As the applicant was not a spouse of the deceased but a life partner, she does not have *locus standi* to bring the present proceedings seeking a declarator

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[4] Master of the High Court Northern Gauteng High Court, Pretoria v Motala NO and Others (2012 (3) SA 325 (SCA) (1 December 2011)

that the protection afforded to "a spouse" as referred to in section 1 of the Act should include all of the wives married to a deceased husband in terms of a polygamous marriage solemnised by the IPHC.

[14] In light of my finding above, I do not deem it necessary to traverse other grounds of appeal raised by the applicant. I am of the opinion that, on the merits, the appeal will have no reasonable prospect of success, and in respect of the above circumstances and factors, there is no compelling reason why the appeal should be heard. In all the circumstances, it would not be in the interest of justice to grant leave to appeal.

Order

[15] In the circumstances, an order is granted dismissing an application for leave to appeal, with costs, including the costs of two counsel if so employed.

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KE MATOJANE
JUDGE OF THE HIGH COURT

Heard: 18 August 2022
Judgment: 26 August 2022

For Applicant: D.B. Ntsebeza SC (with B Mkhize)
Instructed by: Tony Tshivhase Inc.
For Ninth Respondent: Dickson
Instructed by: Phosa Loots Inc.