

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 43100/15

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

Date _____ Signature _____

In the matter between:

KHAINA ANNE MONARENG

APPLICANT

And

AHMED DADA AND 4 OTHERS

RESPONDENTS

Summary: Application for an extension of time to file a declaration outside the time period fixed by a Court order. *Good cause* must be shown in order for the extension to be granted. Condonation is not there for the mere taking. The delay of

over five years is excessive and required a cogent and reasonable explanation to enable the Court to indulge the applicant. Where the explanation is extremely poor and lacking in details prospects of success becomes irrelevant. Held: (1) The application is refused with costs.

JUDGMENT

CORAM: MOSHOANA, J

Introduction

[1] This is an opposed application in terms of which the applicant, Ms Khaina Monare (Monare) seeks an order to extend the time period fixed in an order granted on 24 August 2017 by the learned Acting Justice Mogagabe. In terms of that order, motion proceedings instituted by Monare, seeking a declaratory relief to the effect that the customary marriage entered into between her and the late Abdul Dada (deceased) complied with the requirements of a valid customary marriage, were referred to trial and Monare was ordered to deliver a declaration within 20 days of the order. Additionally, Monare had also sought an order directing the Department of Home Affairs to register the alleged customary marriage in terms of section 4 (7) of the Recognition of Customary Marriages Act¹. Monare failed to deliver a declaration within the fixed period of 20 days as ordered. Five years later, Monare launched the present application.

Background facts and evidence

[2] According to Monare's counsel this matter seeks to advance the principle of social justice and the Court must treat it as such and show some lenience to her. Briefly,

¹ Act 120 of 1998 as amended.

the facts appertaining this matter are simple and straight forward. Monare alleged that in the 1980s she got involved in a romantic relationship with the deceased, who at the time was a married man. Monare further alleged that the deceased negotiated and entered into a customary marriage with her on 01 September 2007. Allegedly, both Monare and the deceased failed to register such a customary marriage within the time stipulated in the Act. The deceased passed away on 28 February 2015. Around 5 June 2015, Monare launched an application seeking the orders already mentioned above. As indicated, the application was enrolled before Acting Justice Mogagabe, who on the day made what appeared to be an agreed draft order an order of the Court². Five years after the order of the Acting Judge, the present application was launched.

Analysis

[3] Essentially, this Court is faced with a condonation application. Monare failed to file a declaration as ordered. Now she seeks an indulgence from this Court to be permitted to file the declaration after many years had passed. Her 20 days, as fixed by the Acting Justice, had expired a thousand folds so to speak. Before this Court deals with the merits of the condonation application, it behoves this Court to deliver a comment on a misgiving expressed during argument of this matter to both counsel with regard to the order of 24 August 2017. For avoidance of any doubt, this Court is not empowered to appeal and or review the order of the learned Acting Justice. The misgivings are that the order, regard being had to its contents, seem to have simply converted what was originally a motion matter into an action.

[4] Rule 6 (5) (g) of the Uniform Rules provides that where an application cannot properly be decided on affidavit the Court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave

² The stamped Court order is still at large.

for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise. There is no indication anywhere in the papers before me as to why the matter was referred to trial. Both counsel were unable to assist the Court as to the reason why the matter was referred to trial. They both confirmed that on the day in question an order to that effect was made. Where an application for referral to oral evidence is not made timeously, a party who should have anticipated a dispute of fact should be non-suited on application of the *Plascon Evans* rule. No details are available as to whether the Acting Justice acted *mero motu* or *Monare* as an applicant successfully applied for the referral of the matter for trial. It seems to be settled law that a referral to trial may still be ordered in the absence of an application for such a referral³.

[5] It has been held that in an instance where a matter is referred to trial, such must happen only in instances where there is a dispute of fact. At this stage, this Court must speculate that there was a dispute of fact hence the decision of the Acting Justice to refer the application to trial. However, it has been held that in such instances, it is essential that the issues are defined.⁴ Regrettably, in the order of the Acting Justice, issues were not defined. It only appears as if the motion proceedings were simply converted from a motion to an action. Usually, a Court orders in such instances that the notice of motion shall stand as a simple summons, the answering affidavit as a notice of intention to defend and that a declaration shall be delivered within a stated period. Regrettably, the order does not order that the notice of motion shall serve as a simple summons nor does it order that the opposing affidavit shall serve as a notice of intention to defend. Simple summons is used usually where quantum is already determined or can be easily ascertainable usually without leading evidence.

³ See *Pahad Shipping CC v Commissioner, SARS* [2010] 2 All SA 246 (SCA)

⁴ See *Les v Bornstein* 1948 (4) SA 333 (C) and *Room Hire Co Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) 1155 (T).

[6] Ordinarily, a declaration is required in all actions in which the plaintiff claims a debt or liquidated demand⁵. The current matter does not involve a debt or a liquidated demand. Nevertheless, in an instance where a Court has ordered that the notice of motion stands as the summons, which order was not made in this instance, failure to file a declaration within a particular time may be remedied by delivery of a notice of bar. In *casu*, there is no notice of bar that was issued, thus, Monare was not *ipso facto* barred⁶. All what happened is that the time period fixed by the Acting justice lapsed. By necessary legal implications, until the fixed period is extended by a Court, Monare lost the opportunity to file a declaration 20 days after 24 August 2017.

[7] Monare, in the current proceedings, launched an application contemplated in rule 27 (1) of the Uniform Rules. Given that the time period to file a declaration was fixed by an order, Monare was bound to seek condonation in terms of this rule. Such an application may be granted only where a *good cause* is shown. Where there has been a long delay, as it is the case herein, a full and reasonable explanation which covers the entire period of delay must be given. This is so because condonation is not there for the mere taking. It is not sufficient for a party to simply allege that the other party shall not suffer prejudice. Nonetheless, the prejudice that will visit the respondents in this matter is so palpable. A delay of over half a decade is bound to prejudice the other party. Memories fade and witnesses disappear after such a long delay. The fact that matters take long to be enrolled by the Registrar is no licence to litigate at one's leisure.

[8] The explanation provided by Monare is shallow and not convincing at all. All this time of the delay, she has been looking for her erstwhile attorney who disappeared on her. In July 2022, she obtained a *pro bono* assistance. This was almost five years later. She provides no explanation as to what she was doing since August 2017 to litigate her matter. The fact that she is illiterate and impecunious is no

⁵ See rule 20 of the Uniform Rules.

⁶ See *Landmark Mthatha (Pty) Ltd v King Sabata Dalinyebo Municipality: In re African Bulk Earthworks (Pty) Ltd v Landmark Mthatha (Pty) Ltd* 2010 (3) SA 81 (ECM) at 86B-C.

justification for the inaction for such a long period of time. To my mind, the delay has not been fully explained and it is crystal clear to this Court that Monare does not seriously intend to proceed with this matter⁷. Generally, where a party is obliged to seek condonation, such a party must do so as soon as it becomes apparent that condonation is required. In this instance, it took Monare a year to approach this Court to seek condonation. In July 2022 she had the benefit of legal advice yet, the present application was only launched in July 2023. Clearly, Monare was not serious about proceeding with this matter.

[9] Nevertheless, it is clearly not in the interest of justice to grant the extension. Monare's prospects of success are very slim. Besides where the explanation is so poor, the prospects of success become meaningless⁸. Nonetheless, there is no sufficient evidence to prove that the requirements of the Act were met. Section 3 (1) (b) of the Act requires the marriage to be celebrated in accordance with customary law. There is no evidence that Monare was handed over to the deceased family in line with the *Pedi* custom. On her own version the handing over of a *makoti* (bride) happened at her parental home as opposed to the parental home of the *mokgonyana* (bridegroom) deceased. On her own version she was never handed to *bogadi* (the homestead of the deceased). When dealing with prospects of success in the present application, Monare simply alleged that she possess prospects because she was a life partner of the deceased.

[10] In the final analysis, this Court is not satisfied that a *good cause* was demonstrated by Monare. The explanation is poor and lacking in many respects. Each and every day of the delay was not explained at all. A party seeking an indulgence must provide an explanation for each day that passes without compliance.

[11] For all the above reasons, the following order is made:

⁷ See *Silverthorne v Simon* 1907 TS 123 at 124.

⁸ *Collet v CCMA* [2014] 6 BLLR 523 (LAC)

Order

1. The application for extension is refused.
2. The applicant must pay the costs of this application.

**GN MOSHOANA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

APPEARANCES:

Counsel for the Plaintiff:	Mr D B Tshabalala
Instructed by:	Malapane Bruce Attorneys
Counsel for the Respondents:	Ms Z Omar
Instructed by:	Zehir Omar Attorneys
Date of the hearing:	12 February 2024
Date of judgment:	13 February 2024