REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

CASE NO:4969/2021

(1) **REPORTABLE: ~~YES~~ / NO**
(2) **OF INTEREST TO THE JUDGES: ~~YES~~ / NO**
(3) **REVISED.**

Signature: ……

Date: **03 / 07 / 2025**

In the matter between:

CHIPO CHAROVA	**APPLICANT**
And	
LOVENESS MUKOYI	**1ST RESPONDENT**
CHIPO CHAROVA N.O	**2ND RESPONDENT**
MASTER OF THE HIGH COURT	**3RD RESPONDENT**
THE MINISTER OF HOME AFFAIRS	**4TH RESPONDENT**

JUDGMENT: LEAVE TO APPEAL

MONENE AJ

INTRODUCTION

[1] This is an application for leave to appeal against a decision of this court handed down electronically on 29 October 2024 in which this court found, in the main, that that a Zimbabwean customary marriage entered into between one Loveness Mukoyi, the first respondent and a now deceased Mishack Charova was for the purposes of administering the deceased estate in South Africa implicated valid and in the same breadth declared a "civil" marriage between the deceased and Chipo Charova, the leave to appeal applicant, a nullity.

[2] In sum the grounds upon which the judgment and orders of this court, as I understand them from the notice of application for leave to appeal and extensive submissions by counsel before me, are assailed by the applicant are the following:

2.1 That this court misdirected itself on its finding that it has jurisdiction to determine the dispute.

2.2 That this court disregarded the fatality of lack of solemnization of a customary marriage to the validity of a customary marriage in Zimbabwe

as well as the import of the customary wife's minority status at the time of the conclusion of the marriage.

2.3 That this court misdirected itself in applying South African legal instruments to declare the "civil" marriage of the applicant to the deceased a nullity and should have relied on Zimbabwean law as the estate in question is largely Zimbabwean. It seems to be argued somewhat incongruently and in a conflated contradictory manner that either only Zimbabwean law or only South African law ought to have been employed and not a consideration of both.

[3] The parameters within which leave to appeal contestations are to be determined are catered for in section 17 (1) (a) of the Superior Courts Act No 10 of 2013 ("the Act") provides as follows:

"*Leave to appeal may only be given 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 judgements on the matter under consideration;"

[4] Shedding more light on the above-stated leave to appeal test the SCA in ***Ramakatsa and Others v African National Congress and Another (724/2019) [2021] ZASCA 31(31 March 2021)*** **("Ramakatsa")** at para 10, the Supreme Court of Appeal held as follows:

> "*I am mindful of the decisions at high court level debating whether the use of the word 'would' as opposed to 'could' possibly mean that the threshold granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates 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 other words, the appellants in this matter need to convince this court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist."*

[5] In the unreported matter of ***Action Tinyiko Ngoveni and Another v Premier Limpopo Province and 6 Others (02/2022) Limpopo local Division,***

Thohoyandou [26 June 2024] this court made the following remarks which, in my view, deserve repetition *in casu*:

> "*I momentarily pause, digress a bit and note that the court in* ***Ramakatsa,*** *while not per se answering the question of whether 'would' infers a more strenuous test than 'could', went on to itself employ the word 'could'. I venture to state here, albeit uninvited to go so far, that, it would in my view not be humanly possible nor permissible for a court seating as a court determining a leave to appeal application to make a finding on what a court of appeal* ***would do****. Such a finding would have some definitiveness which would not only be prejudging the consequent appeal and thus conflating the leave and appeal stages but would, if the appeal subsequently fails, disrespectfully suggest rather that the court granting the leave was in its injudicious soothsayer sighting of the future, some kind of false prophet. Courts are, as we are taught, steeped in the facts and law realm of this planet and have no jurisdiction in the prophetic spiritual other worldly. In my view therefore, despite the employ of the word "would" by the legislature in the Act, the actual rational intended meaning remains "could", which is not only a lesser attainable threshold but one judiciously and rationally permissible. Perhaps that is why the SCA in Ramakatsa did not pronounce with any definiteness on the debate at "high court level" on the could/would interpretation.*"

[6] Avoiding regurgitation of this court's judgement, I am not persuaded that this court's judgment and orders face a reasonable prospect of being overturned on appeal either on the literal meaning of the "would" test in the statute nor this court's suggested less strenuous test of a higher form of "could", regard being had to the following considerations:

6.1 The matter having been referred to this court for oral evidence on the validity of the two marriages, one concluded customarily in Zimbabwe ad the other "civilly" in South Africa, it was incumbent on the parties to adduce evidence to help the court determine the factual matrix. In that regard only the Zimbabwean customary wife testified, the leave to appeal applicant did not testify nor did she lead any evidence. Factually therefore the Zimbabwean customary wife's version is uncontested on all fronts making the applicant's protestations on age at marriage, which is spoken to at paragraph 37 of the judgement with reference to the Customary Marriages Act of Zimbabwe (Chapter 5:07) and related matters of no helpful value.

6.2 The point on solemnization of the Zimbabwean customary marriage was sufficiently reasoned, with reference to a clear provision in section 68(3) of the Zimbabwean Administration of Estates Act (Chapter 6:01) at paragraphs 33 and 34 of this court's judgement and needs no belaboring. In my view therefore, no other court, correctly seeped in the context of the cultural

milieu of the matter and the facts testified to by the old woman, Loveness Mukoyi on both the pre-marriage and post marriage situation inclusive of the post death happenings, would elevate the applicant's clasping at straws to something concrete enough to discount the Zimbabwean customary marriage.

6.3 There are no reasonable prospects that a court of appeal would find differently to this court on the nullity of the "civil" marriage of the applicant, at least for administration of estates purposes in the light of the solid authority of the SCA in **Monyepao v Ledwaba and Others (1368/18) [2020] ZASCA("Monyepao")** and **Netshituka v Netshituka 2011(5) SA 453(SCA)("Netshituka")**. Beyond that, seriously eyebrow-raising questions posed by this court at sub-paragraphs 44.1 to 44.2 of the judgement and remaining unanswered by the leave to appeal applicant, who remained mum despite a referral to oral evidence, suggest to this court that the "civil" marriage did not need to be pitted against another to be set aside. It falls on its own due to several unanswered questions and oddities swirling around it.

6.4 The suggestion that there is a misdirection in this court's employ of both the *lex loci celebrationis* of the customary marriage and the South African legal instruments such as **Monyepao, Netshituka, Benina Chitima v Road**

Accident Fund (18996/2011) Western Cape Division(15 December 2011) and **Zulu v Zulu and Others 2008(4) SA 12 D** or the view that perhaps only Zimbabwean or only South African law should have found application(if that is what the notice of application for leave to appeal communicates) strikes a serious discord with trite practice of law that it is best to simply state that the submissions in that direction are unfortunate. No other court may let alone will find differently on that score.

6.5 The inelegantly and half-heartedly taken point on jurisdiction is, in my humble view, a non-starter. It simply stretches incredulity to even begin to fathom that a court of appeal would endorse a biblical Pontius Pilate approach of washing hands and stating that South African Courts lack jurisdiction in a matter implicating a deceased estate found in this country.

[7] On account of the above considerations I find that none of the grounds mentioned in the notice of application for leave to appeal and argued before me are persuasive to tilt the scales in favour of the applicant when the section 17(1)(a) test alluded to *supra* and the attendant Ramakatsa rationale are applied.

[8] I understand the law as per section 17(1) (a)(ii) of the Act to be that beyond a finding that there are no reasonable prospects of success a court hearing a leave to appeal application must still enquire into whether there is any compelling

reason why the appeal should be entertained and based on which leave may be granted. Apart from the obvious relative novelty of the issues involved in casu I am unable to find any compelling reason for leave to appeal to be granted. I certainly do not understand novelty of a matter to on its own constitute a compelling reason to bloat courts of appeal with appeals which are substantially poor on prospects of success, as, in my view, the one in casu. If the relatively novel aspects of this matter are to be entertained and determined differently or entrenched by a court of higher standing, it must not be through this court granting leave where it strongly holds that the leave to appeal test bars it to. Other routes of reaching those heights remain available if properly summitted.

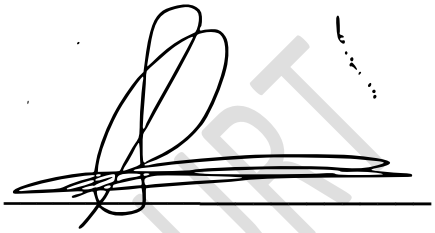
[9] In all the above premises there are, in my view, no reasonable prospects that the applicant could, let alone would, succeed on appeal. The application should thus fail.

[10] The application for leave to appeal was successfully opposed by the first respondent, Loveness Mukoyi. There is no reason why the costs of this application should not, as is custom, follow the event.

[11] In the result, I make the following order:

11.1 The application for leave to appeal is dismissed.

11.2 The applicant, Chipo Charova, is ordered to pay the costs of this application which costs shall include the costs of counsel on scale B



MALOSE. S. MONENE

ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES

Heard on: 07 April 2025

Judgement delivered on: 03 July 2025

For the Applicant: Mr Maphutha M E

On Instructions from: Mathabatha Lekoloane Attorneys

Email: m11attorneys@gmail.com

For the First Respondent: Mr Mureriwa I

On instructions from: DDKK Inc. Attorneys

Email: vz@ddkk.co.za