REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: **53489/13**

21/10/2016

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

SIGNATURE ..... DATE 21/10/'16

In the matter between:

MARGARET MANAKA N. O.	APPLICANT
and	
RUTH TSHAI THEBE	1ST RESPONDENT
THE MINISTER OF HOME AFFAIRS	2ND RESPONDENT
THE DIRECTOR GENERAL OF HOME AFFAIRS	3RD RESPONDENT
THE MASTER OF THE HIGH COURT, PRETORIA	4TH RESPONDENT

J U D G M E N T

SWARTZ AJ

[1] This is an application in terms of Rule 42(1)(a) of the Uniform Rules of Court for the recession of a judgment erroneously granted in the absence of a party affected thereby. The Court ordered on 18 March 2014 that the second and third respondents register the customary marriage between the late Thabane Israel Ratsoma and the first respondent in terms of section 4(a) of the Recognition of Customary Marriage Act 120 of 1998. The application is opposed.

[2] The conclusion of the customary marriage between the first respondent and the deceased is disputed by the late applicant, Modjadji Mamma Ratsoma. The applicant died on 28 October 2015 and is substituted by Margaret Manaka in her capacity as duly appointed Executrix of the Estate late Modjadji Mamma Ratsoma. It was submitted on behalf of the applicant that the late applicant as mother of the deceased and *de facto* matriarch of the Ratsoma family had a direct and substantial interest in the matter. If Mothle J who granted the order on 18 March 2014 had been aware that the customary marriage was disputed by the deceased's family, he would not have granted the order.

[3] The first respondent and the late Thabane Israel Ratsoma had lived together as husband and wife since December 2008. Their marriage was never registered by the second respondent. On 11 September 2013 the first respondent (then applicant) approached the Court with an application to have the customary marriage entered into between the first respondent and the late Thabane Israel Ratsoma registered

by the Department of Home Affairs posthumously. The Court then ordered that the fist respondent should cause her application to be served on the mother of the deceased and two other individuals, namely H. L. Peta and P. R. Phasha. This was duly done and on 15 October 2013 the late applicant served on the first respondent an application to intervene. Subsequent thereto the late applicant apparently did nothing to take the application to intervene any further. On 20 January 2014 the matter was again placed on the roll for hearing on 28 February 2014. The late applicant was cited as the first intervening party. The Court ordered that the respondent should cause the notice of set down to be served on the Minister of Home Affairs and on the Director General of the Department of Home Affairs. This was done and on 28 February 2014 the Notice of Set Down was served on the Minister of Home Affairs and on the Director General of the Department of Home Affairs. The late applicant was not cited as an intervening party, nor was the notice served on her. The order granting the first respondent's application was given in the absence of the late applicant, who was again not cited. It was argued on behalf of the first respondent that the late applicant as Intervening Party was for all intent purposes not a party to the proceedings. She failed to file an opposing affidavit as an intervening party. She was therefore not properly before the Court. It was argued that the late applicant was at all times legally represented and, the only logical conclusion, was that she was no longer interested in pursuing her application to intervene. I am not persuaded by this argument. In an

affidavit of the late applicant dated February 2014, she stated as follows:

"*I was served with Court papers of this honourable Court at my home... even though I am not cited as a party in these proceedings...*

There was never a marriage which was concluded between my late son and the Applicant...

I submit that it be in the best interest of justice that I be allowed to intervene in this matter as I have a direct and substantial interest in this matter...

Wherefore I pray for the granting of leave to intervene".

[4] The first respondent submits that there was never malice intended on the part of the respondent in not serving the applicant and/or her attorney of record. It is common cause that the notice was not served on the applicant or her attorney. They were not cited as intervening parties when the matter came before Mothle J on 18 March 2014. It is abundantly clear that the existence of a customary marriage between

the deceased, the late applicant's son, and the first respondent was heavily disputed. This was probably not brought to the attention of the Judge when the order was granted in the absence of the intervening party who had a direct and substantial interest in the matter.

[5] Rule 42(1)(a) of the Uniform Rules of Court affords the Court a discretion to rescind an order erroneously granted in the absence of any party affected thereby. It is clear that the order was erroneously granted. Had the Court been aware of the factual dispute of the existence of the customary marriage, the Judge would probably not have granted the order in the absence of the intervening party. See **Naidoo and Another v Matlala NO and Others**[1] where the Court held that:

"In general terms, a judgment is erroneously granted if there existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge, if aware of it, not to grant the judgment – see ***Nyingwa v Moolman NO*** **1993 (2) SA 508 (Tk GD)** at 510D-G; **Herbstein & Van Winsen Vol 1** 931. It follows that if material facts are not disclosed in an *ex parte* application – see ***Schlesinger v Schlesinger*** **1979 (4) SA 342 (W)** at 348C-349E; ***National Director of Public Prosecutions v Basson*** **2001 (2) SACR 712 (SCA)** para 21; ***United Diamond Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another*** **1972 (4) SA 410 (C)** at 414F-415C – or if a fraud is committed (i.e. the facts are deliberately misrepresented to the court) the order will be erroneously granted. It has been held that an order granted in an application brought *ex parte* without notice to a party who has a direct

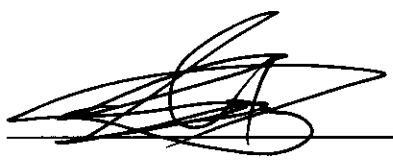
[1] Naidoo and Another v Matlala NO and Others (67502/2010) [2011] ZAGPPHC 165; 2012 (1) SA 143 (GNP) (20 September 2011)

and substantial interest in the matter is an order erroneously granted – see ***Clegg v Priestly*** **1985 (3) SA 950 (W)** at 953I-954I.".

[6] In the result the following order is made;

6.1 The order of 18 March 2014, ordering the second respondent to register the customary marriage between the first respondent and the late Thabane Israel Ratsoma, is rescinded.

6.2 The first respondent is ordered to pay the costs on a party and party scale.



E. SWARTZ

ACTING JUDGE OF THE HIGH COURT

Counsel for the Applicant:	C. Joubert
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Counsel for the 1st Respondent:	B. F. Gededger
Instructed by:	MAVHUNGU MASIBIGIRI INC
Counsel for the 2nd & 3rd Respondent:	T. Ramahlaha
Instructed by:	C. B. RIHLAMPFU ATTORNEYs

Date of hearing:	17 October 2016
Date of Judgment:	21 October 2016