IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 5858/2019

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

DATE	SIGNATURE
26 August 2022	.....

In the matter between:

PAUL MISTREY MXHOSANA	**APPELLANT**

and

DISERLECOE SARAH MXHOSANA N.O (in her capacity as duly appointed Executrix of the estate of the late Velile William Mxhosana	**1ST RESPONDENT**
CAPITEC BANK LIMITED	**2ND RESPONDENT**
MASTER OF THE HIGH COURT	**3RD RESPONDENT**
MMI GROUP HOLDINGS T/A METROPOLITAN	**4TH RESPONDENT**

This judgment was handed down electronically by circulation to the parties' representatives by email.

The date and time of hand-down is deemed to be 26 August 2022.

JUDGMENT

N KHUMALO J

Introduction

[1] The Applicant, applies for leave to appeal to the full bench against the Judgment of this court that dismissed his Application for an order declaring the Applicant to be the descendant of the deceased as in terms of the Intestate Succession Act 81 of 1987 and the Reform of the Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 and directing the 3rd Respondent, the Master of the High Court, to remove the 1st Respondent as an executrix of her deceased son's estate ("the late estate"), and within a stipulated period from the date of the order to appoint the Applicant instead as the executor.

[2] The 1st Respondent was appointed and furnished with letters of executorship on 14 December 2018, on application as the only surviving relative of her deceased son who died without issue on 6 November 2018.

[3] In order for the Applicant to succeed in this matter he was required to establish a *locus standi* that entitles him to challenge the appointment of the 1st Respondent by making a case for the court to make the required declaration.

[4] It is common place that for leave to appeal to be granted the requirements set out in s 17 of the Superior Court Act 10 of 2013, are to be met. The subsection has raised the bar for the test for granting of the leave to appeal, which now compels a court to grant the leave only when it is of the believe that there are reasonable prospects that another court would come to a different conclusion.

[5] In *The Mont Chevaux Trust v Goosen* 2014 JDR 2325 (LCC) an unreported decision of the Land Claims Court, Bertelsmann J held at para [6], albeit obiter, that:

> "It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see *Van Heerden v Cronwright & Others 1*985 (2) SA 342 (T) at 343H. The use of the word **"would**" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against." [My emphasis)

[6] The Supreme Court of Appeal, confirmed in *Notshokovu v S* (157/15) [2016] ZASCA 112 (20 September 2016) at para [2] recognising the new challenge, that an Appellant now faces a higher and stringent threshold in terms of the Act. In *MEC for Health, Eastern Cape v Mkhitha and Another* (1221/2015[2015] ZASCA 176 (25 November 2016) the court held at par [17] that:

> "[17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be sound, rational basis to conclude that there is a reasonable prospect of success on appeal."

[7] Furthermore, what is appealable is the court order or judgment. A court order or judgement is described in *Zweni v Minister of Law and Order of the Republic of South Africa* (310/91) [1992] ZASCA 197; [1993] 1 All SA 365 (A) 1993 (1) SA 523 (A) at 532D as follows:

> "The word "judgment" has (for present purposes) two meanings, first the reasoning of the judicial officer (known to American jurists as his "opinion)" and second, "the pronouncement of the disposition" (Garner, A Dictionary of Modern Legal Usage s v Judgments, Appellate Court) upon relief claimed in a trial action. In the context of s 20 (1) we are concerned with the latter meaning only."

[8] As a result views expressed on the factual findings or on any of the points of law found applicable cannot be made the subject of a pronouncement on the judgment – all the more so when the view taken on the point in question makes no difference to the outcome of the case: see *Absa Bank Limited v Mkhize and Another, Absa Bank Ltd v Chetty, Absa Bank Ltd v Mlipha* (716/12) [2013] ZASCA 139; 2014 (5) SA 16 (SCA) where Ponnan JA opined that:

> "In truth the matter was approached as if an appeal lies against the reasons for judgment. It does not. Rather, an appeal lies against the substantive order made by a court." (Western Johannesburg Rent

Board & another v Ursula Mansions (Pty) Ltd 1948 (3) SA 353 (A) at 355.)

[9] The Application for leave to Appeal was therefore considered on the basis of the abovementioned tenets.

Grounds of Appeal and Responses thereto.

[10] The Applicant seeks leave to appeal against the finding of facts and ruling of law by the court on the ground that the court erred:

[10.1] when it found that the facts averred in Applicant's Application and the facts admitted by the Respondent together with the facts as stated by the Respondent do not justify the granting of the relief sought.

[10.2] when it failed to rule on prayer 7 and 8 of the Applicant's Application (Prayers 7 and 8 are together with prayer 9 and 10 part of the reliefs sought on Part B of the Applicant's Notice of Motion which part was before court when the matter was decided).

[10.2.1] The judgment on paragraph 32 has adequately dealt with the implication a finding on the declaration sought by the Applicant would have to the remainder of the relief sought in prayers 7 to 8. The decision on prayers 1 to 6 made it not necessary to decide on the remainder of the issues.

[10.3] in its finding of fact that the Applicant was the late Komane's only child.

[10.3.1] The Applicant was the late Komane's only surviving child. This articulation will not make any impact on the order made by the court.

[10.4] in finding in law that it was required that the deceased accepted the Applicant as his son at the time of Applicant's birth.

[10.4.1] No such finding is found in the Judgment. The Applicant in paragraph 5.5.3. of its Founding Affidavit made such an assertion. The Applicant also alleged to have been maintained by the deceased since birth, but later disowned those assertions and agreed with the 1st Respondent that the deceased was in fact in prison when the Applicant was born and there was no relationship between the deceased and Komane at the time of Applicant's birth.

[10.5] The court erred in failing to have regard to the approach enunciated in *Howard Decker Witkoppen Agencies and Fourways Estates (Pty) Ltd v De Sousa* 1971 (3) SA 937 T at 940E -G2 and the law of evidence in respect of public and private documents. Further in failing to have regard to the provisions of s 9 to 11 of the Births and Deaths Registration Act 51 of 1992. It erred by disregarding all the documents attached to the Applicants affidavit because the Respondent denied the authenticity thereof.

[10,5.1] The court has referred to and considered the documents, and where relevant to do so expressed its views. In respect of the documents attached by the Applicant, including the unabridged birth certificate, the 1st Respondent pointed out that they have all been altered, and recently issued, challenging the authenticity of the documents. The onus was on the Applicant to prove their authenticity and explain how he managed the alterations and registration of the deceased's name as his father on his birth certificate post the deceased's demise.

[10.6] The court erred by finding that the deceased did not accept the Applicant as his own child.

[10.6.1] The court actually did consider the fact that the 1st Respondent acknowledged that the deceased treated the

Applicant as his own son but had not gone to the extent of adopting him.

[10.7] The court erred in finding that the 1st Respondent disputed that the deceased adopted the Applicant in terms of the customary law. The 1st Respondent stated that a customary law adoption does not exist.

[10.7.1] This is the substance of the dispute between the parties and not the court's finding.

11. The Applicant argues that the court should have made the following findings:

[11.1] The 1st Respondent conceded that the deceased maintained the Applicant by registering him as a dependant on his medical aid, paying his medical expenses and providing him with accommodation for a period of 17 years. The deceased nominated the Applicant as beneficiary to his retirement policy and this act is supported by documentary evidence.

[11.1.1] The issue is not about the maintenance of the Applicant by the deceased and those facts were not disputed by the 1st Respondent, who also conceded that the deceased accepted parental responsibility of the Applicant as a stepfather. The facts were recognised by the court taking also into consideration that Komane understood that the deceased could not be 100 % responsible therefore had asked the sister in law to assist in taking care of the Appellant which she actually did.

[11.2] The deceased acknowledged the Applicant as his son and subsequent thereto the Applicant's surname was amended at Home Affairs.

[11.2.1] The change of the Applicant's surname to that of the deceased which was already done on 15 September 1998 or an assumption of a surname, does not effect an adoption. The deceased did not register himself on the Applicant's birth

certificate as the father of the Applicant. The evidence of the 1st Respondent is that the purpose of the change of surname was so that the Applicant can be registered on the deceased's medical aid. The Applicant is further referred to paragraph 43 of the Judgment.

[11.3] The 1st Respondent failed to prove that the original documents issued by the Department of Home Affairs have been tampered and altered.

[11.3] The Applicant obtained the unabridged certificate that registered the deceased as his father post the demise of the deceased on 19 January 2019. Applicant carried the onus to prove the authenticity of the documents.

[11.4] The Applicant was regarded by the deceased as his son and dependant.

[11.4.1] The 1st Respondent agrees that the deceased treated the Applicant as his son. The treatment as one's son does not automatically make that factual.

[11.5] The 1st Respondent's bare denials are unsubstantiated and not *bona fide*.

[11.5.1] In fact, the 1st Respondent's denials were corroborated by the Applicant in his Supplementary Affidavit when he contradicted the allegations he made in his own Founding and Replying Affidavit, confirming the facts as asserted by the 1st Respondent regarding his birth and when the deceased assumed responsibility over him.

[11.6] The court erred in finding that it was a requirement that the Applicant's biological father consent to his *de facto* adoption by the deceased.

[11.6.1] The Applicant does not expatiate on his contention why would the court have erred in its finding and therefore merits no

response. The Applicant is referred to paragraph 42 to 45 of the Judgment.

[11.7] The learned court erred in disregarding the evidence contained in the Applicant's Supplementary Affidavit.

[11.7.1] Reference is made herein to the judgment that has dealt extensively with the Applicant's whole evidence including that in its Supplementary Affidavit.

[12] The basis of Applicant's application as set out in his Founding Affidavit was that the deceased and his mother Komane, were in a permanent romantic relationship whilst his mother was pregnant with him. The deceased accepted him as his own son, supported and provided for him since birth. He was always financially dependent on the deceased. The deceased was registered as his father in terms of the Births and Deaths Registration Act 51 of 1992 ("Births and Deaths Registration Act"). He as a result carries the surname of the deceased and has attached his birth certificate, issued on 24 January 2019, which he says is the date when he applied for an unabridged certificate. He grew up knowing the deceased to be his father who during his lifetime has accepted and raised him as his own child in accordance with the customary law.

[13] The allegation that when the Applicant was born in 1993, the deceased and Komane were in a permanent relationship whereupon the deceased accepted and supported the Applicant as his own son as initially alleged by the Applicant, (not a requirement by the court) where later conceded by him to be incorrect. The Applicant further incorrectly alleged that his birth was subsequently registered, naming the deceased as his father. The 1st Respondent in her Answering Affidavit pointed out the incongruities in those allegations, that the deceased could not have accepted, supported and provided for the Applicant as his own son from the time of Applicant's birth in 1993 as the deceased was in fact in prison since 1991 and released in May 1997. The deceased only married Komane on 24 December 1997. The Applicant's birth registration subsequent to the marriage was also only in the name of Komane. The change of surname took place later and the Applicant came to live with the

deceased and Komane in 2001, when Komane's sister passed away. The Applicant in his Replying Affidavit, did not dispute the allegations.

[14] The Applicant, contrariwise in his Supplementary Affidavit confirmed the allegations by the 1st Respondent, without explaining the discrepant version he gave in his Founding and Replying Affidavit. The Applicant then alleged that the deceased and Komane had a relationship prior to deceased being incarcerated. On deceased's arrest in 1991 and sentence to death, the deceased advised Komane to move on with her life. The Applicant confirmed to have been conceived and born when the deceased was in prison. In essence confirming that at the time of Komane's pregnancy and Applicant's birth there was no relationship between deceased and Komane. It was therefore not factual that the Applicant was dependant or supported by the deceased since birth. The Applicant's birth was first registered and a certificate issued under Komane on 16 March 1998 notwithstanding that the deceased and Komane were already married by that date.

[15] It was also the Applicant's allegations that when the deceased paid lobola it was confirmed that the deceased was marrying Komane and the Applicant. The deceased, had according to the Xhosa customary law during their wedding ceremony proclaimed, signifying to the world that he adopted the Applicant and formally accepted parental responsibility for him. All that not substantiated by any credible evidence.

[16] The 1st Respondent refuted that a customary adoption took place, pointing out that the Applicant has neither a blood or legal relation with the deceased. She however confirmed that the deceased's family agree that the deceased as a stepfather treated the Applicant as his son.

[17] In proof of the allegation of his adoption by the deceased, the Applicant attached a confirmatory Affidavit by Komane's sister in law who rather confirms a legal adoption having taken place, which she alleges the Applicant and the Mxhosanas (the deceased's family) were not aware of. She alleges that the deceased's family had thought the deceased was the Applicant's biological father as the deceased treated the Applicant as his own child. Furthermore, that she has observed the treatment when

she started knowing Komane, the Applicant and the deceased in 1995 when she visited them at Pretoria, till Komane predeceased the deceased.

[18] The sister in law's Affidavit does not confirm the customary law adoption but in contradiction alleges the adoption to have been a legal adoption. The legal adoption is however conceded by the Applicant to have not taken place. The sister in law further alleges that the deceased's family members were not aware that the Applicant was not the deceased's biological son. This is in contradiction of the Applicant's statement that during the lobola wedding a pronouncement was made to the whole world that the deceased was marrying Komane, with the Applicant. As shown in the pictures, the wedding was attended by the Mxhosanas. It is therefore inconceivable that the Mxhosana family would not be aware that the deceased was not the biological father of the Applicant or of the customary law adoption, as, the pronouncement would expectantly, have been made publicly at the ceremony in their presence; see Metiso where it is stated in the experts' evidence that:

> '… (Even in cases where adoption was not reported to the traditional leader, the adoption would still be valid if due publicity was given to the process and there was agreement between the families of the adopted child and the adoptive parent(s)*'*

[19] Furthermore, the sister in law also seemed to have missed the fact that the deceased was in prison in 1995 and therefore she could not have visited the couple during that time or known the deceased by then as she alleges. Her Confirmatory Affidavit was therefore of no consequence as some of the facts were fictional and failed to confirm or collaborate the Applicant's allegations about which he certainly would not have had any first-hand information.

[20] In addition, the inference of such an adoption having taken place due to the alleged pronouncement at the lobola ceremony is contradicted by the allegation that prior to her passing, Komane told the Applicant that the deceased is not his biological father and had asked the sister in law to look after the Applicant after her passing. Komane's conduct indicates that notwithstanding the deceased treating the Applicant as his own son, she never believed it to be the total responsibility of the deceased to take care of the Applicant. The Applicant and the sister in law confirm that after

Komane's passing, the sister in law and the deceased financially supported the Applicant when required.

[21] The Applicant, of course being ill-advised, contends that the court erred in finding that it was a requirement that the Applicant's biological father consent to his *de facto* adoption by the deceased. No explanation is given why the court would have erred in its finding. The Applicant still doesn't mention anything about his father. The Applicant is referred to paragraph 43 and 44 of the Judgment

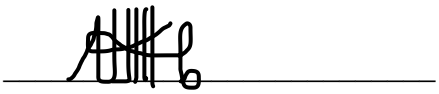
[22] The grounds of appeal raised by the Applicant are substantively and adequately addressed by the Judgment.

[23] The issue was whether or not the Applicant has proven an adoption as alleged. It being common cause that an adoption in terms of the Child Care Act had not taken place, the court had to determine whether the facts as alleged by the Applicant and admitted by the Respondent do prove at least an adoption in accordance with the Customary Law to have taken place, for the Applicant to be recognised as the descendent of the deceased, which will then entitle him to inherit from the deceased as a descendant of the deceased either in terms of the Intestate Succession Act or the Reform of Customary Law of Succession Act and Regulation of Related Matters Act 11 of 2009. The order for cancellation of the 1st Respondent's letters of executorship, could only be dealt with after the first question is resolved.

[24] The Applicant has failed to prove that the court erred in dismissing his Application in *toto.* On the reasons and argument presented, the court is not convinced that another court would arrive at a different conclusion.

It is hereby ordered that:

1. The Application for leave to appeal is refused.
2. Applicant to pay the costs.



N.V. Khumalo

Judge of the High Court

Gauteng Division, Pretoria

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