IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MTHATHA)

CASE NO: CA 645/2015

In the matter between:

THOKOZILE BANGANI Appellant

and

GOVERNMENT EMPLOYEE PENSION FUND First respondent

MINISTER OF CORRECTIONAL SERVICES Second respondent

BUKELWA MTINTSO Third respondent

JUDGMENT

RUSI J

[1] The reason why the law insists on finality of litigation is to prevent the uncertainty which deprives the parties of an opportunity to move forward with their lives and business with a clear understanding of their rights and obligations after a dispute has been adjudicated. Never-ending litigation thwarts stability in the legal system. The present matter engages this ethos of our legal system.

[2] This is an appeal with leave of the court a quo against its judgment and order dated 14 August 2007.[1] Leave to appeal was sought almost 7 years after that judgment and order. The appeal comes before us 10 years later. In short, 17 years have elapsed since the court a quo gave the judgment and order now appealed against.

Factual background

[3] The third respondent was married to Mnikelo Bangani (the deceased) on 31 May 1994 in Elliotdale. One child was born of their marriage. She separated from the deceased in 1997 as result of a marital discord which was allegedly caused by alcohol by the deceased's abuse of alcohol as well as his alleged promiscuous behaviour and extra marital affair with the appellant. Even though she and the deceased were separated, the deceased would visit her where she lived, and he simultaneously engaged her family with a view to reconciling with her.

[4] Their attempts to reconcile were hindered by the deceased's continued extra marital affair with the appellant. In 2001, the third respondent obtained employment in Durban, Kwa-Zulu Natal Province, where she worked at the time of the proceedings in the court a quo. She later heard that the deceased had married the appellant by civil rites, and they had two children together. The deceased died in February 2006. At the time of his death, he was employed by the second respondent which participated in pension contributions to the first respondent for his benefit as his employer.

[1] The judgment and order of Revelas J was handed down on 14 August 2007 in opposed motion court.

[5] After the death of the deceased, the third respondent brought an application in terms of which she sought to interdict the second respondent who held the deceased's leave gratuity; and the first respondent who held the deceased's pension benefit, from paying out these monies to anyone, pending the finalization of the application to declare the marriage between the deceased and the appellant null and void (the declaratory application).

[6] The third respondent alleged that she and the deceased entered into a civil marriage which had not been dissolved at the time of his death. The appellant and the deceased could therefore not validly enter into a civil marriage while her marriage to the deceased subsisted. On 28 December 2006 a rule nisi was issued, with an adjunct of an interim order interdicting the first and second respondents from paying the deceased's pension benefit and leave gratuity, respectively, pending the finalization of the declaratory application.

[7] Even though the appellant had fully opposed the application, there was no appearance by or on her behalf on 14 August 2007 when the application was finally heard. After hearing the third respondent's legal representative, the court a quo confirmed the rule nisi dated 28 December 2006. The court a quo substituted the relief in terms of which the third respondent sought an order declaring the appellant's marriage to the deceased null and void. In its place it declared that the marriage between her and the deceased was not dissolved at the time of his death, and that no valid marriage could exist between the appellant and the deceased.

The grounds of appeal

[8] The grounds on which the appellant relies in this appeal are that the court a quo erred in the following respects:

(a) In finding that the third respondent was legally married to the deceased at the time of his death and that she was the lawful wife of the deceased.

(b) In dealing with the case as though the appellant had abandoned her opposition because her legal representative did not attend court on the date of hearing even though the legal representative had not filed a notice of withdrawal.

(c) In finding that the record of the Regional Authority entailing the deceased's action for the return of the dowry did not constitute proof that the marriage between the third respondent and the deceased was dissolved.

(d) In not referring the matter to oral evidence despite the fact that the papers before it raised factual disputes.

[9] At the hearing of this appeal, we raised concerns with Mr *Dyantyi* who represented the appellant regarding the state of the appeal record. It was not properly indexed and paginated; it was incomplete in certain respects and in some instances its pages were not properly collated. This was not the only concern we had with this appeal – the application for condonation of its late prosecution, a matter I deal with below, presented us with great difficulty. Despite these concerns, we indicated to the parties that if they wished to make submissions on the merits of the matter besides what the heads of argument contained, they were free to do so. This ought not be construed as condonation of tardiness on the part of legal practitioners. The Rules of this Court enjoin the appellant to prepare the record of appeal in accordance with the set standards.[2]

[10] The appeal was first noted in March 2015, more than 5 months after leave to appeal was granted, and it was not prosecuted until 02 August 2016 when the appellant's attorney applied in accordance with Uniform Rule 6(5)(f) to the Registrar, for the allocation of the date of hearing of the appeal. This was more than a year after it was noted. The appeal is accordingly deemed to have lapsed.

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[2] Uniform Rule 49(8).

[11] Two applications for condonation of non-compliance with the appeal procedures set out in Uniform Rule 49 were filed. The first application was filed on behalf of the appellant by the office of Legal Aid South Africa on 08 July 2015 (the first condonation application). In the notice of motion, the appellant sought condonation of the late filing of the appeal.

[12] The second application is dated 20 November 2024. In it the appellant sought condonation of the late enrolment of the appeal. Notably, no prayer is made in the notice of motion for the reinstatement of the lapsed appeal. *Mr Dyantyi* for the appellant stated from the bar that this was an application for condonation of thelate prosecution of the lapsed appeal and reinstatement thereof. We accept that despite the inelegant drafting of the prayers, this must be so.

[13] It emerged during the hearing of this appeal that the first condonation application was never served on the third respondent although it was properly issued by the Registrar of this Court. This fact was confirmed by Mr *Dyantyi* who submitted that this was an oversight which he was unable to explain. This notwithstanding, it was annexed to the appellant's replying affidavit as ostensible support for the contention that it was served on the third respondent.

[14] The first and second respondents did not participate in the appeal. Since the issue of condonation is a preliminary one, it must be disposed of first.

The condonation applications

[15] In the first condonation application, Mr Kelengile, the appellant's attorney at the time deposed to a supporting affidavit dated July 2015. In it he states, in essence, that he lost track of the appeal when his office began its preparations during October and December 2014 to relocate to newly acquired offices. He goes on to state that when his office ultimately settled at the newly acquired premises in February 2015, it was hit by administrative setbacks which included malfunctioning of the

photocopy machines and office equipment. He admits having failed in his duty to put all his effort into ensuring that the appeal was noted timeously. In his view, the appellant should not be penalized because of his failure in his duty.

[16] In November 2024, almost 9 years after Mr Kelengile filed the application for condonation of the late filing of the appeal, Mr Dotwana of Legal Aid South Africa made the condonation application dated 20 November 2024 in which he seeks condonation of the late prosecution of the appeal. Mr Dotwana explains that when it came to his attention that the third respondent's attorneys withdrew as her attorneys of record, he made attempts to ensure that the third respondent had legal representation. He did this because of the seriousness of the case.

[17] Those attempts culminated in a directive issued by the Acting Deputy Judge President in November 2022, in which the third respondent was directed to present herself at the offices of Legal Aid South Africa not later than 17 January 2023 in order to make an application for legal representation. This directive was only served by the Sheriff upon the third respondent in August 2023 due to the fact that it transpired, after several attempts at following up on its service, that the Sheriff who was handed the document passed away. It was only when the Registrar of this Court facilitated an application for *pro bono* legal representation for the third respondent that she secured an attorney. Mr *Baceni* became counsel on brief to appear on her behalf on a *pro bono* basis.

[18] The third respondent opposes the application for condonation of the late prosecution of the appeal. The deponent of the opposing affidavit states, in essence, that the appellant has not given any sufficient and reasonable explanation for the delay that occurred before the withdrawal of the third respondent's erstwhile attorneys and that for this reason, the condonation application must fail.

The parties' submissions

[19] Mr *Dyantyi* submitted that this Court should condone the late prosecution of this appeal in the interests of justice due to the nature of the issue that the appeal entails. In the appellant's heads of argument, it was submitted that the second respondent has since paid out the deceased's leave gratuity and the first respondent has paid the pension benefit; and further that both the appellant and third respondent were beneficiaries of these payments.

[20] It appears that beyond the payment of the lump sum of the pension benefit in the manner already mentioned, the appellant challenges the order of the court a quo in so far as it relates to her status as the alleged surviving spouse of the deceased. This, according to the appellant, is for the purposes of the relevant monthly pension benefit that the deceased's surviving would be eligible to receive from the first respondent.

[21] Mr *Baceni* indicated that the heads of argument filed on behalf of the third respondent constitute his submissions on appeal before us. In the third respondent's heads of argument Mr *Baceni* persisted with the contention that the non-compliance by the appellant with the Rules of Court is gross, and the explanation given for that non-compliance is not a reasonable one. He submitted that on these grounds, condonation must be refused.

[22] Below I set out the legal principles governing the appeal process and applications for condonation of non-compliance with the Rules of Court.

The legal principles

[23] Uniform Rule 49 governs the appeal procedure when the decision appealed against is from the High Court. In terms of Rule 49(2), the appellant must deliver her notice of appeal within 20 days after the date on which she was granted leave to

appeal. This period may be extended by the court in the exercise of its discretion upon good cause being shown.

[24] Within 60 days after the delivery of the notice to appeal, the appellant must apply to the Registrar for a date of hearing of the appeal. Failing the appellant, the respondent may so apply. If none of these parties make the application for a date of hearing of the appeal, the appeal shall be deemed to have lapsed. It will be re-instated on application of the appellant and upon good cause being shown. This is in terms of Rule 49(6)(a) and (b).

[27] Where time limitations are set in litigation, a party who has failed to comply with those time bars has a duty to explain his non-compliance to the satisfaction of the court. The SCA has recently reaffirmed the legal principles applicable to an application for condonation of a party's failure to comply with the Rules of Court in *MEC for Health Eastern Cape v AS obo SS*[3]. I can do no better than quote Keightly JA (with whom Nicholls and Weiner JJA and Dolamo and Molitsoane AJJA concurred) when he wrote:[4]

'It is trite that the high court has an inherent right to grant condonation for a failure to comply with the rules of court where the interests of justice demand this. The discretion to do so is extensive, but it must be exercised judicially. A party seeking condonation must give a full explanation for the failure to comply with the rules and this explanation must be reasonable. The court must weigh all relevant factors including, depending on the facts of each case, the degree of non-compliance, the explanation therefor, the importance of the case, the avoidance of unnecessary delays in the administration of justice and the prospects of success. These factors are interrelated and must be weighed one against the other. For example, a slight delay and a good explanation might compensate for weak prospects of success. However, in a case of flagrant or gross non-observance of the rules, a court may refuse condonation regardless of the prospects of success.

[3] *MEC for Health Eastern Cape v AS obo SS* (842/2023) [2025] ZASCA 02 (15 January 2025), and all the cases referred to at paragraphs 19 to 20 of the judgment.

[4] Ibid, at paras 19-20.

Where an attorney is to blame for the non-compliance, a blameless litigant may escape penalization, but there is a limit beyond which she or he may be indemnified against the attorney's lack of diligence and absence of a reasonable explanation. The negligence of the attorney is weighed together with the other relevant factors in considering whether condonation is justified.' (footnotes omitted)

Discussion

[28] Conspicuously absent from the appellant's explanation of the default is an account of her failure to prosecute the appeal after March 2015 which is the date on which Mr Kelengile filed the condonation application for its late filing.

[29] Needless to say that Mr Kelengile fails to set out, in the first condonation application, what steps he took in order to ensure that 20 days after leave to appeal was granted, the notice of appeal was delivered. He states nothing regarding what remedial measures were put in place by Legal Aid South Africa to ensure that the smooth running of the office was not hampered despite the calamity that he portrays as having befallen that office.

[30] Be that as it may, if Mr Kelengile's explanation is accepted as it is, then, at worst for him, as early as October 2014 it ought to have been evident to him as the appellant's attorney, that he would not meet the time frames applicable to the filing of the appeal. This ought to have signaled to him the need to apply for the extension of the timeframe for the filing of the appeal. This was not done. Furthermore, Mr Dotwana gives no explanation regarding what his office did with the appeal after Mr Kelengile filed the first condonation application around March 2015. As already alluded to, his explanation relates to the period after the third respondent's legal representatives withdrew from representing her in 2016.

[31] The explanation given on behalf of the appellant lacks in substance in that it seeks to put the blame squarely on the third respondent by suggesting that her alleged failure or neglect or refusal to obtain legal representation hindered the hearing of the appeal. This stance overlooks the fact that the attorney who represented the third respondent at the time the court a quo granted leave to appeal in 2014 only withdrew as her attorney by notice of withdrawal dated 29 February 2016. What this means is that for a period of 2 years nothing was done to note and prosecute the appeal while the third respondent had legal representation.

[32] An inescapable finding is that the appellant's reliance on the alleged failure or neglect or refusal of the third respondent to obtain legal representation is not only disingenuous, but it is also opportunistic.

[33] It has been held that an inordinate delay in bringing an appeal induces a reasonable belief that the order has become unassailable and after such a delay, a litigant is entitled to assume that the losing party has accepted the finality of the order and does not intend to pursue the matter further.[5] In such a case, the successful party becomes entitled to order its affairs with an understanding that the order of court has brought finality to the litigation and settled the dispute.

[34] The delay in bringing this appeal is inordinate, and the manner in which it was handled by those representing the appellant is bothersome. The explanations proffered in the condonation applications dated July 2015 and November 2024, respectively, are grossly insufficient and unreasonable. They evince negligence on the part of the appellant's attorneys in how they handled her appeal. In as much as the negligence on the part of the appellant's attorneys would be a factor that would call for leniency towards the appellant, all the circumstances of the case must also

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[5] *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* 2008(2) SA 472(CC) at 479H-480A).

be considered. In *Saloojee and Another NNO v Minister of Community Development*[6] the court said:

'There is a limit beyond which a litigant cannot escape the result of his attorney's negligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous upon the observance of the Rules of this Court. Considerations ad *misericordiam* should not be allowed to become an invitation to laxity. . . The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.'

[35] The ineptitude and flagrant disregard of the Rules of Court by the appellant's legal representatives must be deprecated.

Lapsing of the appeal

[36] It is common cause that the appeal is deemed to have lapsed as envisaged in Rule 49, hence an application to reinstate it. The word 'deemed' in this instance has been considered to have conclusive effect — in the absence of the prosecution of the appeal within the prescribed period the appeal was held to have lapsed.[7] In *Steel v Shanta Construction (Pty) Ltd & others*[8], Coetzee J stated that the word 'deemed' means 'considered' or 'regarded' and is used to denote that 'something is a fact regardless of the objective truth of the matter'.

[37] There is absolutely no explanation why an application for the extension time before the expiry date for the filing of the appeal was not made. Similarly, no reasonable explanation has been proffered why there was no timeous application for condonation of the late filing of this appeal immediately after the prescribed time frame expired. In view of this fact, there is no reason for this Court to grant the

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[6] 1965(2) SA 135 (A) at 141C-E.
[7] *Pereira v Group Five (Pty) Ltd & others* 1996 4 ALL SA 686 (SE) at 698, in which the court referred with approval to *Steel v Shanta Construction (Pty) Ltd & others* 1973(2) SA 537 (T).
[8] Id footnote 7.

condonation application. That being said, the fact that the live issue between the parties relates to their status makes the case an important one to the appellant. It is in the interests of justice that this Court considers whether there are prospects of success despite the inordinate delay and the insufficient explanation; and that is the issue to which I now turn.

The prospects of success

[38] Nowhere in the condonation application for the late prosecution of the appeal is this Court given information which would enable it to assess the prospects of success. A consideration of prospects of success is inexorably linked to a determination whether a party's failure to comply with the Rules of Court ought to be condoned. Not even a bare averment is made by the deponent that the appeal enjoys prospects of success. That being the case, we are at large to have recourse to the record of appeal before us and assess those prospects. This approach was followed in *SA Allied Workers' Union (in Liquidation) v De Klerk NO*.[9]

[39] The key averments that the appellant made in her answering affidavit filed in opposing the application in the court a quo, are that she was married to the deceased by 'civil rites' on 28 July 2002. She heard from the deceased that he and the third respondent were previously married by customary law, but that marriage was dissolved by the Nyandeni Regional Authority. This was denied by the third respondent.

[40] In support of the allegation that the deceased and the third respondent were married by customary law, the appellant annexed a copy of what purports to be a record of proceedings in the Nyandeni Regional Authority. From the combined summons issued in the said Regional Authority, the deceased had sued the third respondent and her guardian (her father) for the return of his dowry. The Regional

[9] 1992 (3) SA 1 (A) at 4B.

Authority entered judgment in favour of the deceased for the return of the dowry or payment of monetary refund.

[41] Notably, the appellant adduced no proof of her marriage to the deceased. In her affidavit dated 08 April 2014 which she filed when she applied for condonation of the late filing of her application for leave to appeal, she stated that at a certain point during 2013, investigations were conducted by the Department of Home Affairs regarding the validity of her marriage to the deceased. During that period, she was assisted by yet another attorney from Legal Aid South Africa. The appellant does not state what the outcome of those investigations was. She only mentions that the attorney who assisted her while those investigations were undertaken left the employ of Legal Aid South Africa, and Mr Kelengile took over as her attorney.

[42] The third respondent, on the other hand, alleged, in support of the interdict application, that she was married to the deceased on 31 May 1994 and their marriage was in community of property. She lost her marriage certificate, and as proof of her marriage to the deceased she annexed a copy of the what appears to be a duplicate abridged marriage certificate issued by the Department of Home Affairs on 28 November 2006. It was her evidence in this regard that she requested this copy in November 2006.

[43] Together with this duplicate marriage certificate, the third respondent annexed an extract from the marriage register kept by the marriage officer which reflects her names and those of the deceased, the year in which they were married, and the sequence number of their marriage certificate. She denied that her marriage to the deceased was a customary one and that it was dissolved by the judgment of the Nyandeni Regional Authority.

[44] The principal contention made by the appellant is that in the light of the judgment of the Regional Authority, the marriage between the third respondent and the deceased could only have been a customary one. She bases this contention on the fact that section 39(1) of the Transkei Marriage Act 21 of 1978 is the law that governed marriages in Transkei at the time the third respondent and the deceased entered into their marriage. According to the appellant, marriages concluded under that Act were automatically out of community of property unless there was an ante nuptial contract in terms of which the parties agreed to include community of property.

[45] It is indeed so, that the Transkei Marriage Act makes provision for the conclusion of civil and customary marriages. This is set out in sections 26 and 27 of the said Act. The proprietary consequences of marriages entered into under this Act, whether civil or customary, are governed by section 39, the relevant part of which provides as follows:

'(1) Subject to the provisions of subsection (2), a marriage contracted in terms of the provisions of this Act shall produce the legal consequences of a marriage out of community of property or of profit and loss; or

(2) It shall be competent for the parties to any intended civil marriage who desire that community of property and of profit and loss shall result from their marriage – (a) to enter into an antenuptial contract which provides for community of property or of profit and loss; or

(b) to declared jointly before a magistrate or marriage officer, at any time prior to the solemnization of such civil marriage and substantially in the prescribed form that it is their intention and desire that community of property and of profit and loss shall result from their civil marriage, and thereupon such community shall, subject to the laws relating to the registration of antenuptial contracts, result in accordance with the provisions of such antenuptial contract or declaration, case may be. . .'

[46] The appellant's contention that since the third respondent did not adduce evidence of an ante-nuptial contract her alleged customary marriage to the deceased was automatically out of community of property as a default regime cannot be sustained. It overlooks the fact that under the above quoted provisions of subsection (2) of section 39, a declaration before the marriage officer solemnizing the marriage, that the parties intended their marriage to include community of property, was also sufficient. Moreover, in terms of section 12(1) of the Black Administration Act 38 of 1927, the Chief's Court had no jurisdiction to determine a question of divorce or separation arising out of any marriage which was not a customary union.[10]

[47] Besides the hearsay evidence adduced by the appellant that she was told by the deceased that he and the third respondent were married by customary law, no other evidence appears from the record supporting her contention.

[48] In the evidence that the deceased adduced in the Regional Authority, he did not testify regarding a divorce and the reasons therefor.[11] His evidence was that the third respondent had requested to go to her home. He subsequently discovered that the she was not at her home. She made an admission to him that she was involved in an extra-marital affair with someone in Centane. He assaulted her and reported the matter to her parents. The deceased's cause of action in the Regional Authority is set out, in part, as follows:

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[10] Although the jurisdiction of the Chief's Courts (the Regional Authorities) was extended by the Regional Authority Courts Act 13 of 1982, it would come into operation on a date fixed by the President. Section 3(1) of that Act reads: "A regional authority court shall, where – the accused in a criminal case; or all the parties in a civil suite, are citizens of Transkei, exercise jurisdiction concurrently with the magistrate's court within its regional authority area and shall enjoy in all respects the same powers, authorities and functions as that of the magistrate's court established in terms of the Magistrates' Courts Act, 1944 as amended."

[11] TW Bennett – Customary Law in South Africa, (Juta) page 268 under *'Grounds for Divorce'*, where the learned author states that even though 'grounds for divorce' as a pre-condition of the release of the wife from marital obligations is a misnomer in customary marriages, since the return of lobolo, is necessary to signify termination of marriage, and because the amount of lobolo to be returned depends partly on which party was at fault, the reasons for divorce are nevertheless important.

"4. That on or about October 1996 plaintiff's wife went home unlawfully and wrongfully and intentionally.

5. That the plaintiff went to his wife (sic) kraal to fetch his wife and she refused to go back to plaintiff's kraal.

6. That plaintiff prays for judgment against the defendants to the customary fine, to return plaintiff's dowry (6) herd of cattle or their value of R10 800.00 plus costs."

[49] It appears from the above quoted pleadings that the third respondent deserted the deceased who then went to fetch her from her kraal. Learned author Bennett[12] states that the wife's desertion on its own would not constitute a valid divorce. He further sates as follows:

"The wife's departure or desertion from her husband, on the other hand is *an equivocal act. It may very well imply deterioration in marital relations, but it does not necessarily mean that the parties mean to separate permanently. Hence, if the parties wish to express their intentions clearly, the should observe a particular procedure.* When the wife intends to initiate the divorce, she should leave her husband and report her departure to the traditional ruler. If the husband accepts his wife's action, which he would normally do by claiming the return of lobolo, the marriage may be considered dissolved. Conversely, if the husband initiates the divorce, he should escort his wife to her family and report the matter to the traditional leader. . ." (Emphasis added)

[50] In the court a quo, the appellant did not dispute the third respondent's version that the separation between her and the deceased was as a result of his abuse of alcohol and promiscuous behaviour. She also did not dispute the third respondent's assertion that there was continued engagement between the deceased and her family with the purpose of facilitating their reconciliation. Bennett goes on to discuss *ukutheleka* and *phuthuma* customs as the time-honored methods of dealing with marital discord. He states:

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[12] Bennett, pages 270 to 274.

"If a wife proved troublesome, her husband could send her back to her own family, with the implication that her guardian should discipline her. Conversely, if the husband made life unbearable for his wife, she could return to her guardian who was obliged to shelter her. The latter practice is termed *theleka* in Xhosa, and it was traditionally used to protest against a husband's behaviour or to prompt further payment of lobolo. If the husband wanted his wife to come home, he was obliged to *phuthuma*, namely, fetch her, and when he did so, the wife's guardian could demand a *theleka* beast as a fine for misbehaviour."

[51] It is so that the return of *lobolo* was one of the customary methods of terminating a marriage (unlike with marriages under the Recognition of Customary Marriages Act 120 of 1998, where the only way of dissolving a marriage is a divorce decree). However, in paragraph 6 of the above quoted pleadings filed in the Regional Authority, the deceased prayed for '<u>the customary fine</u>'[13] of the return of the plaintiff's dowry.

[52] In the Oxford English Dictionary[14] the word 'fine' as used in law is defined as 'a fee', 'a penalty of any kind', 'a sum of money imposed as the penalty for breaking the law or regulation'. There is no evidence from the record before us indicating that the 'customary fine' of the return of the dowry which the deceased prayed for in the context of the background facts that are apparent from the record of proceedings in the Regional Authority, signified a dissolution of the marriage between him and the third respondent.

[53] Equally unavailing to the appellant is the assertion that the application was heard in her absence. It was submitted in the appellant's heads of argument, that the application had not been properly set down for hearing on 14 August 2007. In such a case, the appellant had the option to apply for the rescission of the court a quo's judgment in accordance with the Rules of Court.

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[13] Emphasis intended.
[14] Shorter Oxford English Dictionary, Volume 2, page 965.

[54] The contention that the court a quo was obliged to refer the matter to oral evidence can also not be sustained. After it considered the papers before it, the court a quo acknowledged the factual disputes arising from the papers and granted the order appealed against. This was in keeping with the trite principle in *Plascon Evans*[15], in terms of which the court may decide an application on papers despite there being factual disputes. That will be the case where facts alleged by the applicant, which the respondent admits, together with the facts alleged by the respondent justify the granting of such a final order. After all, where the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable, the court would be justified in rejecting them merely on the papers.[16]

[55] Since, on the appellant's version, an investigation was undertaken in 2013 by the Department of Home Affairs into the status of her marriage to the deceased, it would be expected that she would be keen to know the outcome of that investigation into a matter as important as her status. She does not state what that outcome was but states that the attorney from Legal Aid South Africa who assisted her left that office and Mr Kelengile took over. The appellant does not mention that she enquired from Mr Kelengile regarding the outcome of that investigation which was crucial to her case in the intended appeal.

[56] The aforegoing puts to serious doubt the correctness of the appellant's allegation that the marriage between the third respondent and the appellant was a customary marriage and was dissolved by the judgment of the Regional Authority. The appellant's version is untenable. The result is that her appeal enjoys no reasonable prospects.

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[15] *Plascon- Evans Paints Ltd v Van Riebeck Paints* (Pty) Ltd 1984(3) SA 620 (SCA).
[16] Id.

Costs

[57] Mr *Baceni* submitted that he would not seek costs against the appellant. This concession was well made. Since Mr *Baceni* undertook legal representation without the expectation of payment of fees, there would be no basis for the payment of fees even if the party he represents succeeds.

[58] In the result, I would make the following order:

1. Condonation for the late filing and prosecution of the appeal is refused.
2. The appeal has lapsed.
3. The reinstatement of the appeal is refused.
4. There is no order as to costs.

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L. RUSI

JUDGE OF THE HIGH COURT

I agree and it is so ordered:

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B. R. TOKOTA

JUDGE OF THE HIGH COURT

I agree:

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M. MHAMBI

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the appellant	:	*S Dyantyi*
		Legal Aid South Africa
		Mthatha Local Office
For the first respondent	:	*Z Baceni*
Instructed by	:	Savela Fuzile Attorneys, Mthatha

Date heard : 17 February 2025

Date delivered : 18 March 2025