REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

REPORTABLE: YES/NO
OF INTEREST TO OTHER JUDGES: YES/NO
REVISED.

DATE: 06/12/22

CASE No HCAA 04/2022

In the matter between:

M[....]1 J[....] M[....]2 **APPELANT**

And

N[....] C[....] M[....]2 **First RESPONDENT**

MASTER OF THE HIGH COURT, THOHOYANDOU **Second RESPONDENT**

MINISTER OF HOME AFFAIRS,RSA **Third RESPONDENT**

UNIVERSITY OF VENDA **Fourth RESPONDENT**

SANLAM LIMITED **Fifth RESPONDENT**

JUDGMENT

LEDWABA AJ

Introduction

[1] With the leave of appeal granted by the court of first instance on the 19th April 2022, the appeal is against the whole judgment of NF Kgomo J delivered on the 30th November 2018.

[2] Only the first respondent participated in both the court of first instance proceedings and in this appeal. The second respondent is cited in its capacity as the supervising authority in the administration of deceased estates and the authority which appointed the first respondent as the executrix. The third respondent keeps the records and make endorsements in the country's population register. The fourth respondent is L[....] R[....] M[....]2's former employer. The fifth respondent administers the fourth respondent's provident fund.

[3] L[....] R[....] M[....]2 is referred to as the deceased.

[4] The appellant applies for the condonation of the late service and filing of this appeal. The founding affidavit states that it is more than twenty months out of the prescribed period and that the reason for the delay was because the appellant did not have the money requested by her previous legal team. This application is unopposed.

[5] The appellant and the first respondent make claims that they were married to the deceased during his lifetime. The appellant's case is that she was married by

customary marriage which was registered on the 13th March 1979. As proof, she attached annexure FA 3 to her founding affidavit. She submits that annexure FA 3 is *prima facie* proof referred in section 4(8) of the Recognition of Customary Marriages Act 120 of 1998 (the Act) and that in the absent of contrary evidence it becomes conclusive.

[6] The first respondent's version is that she was married to the deceased by civil marriage on the 23rd December 1996. She refers to annexure FA 4 to the founding as proof of her marriage to the deceased.

[7] The court of first instance dismissed the appellant's application with costs and found in favour of the first respondent. This aggrieved the appellant, hence this appeal. The court order sought to be overturned is to the effect that [1]:

> [7.1] the appellant failed to make out a case that she was married to the deceased, be it in 1979 or any stage,
>
> [7.2] the civil marriage entered into between the deceased and the first respondent is declared valid and had existed as at the date of the death of the deceased,
>
> [7.3] what the first respondent and the deceased regarded as a valid joint will and testament was confirmed. This was deferred to the second respondent for its validity and acceptability. and,
>
> [7.4] as the issue of the validity of the lobolo proceedings involving the first respondent and the deceased were embarked upon after a civil marriage in community of property had been already entered into, this issue is academic.

[1] Paragraph 103 -page 34 of the judgment- Bundle A

[8] For the purpose of this appeal, the appellant's grounds of appeal are to the effect that the court of first instance erred:

8.1 by not finding that the deceased was married to the appellant by customary marriage on the 13th March 1979 and that the marriage was terminated by the death of the deceased. This customary marriage was registered in terms of the laws of the Republic of Venda and it is reflected in the identity document issued to the appellant by the Republic of Venda. In the absence of evidence of termination of the marriage and fraud regarding the registration of the said marriage, the court of first instance misdirected itself by not putting any or adequate weight to the marriage certificate issued by the Republic of Venda,

8.2 by overlooking the fact that once a customary marriage is registered, the certificate of registration constitutes a *prima facie* proof of the existence of such marriage, obviating the need to lead evidence regarding the customary rituals,

8.3 by overlooking Masindi M[....]2's supplementary affidavit in which she stated that she is aware of the valid marriage between the deceased and the appellant,

8.4 ignoring the fact that the first respondent's evidence which disputes the existence of the customary marriage between the deceased and the appellant is hearsay and

8.5 by not finding that as the civil marriage between the first respondent and the deceased came into existence after the customary marriage between the appellant and the decease, the civil marriage was void and /or invalid

[9] At issue is validity of the marriage between the deceased and the appellant as against the one between the deceased and the first respondent.

The background

[10] The appellant avers that the deceased and herself grew up with their respective homesteads separated by two stands. They fell in love in 1978 when the deceased was doing Standard nine. She fell pregnant by the deceased the same year in December 1978. The first-born boy child was born on the 20th September 1979. The second born daughter was born on the 3rd February 1983 and the third child is born on the 20th January 1995.

She states that the deceased admitted paternity and expressed intention to marry her. It is common cause that the first two children were excluded by paternity test from being the deceased's biological children. The third child did not participate in the paternity test. In her replying affidavit, the appellant indicates that she is dissatisfied with the paternity test results and is ready to have a retest , also in respect of the third child.

She further states that lobola in the amount of R600 was paid and that they registered their customary marriage at Thohoyandou Magistrates offices where they were issued with the registration certificate. She states that the certificate is lost and despite diligent search she has not been able to locate it. She says efforts to obtain duplicate at Home Affairs and Magistrates offices have been unsuccessful.

She states that on registration of the customary marriage, she applied for a new Venda identity document. She says the copy of the front page of her identity document is attached as annexure FA 2 while the copy of the third page of her document is attached as annexure F3. She says annexure FA 3 reflects her marital

status as married and the date of marriage as the 13th March 1979.

In December 1996 the appellant noticed the change in the deceased's behaviour. Even during festive season, he told her that he was going on educational tour. On the 16th December 1996 he came back home late and highly intoxicated with alcohol and what he said to her was the way of telling her that he was involved with the first respondent . The appellant left their place of resident for her parental home and an attempt by the two families to reconcile them was unsuccessful. She stayed with the deceased's mother for ten years before building her own house where she is currently staying. Since they were never divorced, her staying away from the deceased and their homestead did not terminate their valid customary marriage. It was terminated by the deceased's death.

She avers that she was surprised to learn that the deceased and the first respondent were married to each other with the marriage in community of property on the 23rd December 1996 as evidenced by annexure FA 4 to the founding affidavit.

She submits that because it was concluded while the deceased was a partner in their existing marriage, the marriage between the first respondent and the deceased is contrary to the provisions of section 10(1) of the Act. She says since there was no attempt by the deceased and the first respondent to marry in terms of the customary law, there is no valid customary marriage between them.

[11] The first respondent's version is that she met the deceased as friends in the early part of January 1995. Their relationship developed into the romantic one after the deceased proposed and she accepted his proposal. On the 1st December 1996 there was a meeting of the family delegations where R6500.00 lobola was agreed upon. From the deceased's family, Vho Tshavhungwe M[....]2, Manyaga GT, Mafumadi Elina, Magret Sikhwivhilu and Vho Muofhe Matsheka represented the family while the first respondent's family was represented by Masindi Erick,

Netshitshive Muditambi Khomalo, Josias Masindi, Masindi Phillip and Shonisani Johanna Masindi . The lobola was paid in trenched payments of R500.00 for the opening of negotiations, followed up by R2000,00 payment on the 15th December 1996, R2000 on the 23rd October 1999 and R1000.00 on the 4th December 1999. Lobola documents were exchanged between the two families. By the time the payment of lobola was finalised in December 1999, their civil marriage was already concluded on the 23rd December 1996 as evidenced by annexure FA 4. Four children were born from their marriage relationship.

As advised by the deceased's sister Thinavhudzulo M[....]2, the first respondent stated that the deceased denied having impregnated the appellant and became so furious when he was pressurised that he chased the appellant's delegation who came to report pregnancy. The June 2004 DNA paternity test results released on the 4th August 2004 excluded the deceased as the father of the tested two of the three children.

The deceased's sister and mother advised her that it is not correct that there was a meeting of the two families of the deceased and the appellant where the marriage between the deceased and the appellant was discussed. She is further advised that at that time, the deceased was still a student to have been in the position to pay R650.00 as lobola for the appellant. She stated that the alleged marriage never complied with the customary marriage requirements.

The deceased's sister and mother further advised her that the deceased never registered any customary marriage with the appellant and this is common knowledge within the deceased's family members at large. Her enquiries at Home Affairs revealed that the appellant is registered as unmarried. She says this explains why there is no record of the registration of the alleged marriage.

She submits that the appellant having failed to prove the alleged marriage, this

means that it was never concluded and registered. Her application was rightly dismissed by the court of first instance.

She submits that in the unlikely event of the finding that there was Venda lobola process, the requirements for Venda marriage were not complied with.

[12] In reply, the appellant denied that the first respondent and the deceased were married to each other by customary union. She said Thivhavhudzi was eight years old in 1978 when the appellant was married to the deceased. Moufhe Matsheka is not related to the deceased but was their domestic worker who was paid the salary by the appellant. She said the deceased's sister Elina Mufamadi would not have approved the first respondent and the deceased's customary marriage.

She conceded that the children DNA came out negative. She is contesting the result and needs the second test, which would need the deceased's remains for DNA tissues be extracted.

She only became aware of the civil marriage between the first respondent and the deceased after the deceased's death.

She attained the surname of M[....]2 by virtue of her marriage to the deceased.

[13] In her conditional application, the first respondent seeks orders that the deceased's last wish regarding his estate be respected and that the appellant is not entitled to any form of benefit in the deceased's estate. In the alternative and in the event of the finding that the appellant is entitled to benefit, an order that the appellant should only benefit in the deceased's estate for the duration she alleges to have stayed with the deceased.

Discussion

[14] The appellant claims that her customary marriage to the deceased was registered in terms of the laws of the then Republic of Venda on the 13th March 1979. The first respondent claims her civil marriage to the deceased was registered on the 23rd December 1996. The dates of these marriages are about seventeen years apart. These dates are before the 15th November 2000, being the date of the coming into operation of the Act.

[15] At the time of the appellant's marriage, the applicable law was section 22 of the Black Administration Act 38 of 1927. It provided that :

> 22 (1) No male Native shall, during the subsistence of any customary union between him and any woman, contract a marriage with any other woman unless he has first declared upon oath, before the Magistrate or native commissioner of the district in which he is domiciled, the name of every such first-mentioned woman; the name of every child of any such customary union; the nature and amount of the movable property (if any) allotted by him to each such woman or house under native custom; and such other information relating to any such union as the said official may require.
>
> (2) Upon the official before whom such declaration is made being satisfied of the accuracy thereof, it shall be recorded by him, and such original record of the declaration, or a copy thereof certified under the hand of any magistrate or native commissioner of the district in which it was recorded, shall be admissible in evidence in any proceedings in which the facts therein declared may be relevant, and any document purporting to be such a record, or a copy thereof certified as aforesaid, shall *prima facie* be so admissible without proof of its execution.
>
> (3) No minister of the Christian religion authorized under any law to

solemnize marriage, nor any marriage officer, shall solemnize the marriage of any Native male person unless he has first taken from such a person a declaration as to whether there is subsisting at the time any customary union between such person and any woman other than the woman to whom he is to be married

and, in the event of any such union subsisting, unless there is produced to him by such person a certificate under the hand of a magistrate or native commissioner that the provisions of this section hereinbefore set out have been duly complied with.

(4) Any person contravening sub-section (3) shall be guilty of an offence, and shall, upon conviction, be liable to a fine not exceeding twenty-five pounds, or, in default of payment, to imprisonment for a period not exceeding three months.

(5) Any Native male person who during the subsistence of any customary union between him and any woman contracts a marriage with any other woman without having previously made a declaration referred to in sub-section (1) or sub-section (3) shall be guilty of an offence and shall, upon conviction, be liable to a fine not exceeding fifty pounds or, in default of payment, to imprisonment for a period not exceeding six months; and any Native male person who knowingly makes any false statement in any such declaration shall be guilty of an offence and punishable in the same manner as if he had committed the crime of perjury.

(6) A marriage between Natives, contracted after the commencement of this Act, shall not produce the legal consequences of marriage in community of property between the spouses: Provided that in the case of a marriage contracted otherwise than during the subsistence of a customary union between the husband and any woman other than the wife it shall be competent for the intending spouses at any time within one month previous to the celebration of such marriage to declare jointly

before any magistrate, native commissioner or marriage officer (who is hereby authorized to attest such declaration) that it is their intention and desire that community of property and of profit and loss shall result from their marriage except as regards any land in a location held under quitrent tenure such land shall be excluded from such community.

(7) No marriage contracted after the commencement of this Act during the subsistence of any customary union between the husband and any woman other than the wife shall in any way affect the material rights of any partner of such union or any issue thereof, and the widow of any such marriage and any issue thereof shall have no greater rights in respect of the estate of the deceased spouse than she or they would have had if the said marriage had been a customary union.

(8) Nothing in this section or in section twenty-three shall affect any legal right which has accrued or may accrue as the result of a marriage in community of property contracted before the commencement of this Act

Subsection 1 provided that no black male could , during the subsistence of any customary union between him and any woman, contract a marriage with any other woman unless he had first declared upon oath, before the Magistrate or native commissioner of the district in which he is domiciled, the name of every such first-mentioned woman; the name of every child of any such customary union; the nature and amount of the movable property (if any) allotted by him to each such woman or house under native custom; and such other information relating to any such union as the said official could require.

The provision of section 22 of the Black Administration Act 38 of 1927 as reflected in paragraph 14 of the appellant's founding affidavit is not accurate.

[16] Having regard to section 22(6) of the Black Administration Act 38 of 1927, the marriage between the appellant and the deceased would not produce the

legal consequences of the marriage in community of property. Prayer four of the application is thus not competent.

[17] At the time of the marriage of the first respondent on the 23rd December 1996, section 22 of the Black Administration Act was amended by the Marriage and Matrimonial Property Law Amendment Act 3 of 1988 which came into operation on the 2nd December 1988. Its section 1(1) provided that a man and a woman between whom a customary union subsisted were competent to contract a marriage with each other if the man was not also a partner in a subsisting customary union with another woman. Section 1 (2) provided that subject to subsection 1, no person who was a partner in a customary union was competent to contract a marriage during the subsistence of that union. Subsection 3 barred a marriage officer from solemnising the marriage of a Black man unless he had first taken from him a declaration to the effect that he was not a partner in a customary union with any woman other than the one he intended marrying.[2]

[18] It is important to note that while section 1 of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988 amended section 22 of the Black Administration Act, the Act repealed the whole section.

[19] The document relied upon by the court of first instance is described as *"an uncertified or unverified copy of an ID-document in which* a *single line reads: MARRIED ON 1979-03-13" There is no indication as to whom she is supposed to be married to. There* is *no ID-number of the alleged* spouse. *No names either."*[3]

This document does not appear to form part of the pleadings and having regard to the annexures attached to the pleadings at the hearing of the court of first

[2] Netshituka v Netshituka & Others (2011) ZASCA 120; 2011(5) SA 453(SCA)(Netshituka) – par 14
[3] Paragraph 79 of the judgment.

instance, the closest to this document is annexure FA 3 attached to the founding affidavit. It reads:

> [....]
>
> SURNAME: M[....]2
>
> NAMES: L[....] R[....]
>
> MAIDEN: TSHIKORORO
>
> NAMES: M[....]1 J[....]
>
> MARRIED ON: 1979/03/13

This document has particulars relating to the appellant's full names and maiden surname, the surname and names of the person to whom the appellant is married as well as the date of marriage. The document presented to the court of first instance is described by the court as having no indication as to whom the appellant is supposed to be married, no identity number of the alleged spouse of the appellant and no names of her spouse. If this is the description of annexure FA 3 to the founding affidavit, this description is with respect incorrect.

[20] The appellant's case is that when their marriage was registered, they were issued with the marriage certificate which has been lost. It is not clear if it was a separate document or was endorsed in the appellant's identity document. The records of the Department of Home Affairs and the Magistrates office do not reflect the registration of their marriage for the duplicate certificate to be issued. Home

Affairs told the appellant that it can only issue duplicate certificate if a copy of the marriage certificate is brought to the office. She submits that the fact that she is unable to produce the lost marriage certificate does not invalidate her marriage to the deceased. She submits that in the absence of certificate, annexure FA 3, being a copy of the third page of her identity document, is *prima facie* proof of the existence of her customary marriage to the deceased as envisaged in section 4(8) of the Act and unless wrongfulness or unlawfulness such as fraud is proved, that becomes conclusive proof of the registration of her marriage to the deceased.

The appellant further submits that in terms of section 2(1) of the Act, a marriage which is a valid marriage in terms of customary law and existing at the commencement of the Act, is for all purposes recognised as a marriage.

[21] The reason the first respondent does not accept annexure FA 3 as proof of the marriage between the appellant and the deceased appears to be based on her enquiries at the Department of Home Affairs which revealed the appellant's marital status as unmarried.

[22] The court of first instance accepted the document placed before it as evidence, but have rejected its validity for the purpose of proving the appellant's marriage on the basis that it was forged.

The court of first instance found that there is no proof of the marriage by the two families of the appellant and the deceased, that the document presented to prove the marriage does not take the appellant's case any further and no family documents were exchanged.[4] The judgment further says the document relied on has no particulars of the person the appellant is married to. It found that the appellant failed to establish the existence of the marriage asserted to the appellant

[4] Par 75 to 78 of the judgement.

[23] The appellant's submission is that what she regards as the registration certificate issued to her is evidenced by annexure FA 3 to her founding affidavit, which is *prima facie* proof not only of the existence of her customary marriage to the deceased, but also of the particulars of her former spouse and the date of marriage, as envisaged in section 4(8) of the Act. In the absence of evidence of any illegality such as fraud, the existence of the appellant's marriage to the deceased is on the balance of probability established. The court of first instance found that there was forgery in relation to the documents presented to it, resulting in the dismissal of the appellant's case. The record of the proceedings shows no evidence of forgery.

[24] On the required balance of probabilities and based on annexure FA3 to the founding affidavit, the appellant has proved that she was married to the deceased, which marriage was registered on the 13th March 1979.

[25] Given the above, the next question is whether the first respondent's civil marriage contracted subsequent to the appellant's marriage on the 23rd December 1996 can survive. Like in the Murabi and Netshituka cases, the answer to that lies in section 1(1) and (2) of Marriage and Matrimonial Property Law Amendment Act 3 of 1988 which came into operation on the 2nd December 1988. The appellant's marriage was registered on the 13th March 1979, some nine years before the coming into operation of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988. At that time the legal position was regulated by section 22 of the Black Administration Act 38 of 1927. In the light of the production of annexure FA 3 to the founding affidavit, there is prima facie evidence of the appellant's marriage, obviating the need to prove the requirements of the customary law and of section 22 of the Black Administrative Act 38 of 1927.

[26] Just like in the Murabi[5] case, and given that section 1(2) of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988 prohibited a person who was a partner in a customary union to contract another marriage during the subsistence of such marriage , it was not legally competent for the deceased to contract a civil marriage with the first respondent during the subsistence of the customary marriage between the deceased and the appellant. A civil marriage contracted while a man was a partner in an existing customary union with another woman was a nullity.[6] It follows that the civil marriage between the deceased and the first respondent contracted on the 23rd December 1996, having been contracted while the deceased was a partner in existing customary union with the appellant, was a nullity. It follows that it was not legally competent for the deceased to contract a civil marriage with the first respondent during the subsistence of the customary marriage between the deceased and the appellant.

[27] The appellant's marriage continues to be recognised in terms of section 2(1) of the Act

[28] The prohibition of the marriage in respect of the people in the position of the deceased is also provided in section 10(1) of the Act.

[29] There is no evidence how the birth of the parties' children plays any role in the resolution of this dispute.

[30] The alternative relieves sought by the first respondent are matters relating to the liquidation and distribution of the estate of the deceased referred to in the Administration of Estates Act 66 of 1965 which fall under the jurisdiction of the second respondent. The second respondent being the authority responsible for the

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[5] (M *v* M- Murabi *v* Murabi (2014) *ZASCA* 49;(2014) 2 All SA 644(SCA) 2014(4) SA 575(SCA) (Murabi)- par 17

[6] Murabi- par 17 Netshituka v Netshituka & Others (2011) ZASCA 120; 2011(5) SA 453(SCA)- par 15; Monyepao v Ledwaba (2020) ZASCA 54- par 19

administration of estates, it is undesirable to administer the deceased's estate under the kind of the court order sought by the first respondent. The first respondent has been appointed the executrix in the estate of the deceased.

[31] This matter deserves the engagement of two counsels. There is no reason why the costs should not follow the results.

The Order

[32] The late service and filing of this appeal is condoned.

[33] The appeal succeeds.

[34] The order of the court of first instance of the 30th November 2018 is set aside and replaced with the following order:

34.1 It is declared that M[....]1 J[....] M[....]2 and L[....] R[....] M[....]2 were married by customary marriage and their marriage was registered on the 13th March 1979,

34.2 The marriage between N[....] C[....]h M[....]2 and L[....] R[....] M[....]2 is declared null and void an initio

34.3 The first respondent is ordered to pay the costs, both of the court of the first instance and this appeal. Both costs to include the costs of engaging two counsels.

LGP LEDWABA AJ

ACTING JUDGE OF THE HIGH

COURT

LIMPOPO DIVISION : POLOKWANE

I agree

F KGANYAGO J

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION : POLOKWANE

APPEARANCES

Heard on:	21st October 2022
Judgement delivered on:	November 2022
For the Appellants:	MS Sikhwari SC with Adv Maree
Instructed by:	MK MULAUDZI ATTORNEYS
For the First Respondent:	Adv UB Makuya with Adv ML Magau
Instructed by:	RAPFUMBEDZANIATTORNEYS
	C/O MPHO MOKHITHI INC

G J DIAMOND AJ:

[1] I have read through the majority judgement of Ledwaba AJ, and I am unable to agree with them for the reasons set out below.

[2] The Appellant, who was also the applicant in the court a *quo* approached the court a quo in the end on a very simple basis.

[3] She alleged that she was married according to customary law, to the deceased call, one L[....] R[....] M[....]2.

[4] In paragraph 19 - 20 of the founding affidavit the Appellant attempted to prove that she and the deceased concluded a customary law marriage, by attempting to prove compliance with the essential requirements for the conclusion of a customary marriage.

[5] The court a *quo* ruled in the end that she was unable to do so. Paragraphs 3 and 4, of the Notice of Appeal seem to be an attempt to appeal against the finding of the court *a quo* that the Appellant failed to prove a customary law marriage by adducing evidence of the conclusion thereof. The two grounds are however stated that in isolation in the Notice of Appeal. At the hearing further, Mr Sekwari, who appeared for the Appellant stated explicitly that the Appellant persist with her appeal on the basis of the stipulations of section 4(8) of the Recognition of Customary Marriages Act, 1998 (Act 120 of 1998) ("the Act").

[6] The Appellant attached a document [7] purporting to be an identity document issued by the then Republic of Venda, which identity document ostensibly carries an endorsement of the existence of a marriage between the Appellant and the deceased.

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[7] Annexure **"FA2".**

[7] Section 4 of the Recognition of Customary Marriages Act, 1998 (Act 120 of 1998), stipulates as follows:

> ***"4. Registration of customary marriages.-***
>
> *(1) The spouses of* a *customary marriage have a duty to ensure that their marriage is registered.*
>
> *(2) Either spouse may apply to the registering officer in the prescribed form for the registration of his or her customary marriage and must furnish the registering officer with the prescribed information and any additional information which the registering officer may require in order to satisfy himself or herself as to the existence of the marriage.*
>
> *(3) A customary marriage-*
>
> *(a) entered into before the commencement of this Act, and which is not registered in terms of any other law, must be registered within* a *period of 12 months after that commencement or within such longer period as the Minister may from time to time prescribe by notice in the Gazette; or [General Note: The period for the registration of customary marriages has been extended until 14 November, 2002 as published under Government Notice No. 1228 in Government Gazette 22839 of 23 November, 2001.J (b) entered into after the commencement of this Act, must be registered within* a *period of three months after the conclusion of the marriage or within such longer period as the Minister may from time to time prescribe by notice in the Gazette.*
>
> *(4) (a) A registering officer must, if satisfied that the spouses concluded* a *valid customary marriage, register the marriage by recording the identity of the spouses, the date of the marriage, any lobolo agreed to and any other particulars prescribed. (b) The registering officer must issue to the spouses a certificate of registration, bearing the prescribed particulars.*

(5) (a) If for any reason a *customary marriage is not registered, any person who satisfies* a *registering officer that he or she has* a *sufficient interest in the matter may apply to the registering officer in the prescribed manner to enquire into the existence of the marriage.*

(b) If the registering officer is satisfied that a *valid customary marriage exists or existed between the spouses, he or she must register the marriage and issue* a *certificate of registration as contemplated in subsection (4).*

(6) If a *registering officer is not satisfied that a valid customary marriage was entered into by the spouses, he or she must refuse to register the marriage.*

(7) A court may, upon application made to that court and upon investigation instituted by that court, order--

(a) the registration of any customary marriage; or

(b) the cancellation or rectification of any registration of a *customary marriage effected by* a *registering officer.*

(8) A certificate of registration of a *customary marriage issued under this section or any other law providing for the registration of customary marriages constitutes prima facie proof of the existence of the customary marriage and of the particulars contained in the certificate.*

(9) Failure to register a customary marriage does not affect the validity of that marriage.

[8] The Appellant argues that, by virtue of Section 4(8) of the Act, the identity document qualifies as a certificate contemplated in Section 4(8) of the Act, and that, therefore the certificate provides of prima facie proof of the existence of a customary law union between the Appellant and the deceased.

[9] The court a *quo* rejected this argument, giving several reasons and concluded that the Appellant failed to prove the authenticity and nature of the

alleged identity document.

[10] In my view, the first question that needs to be answered is whether a valid identity document qualifies to be regarded as"

[11] *"(8) A certificate of registration of* a *customary marriage issued under this section or any other law providing for the registration of customary marriages constitutes prima facie proof of the existence of the customary marriage and of the particulars contained in the certificate."*

[12] Clearly, the identity document that was attached to the founding document was not a *"certificate of registration of a customary marriage issued under this section",* for obvious reasons.

[13] The only question that remains is whether such an identity document, carrying an endorsement of marriage, qualifies to be a certificate issued by *"any other law providing for the registration of customary marriage".* If the identity document fails to be within this category, then likewise, the identity document shall not be a document for the purposes of Section 4(8), and such a document shall not confer on the. litigant the benefit that the document itself shall be *prima facie* evidence of the customary law marriage.

[14] It is to be stressed though that the status of such a document shall only be that it evidences *prima facie* evidence of a marriage - it would still be open to an interested party to lead to rebutting evidence of the existence of a customary law marriage. Apart from this, if a person does not have such an acceptable certificate, then such a person is not remediless, and such a person can still prove the existence of the customary law marriage by adducing evidence of the conclusion of the marriage in terms of customary law.

[15] Hence, any certificate that was issued under any law, which does not explicitly provide for the authority to register a customary law marriage, would not qualify to be regarded as a certificate for the purposes of Section 4(8) of the Act.

[16] Thus, if the legislation in terms of which identity documents of the erstwhile Republic of Venda only provides to capture the state of affairs regarding citizens for instance, their marital status, then and identity document issued in terms of such legislation clearly does not qualify as a certificate contemplated in the above-mentioned section, and would not be *prima facie* evidence of customary law marriage.

[17] And this is the argument of the Appellant. The Appellant states in paragraph 1 of the notice of appeal that

> *"This customary marriage was registered in fer.ms of the marriage laws of the Republic of Venda, and it is reflected in the identity document of the applicant issued to her by the Republic of Venda."*

And paragraph 2 of the notice of appeal states as follows.·

> *"The honourable court misdirected itself by overlooking the fact that once a customary marriage is registered in whatever acceptable form, then the certificate thereof constitutes prima facie proof of the valid existence of such a marriage."*

[18] Mr Sekwari, appearing for the Appellant tried to bolster the above two grounds during hearing by stating that in the erstwhile Republic of Venda, registration of marriages only took place in terms of the same legislation authorising the issuing of identity documents. It is stated explicitly this was the only procedure and this is how it was done in Venda.

[19] This contention flies into the face of the version of the Appellant. The Appellant explains in paragraph 28 of the founding affidavit that she could clearly recall that she registered customary law marriage and I

> *"was issued with* a *registration certificate which was way is small and marked in bold caps* ***"R1***". *However, the certificate is lost and after* a *diligent search I could not locate it. Upon confronting the office of Home Affairs in Makwarela with the view to obtain* a *duplicate certificate I was told that the information was with the Magistrate office Thohoyandou that can corroborate my story. The office of the magistrates* (sic) *could not help either.*

[20] In this paragraph directly contradicts the subn1ission of Mr Sekwari.

[21] The ground of appeal stating that "once a customary marriage is registered in whatever acceptable form" then the certificate thereof constitutes prima far proof, can, in my view, not be sustained.

[22] The question is not whether a customary marriage "is registered in whatever acceptable form". The question is whether a person holds in its hand, a certificate which *was issued* in terms of a law *providing for the registration of customary marriages.*

[23] If a person does have such a certificate then such a person is relieved of the duty to the prove existence of the customary law marriage by way of the normal way of evidence. If not, the subsection does not apply and the person will have to resort to the normal way of proving that the customary law marriage existed.

[24] There is absolutely nothing in the identity document attached to the founding affidavit that indicates in any way that it is a certificate of customary law marriage in terms of a law authorising the registration of customary law marriages. What appears from the identity document is only an endorsement of marital status.

[25] I agree with the majority judgment that the court a quo erred in not accepting that the document attached to the founding affidavit was an identity document carrying an endorsement of marital status. That in my view, does not take the matter any further for the Appellant.

[26] I would also differ in a further respect with the majority judgement. As is clear from the motion proceedings filed in the court a *quo* the Respondent instituted a conditional counter application, the condition being that the counter application is instituted should the Appellant be successful with the application. In my view therefore, if one comes to the conclusion that the appeal should be upheld, then the application should be referred back to the court a quo, to adjudicate the counter application.

[27] I am, however, convinced for all the above reasons that the appeal should simply be dismissed.

G. J. DIAMOND
ACTING JUDGE OF
THE HIGH COURT