THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 799/2023

In the matter between:

NTHUSENI CHRISTINAH MANWADU	**APPELLANT**
and	
MATODZI JOYCE MANWADU	**FIRST RESPONDENT**
MASTER OF THE HIGH COURT, THOHOYANDOU	**SECOND RESPONDENT**
MINISTER OF HOME AFFAIRS	**THIRD RESPONDENT**
UNIVERSITY OF VENDA	**FOURTH RESPONDENT**
SANLAM LIMITED	**FIFTH RESPONDENT**

Neutral citation: *Manwadu v Manwadu and Others* (799/2023) [2025] ZASCA 10 (10 February 2025)

Coram: MAKGOKA, WEINER and MOLEFE JJA and COPPIN and DIPPENAAR AJJA

Heard: 23 August 2024

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of

Appeal website, and by release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 10 February 2025.

Summary: Evidence **–** uncertified copy of Identity Document utilised to prove customary marriage – failure to produce certificate of marriage or corollary evidence to prove existence of customary marriage – production of uncertified copy of identification book with endorsement of marriage – admissibility and weight of such evidence challenged – failure to adduce any evidence to prove that required customs for a customary marriage were observed.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (the full court) (Ledwaba AJ and Kganyago J concurring, Diamond AJ dissenting):

1 The appeal is upheld.

2 The order of the full court is set aside and replaced with the following order:

'The appeal is dismissed with costs.'

JUDGMENT

Weiner JA (Molefe JA, Coppin and Dippenaar AJJA concurring):

Introduction

[1] This appeal emanates from the full court of the Limpopo Division of the High Court, Polokwane the full court). The issue before the Limpopo Division of the High Court, Thohoyandou (the high court) and the full court was two-fold. Firstly, whether the first respondent, Matodzi Joyce Manwadu and Livhuwani Robert Manwadu (the deceased) were married by customary law on 13 March 1979. Secondly, whether a civil marriage entered into between the deceased and the appellant, Nthuseni Christinah Manwadu on 23 December 1996 was valid and had existed at the date of the death of the deceased. If the former is correct, the first respondent asserted that the civil marriage between the appellant and the deceased was invalid in terms of s 10 of the Recognition of Customary Marriages Act 120 of 1998 (the RCMA). There was no dispute on the latter issue; nor was there a dispute that the deceased and the appellant were married according to civil law. The dispute in this Court centres on whether the customary

marriage of the first respondent and the deceased was proven by the first respondent.

[2] The second respondent is the Master of the High Court, Limpopo Division, Thohoyandou (the Master) and is cited as an interested party in that the estate of the deceased is being administered under its supervision in terms of the Administration of the Estates Act 66 of 1965, as amended (the Estates Act). The third respondent is the Minister of Home Affairs who is cited as the executive head of the Department responsible for the registration and keeping of a marriage register of the South African population in terms of the Marriage Act 25 of 1961 (the Marriage Act) and the RCMA.

[3] The fourth respondent is the University of Venda, a statutory body created in terms of the University of Venda (Private) Act 89 of 1996[1] and registered in terms of the Higher Education Act 101 of 1997. At the time of his death, the deceased was employed by the fourth respondent. The fifth respondent is Sanlam Limited, a financial service provider registered as such and administering the University of Venda for Science and Technology provident fund. As the second to fourth respondents abide the decision of this court, the first respondent will be referred to as 'the respondent.'

Background

[4] The deceased passed away on 20 February 2017. A dispute arose between the appellant and the respondent as to who was the heiress of the deceased's estate. The respondent launched an application in the high court seeking the following declarations:

[1] Prior to repeal by the Higher Education Amendment Act 23 of 2001.

1. That the [respondent] and the deceased, during his lifetime and until his death, were customary law spouses married on 13 March 1979;
2. That the civil marriage between the appellant Nthuseni Christinah Manwadu) and the deceased, while he was alive, is null and void ab initio;
3. That the appellant and the deceased were not married in terms of customary law;
4. That the customary law marriage between the respondent and deceased was a marriage in community of property;
5. That the costs be paid by any of the parties who opposed the application.

[5] The appellant brought a conditional counter-application in which she sought the following relief, in the event of the respondent's application being successful:

1. A declaratory order that the customary marriage entered into between the respondent and the deceased was dissolved when the applicant left the matrimonial home;
2. A declaratory order that the customary marriage entered into between the appellant and the deceased is valid;
3. An order declaring that the joint will between the appellant and the deceased is valid.

[6] Relying on s 4(8) of the RCMA,[2] the respondent attached an uncertified copy of what she alleged Venda identity document (the ID document), which reflected her name and identity number, the deceased's name but no identity number and an endorsement of the date of marriage (the endorsement). The respondent relied on this ID document as prima facie proof of the existence of the customary marriage to the deceased, as envisaged in the subsection. She alleged

[2] Provisions set out hereunder in para 24.

that this became conclusive proof in the absence of fraud. It was common cause that the copy of the ID document was not certified. The appellant challenged its authenticity and the validity of the customary marriage. Thus, the respondent had to prove the ID document's authenticity, its validity and the weight it should carry as a matter of law.

[7] The high court per Kgomo J (sitting as the court of first instance) dismissed the application and found that the respondent had not proven the existence of the customary marriage. Kgomo J held that appellant and the deceased had been married by civil law and that they had executed a joint will and testament. The high court deferred to the Master regarding the validity and acceptability of the joint will.

[8] In paragraph 1 of the respondent's notice of appeal in the full court, referring to her alleged marriage to the deceased, she stated '[t]his customary marriage was registered in terms 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.'

[9] Paragraph 2 of the same notice of appeal states '[t]he 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 the marriage.'

[10] On appeal, the majority of the full court (Ledwaba AJ, Kganyago J concurring) held that this ID document was prima facie proof of the existence of the customary marriage. It set aside the judgment of Kgomo J. Diamond AJ dissented. The full court replaced the high court order with the following order:

'34.1 It is declared that Matondzi Joyce Manwadu and Livhuwani Robert Manwadu were married by customary marriage and their marriage was registered on the 13th March 1979.
34.2 The marriage between Nthuseni Christinah Manwadu and Livhuwani Robert Manwadu is declared null and void ab 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.'

[11] This Court granted special leave to appeal. The appeal raises the following issues:

a. Whether the ID document constitutes admissible evidence;

b. If admissible, whether the ID document with the endorsement of the date of a marriage and the name of the deceased constitutes a 'certificate' and prima facie proof of the existence of such marriage between the respondent and the deceased in terms of s 4(8) of the RCMA;

c. What weight should be attached to the ID document;

d. Whether the respondent proved the existence of a customary marriage between her and the deceased.

[12] The majority of the full court equated the ID document with a marriage 'certificate'. This document thus assumes substantive significance and substantial weight was placed on this evidence by the full court. In fact, the success of the respondent's case is dependent on this seminal piece of evidence.

Pre and post the Recognition of Customary Marriages Act

[13] The customary marriage and the registration thereof, according to the respondent, took place in 1979 and 1993 respectively, before the promulgation of the RCMA. Customary marriages were however recognised before the

introduction of the Constitution and the RCMA.[3] As a result, it was possible to register a customary marriage before the RCMA came into effect. The State provided a voluntary registration system, whereby the husband, the wife or the wife's guardian were free to have the marriage registered at a central registry.[4]

[14] The Black Administration Act 38 of 1927 (the BAA) sought to unify the regulation of marriages of all black people in South Africa, including customary marriages. At the time of the respondent's marriage, the s 22 of the BAA was applicable. Certain peremptory provisions applied. For example: Section 22(3) provided that no minister, or marriage officer could solemnise the marriage of any native male person unless he has first taken from such a person a declaration as to whether there is a subsisting customary union between such a person and any woman other than the woman to whom he is to be married.

[15] Section 22 of the BAA empowered the commissioner to promulgate regulations for, inter alia, the registration of customary marriages. Pursuant thereto, the Regulations for the Registration of Customary Unions were promulgated under GN R1970 of 25 October 1968 (the BAA regulations).[5] The BAA regulation 8 provided for the issuing of a certificate of registration of a customary marriage by the registrar, after payment of the prescribed fee, at the instance of one of the spouses, or 'any other person who satisfies the registrar that he requires such certificate for a lawful purpose'.[6] The BAA regulation 4(1)

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[3] Nkuna-Mavutane ME and Jamneck J 'An Appraisal of the Requirements for the Validity of a Customary Marriage in South Africa, Before and After the Recognition of Customary Marriages Act 120 of 1998(2023) (26) *PER/PELJ* 1 at 8. Available at: http://dx.doi.org/10.17159/1727-3781/2023/v26i0a15298]

[4] In accordance with regulations 7 and 16 of the Regulations for the Registration of Customary Unions under GN R1970 of 25 October 1968 (promulgated under s 22 bis of the Black Administration Act 38 of 1927). Regulation 8(4) provided that a certificate of registration was prima facie proof of its contents. By contrast, under s 45(3) of the Natal Code of Zulu Law Proclamation R151 of 1987 and the KwaZulu Act on the Code of Zulu Law16 of 1985, registration is conclusive evidence of the marriage. Sections 22(1)-(5) of the BAA were replaced by s 1 of Act 3 of 1988 and repealed by Act 120 of 1998.

[5] Siyabonga Sibisi 'Registration of Customary Marriages In South Africa: A Case For Mandatory Registration.' (2023). *Obiter*, 44(3). https://doi.org/10.17159/obiter.v44i3.16962.

[6] These regulations were promulgated but not utilised according to Sibisi. Id above at 519. 1

provided that an application to register a customary marriage was to be by declaration substantially in the form prescribed … which must be duly confirmed and signed before a Bantu Affairs Commissioner or registrar by, respectively, the male and female partners in such union and the contracting guardian of such female partner, or his heirs. The particulars required in the said declaration were the name and surname of the female/ male partner or contracting guardian, their identity numbers, addresses, witnesses etc.[7]

[16] The BAA regulation 8(1) provided that the registrar may issue a registration certificate at the instance of one of the partners or the female partner's contracting guardian. The registration certificate came in the form of Annexure 4, which records the particulars as:

a. The full names and identity numbers of the spouses;

b. The office where the marriage was registered and serial number allocated to that registration;

c. Date stamp;

d. Signature of the registrar of customary unions; and

e. The folio number.

The BAA and regulations were only repealed in 2006.[8]

[17] According to Nkuna-Mavutane ME and Jamneck J,[9] under customary law, the following were accepted as essential elements for a customary marriage to be viewed as concluded and binding: consent of the bride and bridegroom (spouses), consent of the bride's father or guardian (parents), payment of lobolo, and the handing over of the bride.'[10]

[7] Parts B, C and D of Annexure 1 to the BBA regulations.
[8] Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005.
[9] Op cit fn 3.
[10] Id at 5.

[18] The RCMA added further requirements which address formal and customary law requirements. Both prospective spouses must have consented to getting married in terms of customary law. These requirements are peremptory. The customary law requirements relate to the negotiation and celebration of such a marriage.[11]

[19] Section 2(1) of the RCMA provides that:

'A marriage which is a valid marriage at customary law and existing at the commencement of this Act is for all purposes recognised as a marriage.'

[20] Section 3 of the RCMA deals with the requirements for the validity of a customary marriage, concluded after the RCMA came into being. It provides:

'(1) For a customary marriage entered into after the commencement of this Act to be valid-

(a) the prospective spouses-

(i) must both be above the age of 18 years; and

(ii) must both consent to be married to each other under customary law; and

(b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.'

[21] Regarding the required age of the parties at the time of the marriage, before the RCMA (as at the date of the marriage), s 1 of the Age of Majority Act 57 of 1972 was applicable and it provided:

'All persons, whether males or females, attain the age of majority when they attain the age of twenty-one years.'[12]

[22] Save for the age of majority, there is little difference between the requirements pre and post the RCMA. The RCMA codified certain aspects of customary law in this regard. As set out above, one of the requirements for a valid

[11] Id at 8.

[12] Prior to its repeal by the Children's Act 38 of 2005, s 1 of the Age of Majority Act 57 of 1972.

customary marriage was the consent of the guardian, if one of the parties was a minor.

[23] Section 4 of the RCMA provides:

'(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.*' (Own emphasis.)

[24] Section 10 of the RCMA, at the time of the civil marriage, provided: -

'A man and a woman between whom a customary union subsists are competent to contract a marriage with each other if the man is not also a partner in a subsisting customary union with another woman.'[13]

[25] Section 20 of the Civil Proceedings Evidence Act 25 of 1965 (the Evidence Act), is also relevant to these proceedings. It provides as follows:

'Except when the original is ordered to be produced any copy of or extract from any document in the custody or under the control of any State official by virtue of his office, certified as a true copy or extract by the head of the department in whose custody or under whose control such document is or by any officer in the service of the State authorized by such head, shall be admissible in evidence and be of the same force and effect as the original document.'

The respondent's case

[26] She and the deceased became involved in 1978 while she was still at school. She became pregnant in 1978, and the pregnancy was discovered by her family in January 1979. The respondent stated that the deceased did not hesitate to admit that he was the father and accepted responsibility to marry her. She was sent to the deceased's family's home by her paternal aunt, Vho Phophi Tshikororo Mahwasane (Ms Mahwasane).[14] On the same evening she was joined by a few young girls who would stay with her for a few days, to help her with cooking, cleaning and preparing food.[15] An amount of R600 was negotiated as lobola and paid by the deceased's family to her father.[16]

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[13] The amendment of the section now reads:
'A man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Marriage Act, 1961 (Act 25 of 1961), if neither of them is a spouse in a subsisting customary marriage with any other person.'

[14] According to respondent, in terms of the TshiVenda custom of 'ufhelekedza', which purpose is:
1. To establish if the boy allegedly responsible for the pregnancy acknowledged it; and
2. To determine whether the boy in question was prepared to marry the girl and make her his wife.

[15] In terms of the TshiVenda custom of 'dzipheletshedzi'.

[16] No confirmatory affidavits were provided by Ms Mahwasane or any of the young girls referred to. Neither was there confirmation of the lobola negotiations and payment by any of the persons involved.

[27] In 1982, the respondent fell pregnant again and once more claimed that the deceased had impregnated her. The deceased started working in 1984 and the respondent alleged that the deceased maintained the children. The third child was born in January 1995. According to relatives of the deceased, he denied paternity of this child as well. In 2004, the two oldest children of the respondent approached the maintenance court claiming maintenance from the deceased for tertiary education. The deceased disputed that he was the father of any of the children, whilst the respondent persisted with her allegations that the deceased was the father of all her children. Consequently, paternity tests were ordered to prove whether the deceased was the father of the two oldest children.

[28] The deoxyribonucleic acid (DNA) test was conducted by the National Health Laboratory Service, Johannesburg on 15 July 2004 between the deceased, the two children and the respondent. The DNA results confirmed that the deceased was not the father of the two children. The respondent did not disclose this crucial information to the court in her application. She continued to insist under oath, even after conceding that DNA tests were concluded, and even in her replying affidavit, that the deceased fathered her children.[17]

[29] The respondent's three children were born in September 1979, February 1983 and January 1995 respectively. Thus, during the time that the respondent stated she was married to the deceased according to customary law, she bore (at least) two children, who were not children of the deceased, according to the DNA results. She has never claimed maintenance for the child born in 1995.

[30] The respondent belatedly, in her replying affidavit, relies upon a copy of a 'next of kin' affidavit as proof that the third child, born in 1995, was the child of

[17] She stated in her application launched in 2017 that she intended to conduct another DNA test, but did nothing in this regard for over 13 years or at all.

the deceased. She inferred that the documents were completed by the appellant and that the youngest child was included as a child of the deceased. These allegations are new matters, which the appellant did not have the opportunity to challenge. But throughout her answering affidavit, the appellant and other relatives of the deceased denied that the deceased was the father of any of the three children. The 'next of kin' affidavit is once again an uncertified copy and is hearsay. Its authenticity has not been proven. There is no evidence that the appellant completed the document. The respondent does not disclose how she came to be in possession of the document.

[31] The respondent stated that she and the deceased bought a property, 525 Muledane Block J, Thohoyandou, in 1986. The property was registered in the deceased's name alone. The respondent alleges that in December 1996, she discovered that the deceased was involved with the appellant. She then left the deceased's home and went to her parental home. Meetings were held, according to her, between the two families. In these meetings, the respondent states that the deceased denied stating that he no longer loved her. The deceased began living with the appellant at this time. Despite the deceased's alleged profession of love to her, the respondent went to stay with the deceased's mother for some 10 years, without the deceased, until she moved to her own house, alone with her children.

[32] A confirmatory affidavit of the deceased's mother was attached to both the appellant and the respondent's affidavits. They each contradicted the allegations confirmed in the other affidavit. According to the high court judgment, it is not disputed that the deceased's mother then withdrew both affidavits. This is clear from the high court judgment where Kgomo J stated:

'…the deceased's mother executed a confirmatory affidavit [to the respondent's affidavit] which she later withdrew unconditionally… Both sides accepted her unconditional withdrawal from these proceedings.'[18]

There was no dispute raised in the full court or this Court on this withdrawal. The presiding judge in this matter requested clarity on whether the affidavits of the deceased's mother had been withdrawn. Both parties responded that the affidavits had been withdrawn.

[33] The respondent contended that she and the deceased registered their customary marriage at the Thohoyandou Magistrate's Office (the magistrate's office) in 1993. She did not give a precise date as to when this took place. She alleged that they were issued with a registration certificate, which was lost and she could not locate it. She averred that she approached the Department of Home Affairs in Makwarela to obtain a duplicate, where she was informed that such information was with the magistrate's office. However, they also could not provide her with such certificate. She gives no reason for this, nor does she elaborate on what other attempts were made to obtain a duplicate certificate. No confirmatory affidavits were obtained from any of these officials.

[34] After registering the customary marriage, the respondent stated that she applied for a Republic of Venda ID document. It was issued to her on 11 March 1993. As proof of this, she attached the ID document. She alleges that the ID document clearly indicates that she and the deceased were married in terms of customary law on 13 of March 1979. But the second page of this document, which she now alleged is a 'marriage certificate', contains only the details mentioned above. There is no mention in the ID document of the parties being married according to customary law. The respondent stated that in the absence of evidence of fraud regarding the registration of her marriage, the court had to

[18] Paras 17-18.

accept the certificate appearing in the ID document as valid and that the high court erred by not putting adequate weight on this ID document.

The appellant's case

[35] It is common cause that the appellant was married to the deceased for a period of 20 years. During that period the respondent did not challenge the marriage. The appellant attached a certified copy of the marriage certificate. The appellant and the deceased had four children, and the appellant attached copies of their birth certificates.

[36] The appellant stated that she was advised by her sister-in-law, Vyo Thinavhudzolo Manwadu (Vho Thina), who provided a confirmatory affidavit, that the deceased never impregnated the respondent and had at all times denied such accusations in respect of all three children. Other relatives also denied this. According to them, the deceased refused to pay maintenance and stated that the children were not his.

[37] Regarding the respondent being brought to stay with the deceased's family, members of the deceased's family confirmed that the respondent only stayed for a few days and then went back home as the deceased persisted in stating that he was not responsible for her pregnancy.

[38] The appellant alleged that the immovable property purchased by the deceased was his alone. The respondent played no part in the purchase, as confirmed by Vho Thina. Prior to their marriage, the appellant would visit the deceased and his family at their residences. She did not encounter the respondent at the deceased's residence, at any time. The appellant began staying with the deceased after the deceased's family had started lobola negotiations with her family.

[39] The appellant contended that she had requested a copy of the marriage certificate from the third respondent, but that it had refused to give her access. The appellant was informed by the third respondent, that the respondent was 'single and had never been married'. A challenge was clearly mounted by the appellant in her answering affidavit in the high court. She disputed the existence of the customary marriage, and the authenticity of the ID document (as well as its weight as evidence) as well as the respondent's assertion that it was a 'certificate' of marriage, as contemplated in terms of s 4(4)*(a), (b)* and s 4(8) of the RCMA.[19]

[40] The appellant challenged the respondent in the answering affidavit, to produce 'a certificate or any evidence from the third respondent confirming that indeed she was married to the deceased.' She stated that the respondent could not produce a marriage certificate because 'her alleged marriage never existed'. In addition, the appellant stated that the respondent had failed to adduce any evidence or the documents requested to prove that her alleged customary marriage was celebrated and concluded in terms of customary law and that the marriage was registered at the magistrate's office. No such documentation was produced.

Analysis

[41] The respondent's first ground of appeal in the full court was that the customary marriage was registered in terms of the marriage laws of Venda, i.e. as contained in her ID document. This was not the basis of her initial application in the high court. There was no proof of what the marriage laws of Venda stipulated. The respondent's second ground of appeal, that the high court misdirected itself by overlooking the fact that once the customary marriage was

[19] '(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.'

registered, in whatever acceptable form, then the certificate thereof constituted prima facie proof of the existence of the marriage, was ill-conceived. That too was not the basis of her application before the high court. On her own version, the marriage certificate was lost, and no certificate was produced as required by ss 4(4) and 4(8) of the RCMA, read with s 20 of the Evidence Act. Only a copy of her ID document was produced. She did not allege and could not state that it was a certificate as contemplated in the RCMA and therefore was proof of the existence of the marriage.

[42] In regard to the best evidence rule, in *Gemeenskapsontwikkelingsraad v Williams and Others (Williams)* in dealing with the best evidence required to prove the admissibility of evidence in relation to ownership of immovable property, the court held:

'As a general rule where the contents of a document are in issue, no evidence will be received other than the production of the original document itself. If there is evidence of diligent search and the document cannot be found, then secondary evidence of the contents will be received by a Court. Secondary evidence will also be received if it is not challenged in a civil case…The secondary evidence will, however, be rejected by a court if it concludes that the better evidence was readily available and there is reason to believe that it is not safe to accept the secondary evidence.

I concluded therefore that the evidence in regard to ownership of the land in question was not hearsay, but was secondary evidence which, however, for the reasons set out above, was not received by this Court.'[20]

[20] *Gemeenskapsontwikkelingsraad v Williams and Others* (1) 1977 (2) SA 692 (W) at 702D-F (*Williams*); Cf *Botha v S* [2009] ZASCA 125 and *Transnet Ltd v Newlyn Investments (Pty) Ltd* [2011] ZASCA 44; 2011 (5) SA 543 (SCA) (*Newlyn*). In the latter cases, it was held that while it was preferable for original documents to be produced as evidence, where this is *not possible or practicable* they may be substituted with other documents or evidence. Although there are no degrees in secondary evidence, a party may, '*subject to comment if more satisfactory proof is withheld*', adduce secondary evidence if he would be unable to ascertain the existence of the originals. (*Newlyn*) para 18. Neither of these cases are applicable as the original of the ID document was clearly available.

[43] In *W v W*,[21] Nestadt J, dealt with the proof required in relation to the validity of a marriage certificate. He held that:

'It remains for me to deal with the argument that the marriage certificate was in itself sufficient to prove that the marriage was valid. In terms of sec. 42 (3) of Act 81 of 1963, a marriage certificate (and other types of certificates) "shall, in all courts of law... be *prima facie* evidence of the particulars set forth therein"'.

This means that a judicial official must accept the particulars as correct until he is convinced that he cannot rely upon them. Whether such a conviction is justified must depend on the evidence which refutes or throws doubt upon the contents of the certificates. Included in the presumption thus created would be all the essentials for the conclusion of a valid marriage including the capacity of the parties. A further (common law) presumption which is relevant in this regard is the presumption of the validity of a marriage flowing from evidence of the ceremony and subsequent cohabitation … The presumptions referred to may of course be rebutted. In *Ex parte L., supra*, OGILVIE-THOMPSON, A.J., dealing with the common law presumption referred, to, stated (at p. 57):

"Any presumption which might otherwise have applied on this point is in my view conclusively rebutted by the circumstances that the Court is actually aware that neither of these ministers was in fact at the relevant date a duly appointed marriage officer. The case is therefore not one which can be decided on a presumption: it must be decided on the actual evidence before the court. This latter is fatal to the petitioner's contention". (Authorities omitted, own emphasis.)

[44] The ID document relied upon by the respondent as well as the 'next of kin' affidavit are hearsay and are not admissible in terms of s 3(1) of the Evidence Amendment Act 45 of 1998, (the Amendment Act),[22] unless they can be admitted

[21] *W v W* 1976 (2) SA 308 (W); see also *Mgenge v Mokoena and Another* [2023] ZAGPJHC 222; [2023] 2 All SA 513 (GJ).

[22] Section 3(1) of the Law of Evidence Amendment Act 45 of 1988 (the Law of Evidence Amendment Act) reads as follows:

'(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to –

under one of the sub-sections of the Amendment Act. Documents relied upon may be real evidence but they are not admissible as proof that their contents are true.[23] The best evidence rule would require that the authors of the documents or the person under whose custody they fall, give evidence in this regard.

[45] The full court held that the ID document was authentic and prima facie proof of the marriage. It held further that without this being disputed, it became conclusive evidence of the customary marriage. But the prima facie proof was challenged by the appellant. To prove the existence of the marriage, the respondent had to advance collateral evidence that there was a marriage. The respondent was obliged to show that all legal and customary requirements were adhered to.

[46] Before a customary marriage can be recognised as valid and registered it must satisfy certain requirements. As is evident from s 4(4)*(a)* of the RCMA, and the customary law requirements referred to above, before registering the marriage, the registering officer had to be satisfied that the marriage must have been concluded in accordance with customary law, meaning that the customs and usages traditionally observed among the indigenous African peoples of South Africa, which form the culture of those people, must have been adhered to. The marriage negotiations, rituals and celebrations must be according to customary law.[24] The spouses were required to be assisted by a guardian if

(i) the nature of the proceedings;
(ii) the nature of the evidence;
(iii) the purpose for which the evidence is tendered;
(iv) the probative value of the evidence;
(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
(vi) any prejudice to a party which the admission of such evidence might entail; and
(vii) any other factor which should in the opinion of the court be taken into account,
is of the opinion that such evidence should be admitted in the interest of justice.'

[23] *Rautini v Passenger Rail Agency of South Africa* [2021] ZASCA 158.

[24] Nkuna-Mavutane ME and Jamneck J fn 1.

under 21 years old. It was thus incumbent upon the respondent to offer proof, other than her ID document, to prove the customary marriage. The respondent failed to deal with these vital omissions in reply. If the ID document itself was prima facie proof of the marriage, once it was challenged, the respondent had to prove the marriage through extraneous evidence.

[47] As stated above, at the time when the alleged customary marriage took place, the respondent was below the age of 21 and she would have required the assistance of a guardian. This was also required under customary law. No mention is made of who assisted her to conclude and register the marriage. Although the age of majority and requirement for the consent of a guardian was not pertinently raised by the appellant, it is one of the legal pre-requisites for a valid customary marriage and formed part of what the respondent was required to prove. The marriage could only be registered if the registering officer was satisfied that the spouses concluded a valid customary marriage. The respondent does not say that it was demonstrated to the registering officer that she and the deceased had done so.

[48] All of these omissions render the reliance on one uncertified disputed document (which is not a copy of the marriage certificate) misplaced. The onus was on the respondent to prove the existence of the customary marriage. In seeking to rely on the ID document, no explanation was tendered for not proffering the original or at least attaching certified copies of it. But even that could not relieve the respondent of the burden of proving the marriage, the existence of which was challenged by the appellant and numerous witnesses, who were relatives of the deceased. Simply stating in one paragraph that neither Home Affairs, nor the magistrate's office could assist her, is a blatant disregard for the rules of evidence. Corollary evidence could easily have been produced. The respondent again, despite the challenge in the appellant's answering affidavit,

failed to refer to even one person who confirmed her allegations about the traditional ceremony and other customs having been observed and a customary marriage having been concluded. Neither did she show that the traditional rituals and celebrations occurred in terms of Venda Law. In such a case and considering the blatant untruths contained in the respondent's affidavit, it would not be appropriate or 'safe' to accept the ID document as proof of the customary marriage.[25]

[49] The respondent stated that she had 'lost' her marriage certificate. She however, stated in her grounds of appeal from the high court that the court erred in 'overlooking the fact that once a customary marriage is registered in whatever form, then the certificate thereof constitutes a prima facie proof of the valid existence of the marriage'. But, her ID document was not a marriage certificate. It therefore, on its own, could never have amounted to prima facie proof that the respondent and the deceased were married under customary law. That might have been the case if the respondent relied on a copy of her marriage certificate, which contained the requisite particulars and a valid explanation for not tendering the original.[26]

[50] Having challenged both the authenticity of the 'marriage certificate' contained in her ID document and the fact that the marriage ever took place, it was incumbent upon the respondent to prove the marriage through other means. This she could have done by, *inter alia*, complying with s 20 of the Evidence Act. The Evidence Act refers to certification of a document 'in the custody or under the control of any State official.' This does not detract from the obligation on a party to have a copy of a document certified, when it is to be used as evidence.

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[25] *Williams* fn 20.
[26] Cf *Newlyn* fn 13 para 18.

This more so, when the respondent's entire case is reliant on the uncertified copy of her ID document and the endorsement of a marriage.

[51] The respondent failed to state that she attempted to have the copy certified by any official. A State official can be ordered to either bring the document to court and produce it, or he or she can make a copy thereof, and certify it as a true copy for a party to use it in court. Alternatively, such official should explain why there was no record of the registration of the marriage. The marriage certificate is a public document which would fall within the parameters of the Evidence Act.

[52] The full court appears to have only analysed the evidence presented by the respondent and in doing so arrived at the conclusion that the ID document was not only prima facie proof of the existence of a marriage in terms of s 4(8) of the RCMA, but that it was conclusive proof as it was unchallenged. It concludes that '[o]n the required balance of probabilities based on the [identity document] the appellant has proved that she was married to the deceased, which marriage was registered on the 13th of March 1979.'[27]

[53] On the other hand, the minority judgment carefully analysed the provisions of ss 4(4) and (8) of the RCMA. The minority judgment penned by Diamond AJ referred to the fact that the respondent argued that, in terms of s 4(8) of the RCMA, the ID document qualifies as a certificate contemplated in that section; and therefore the certificate provides prima face proof of the existence of a customary union between the respondent and the deceased. Diamond AJ posed the vital question:[28] did the ID document qualify to be regarded as a 'certificate of marriage' in terms of s 4(8) of the RCMA? He correctly stated that the ID document was not a 'certificate of registration of a customary marriage' issued

[27] Para 24.
[28] Para 10.

under the section.[29] He went on to question whether or not such ID document, which carried an endorsement of marriage, qualified to be a certificate issued by 'any other law providing for the registration of customary marriage'.[30] He noted that the ID document attached was an uncertified copy despite the fact that the respondent had not alleged that she was not in possession of the original. There is nothing in the copy of the ID document attached to the founding affidavit that indicates that it is a certificate of a customary marriage in terms of the law authorising the registration of customary marriages in Venda or elsewhere; there was only the deceased's name, without his ID number and a reference to the date of marriage. He concluded that it was clear that the ID document was not 'a certificate of registration of a customary marriage issued under s 4(4) and s 4(8) of the RCMA'.

[54] Diamond AJ continued in his analysis that if the ID document fails to fall within this category, then the ID document could not be one for the purposes of s 4(8). Such document would not 'confer on the litigant the benefit that the document itself shall be prima facie evidence of the customary law marriage'. As stressed by Diamond AJ, although the status of that document would only be evidence prima facie of a marriage, it would obviously still be open to the appellant to lead evidence to rebut the existence of the customary marriage. If the respondent does not have an acceptable certificate, then she is not remediless. She can still prove the existence the customary marriage by adducing evidence of the conclusion of the marriage in terms of customary law, by providing details and confirmation relating to the necessary requirements.

[55] Counsel for the respondent in the full court and in this Court attempted to bolster the two grounds of appeal, during the hearing, by stating that in the

[29] Para 12.
[30] Para 15.

Republic of Venda, registration of marriage took place in terms of the same legislation authorising the issue of ID documents. He sought to rely upon the law of Venda in submitting that the copy of the ID document carrying an endorsement of a marriage qualified as a certificate issued by 'any other law providing for the registration of customary marriage'. No admissible proof of the law of Venda was produced, nor is this the case of the respondent herself. This contention directly contradicted the version of the respondent who stated that she registered her customary law marriage and she 'was issued with a registration certificate… However, the certificate is lost' and could not be located.

[56] The judgment of Diamond AJ was correct in stating that the question is not whether the customary marriage 'is registered in whatever acceptable form'.[31] The question is whether the person alleging that a customary marriage took place and that it was registered possesses a certificate which was issued in terms of the law providing for the registration of customary marriages. If a person does have such a certificate, then such a person is relieved of the duty to prove the existence of the customary marriage by way of the normal rules of evidence, that is, by attaching evidence and confirmation of the customary marriage taking place according to the customary law of Venda. The corollary is that if the person cannot produce the requisite marriage certificate, she must prove the marriage through other evidence.

[57] In summary, the respondent failed to adduce any admissible evidence of the marriage ceremony and traditional customs having been observed. No confirmatory affidavits were produced to confirm that the requirements of the customary marriage were met. Her reference to many people who were involved in the proceedings necessary for a customary marriage were not confirmed by

[31] Para 22.

those people. Confirmatory affidavits were not attached to confirm her version of the *ufhelekedza*, when she went to stay at the deceased's family's house, or the *dzipheletshedzi* when the unnamed young girls attended to her, whilst she stayed at the deceased's family. None of the deceased's family members confirmed any of her allegations relating to the admission by the deceased that he had impregnated her, or that a customary marriage or lobola negotiations took place. They denied these allegations. It is common cause that a customary union is between two families, not only the 'bridal couple'.

[58] A challenge was clearly mounted by the appellant in her answering affidavit. She disputed the existence of the customary marriage, and the authenticity of the ID document, as well as its weight as evidence. In addition, she disputed the respondent's assertion that it was a 'certificate' of marriage as contemplated in terms of s 4(4)*(b)* of the RCMA.[32] The use of an uncertified copy of a document, when the original is available, and where the authenticity of the document is challenged, cannot by any stretch of the imagination be regarded as the 'best evidence'.

[59] Even if the full court was correct in holding that the ID document was admissible as prima facie evidence of the truth of its contents, the question arises as to what weight should be attached to such document. It does not constitute a certificate as contemplated in ss 4(4) and 4(8) of the RCMA, nor does it comply with the customary law requirements. It remains a document upon which no weight can be placed.

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[32] 's 4(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.'

[60] Relying on the fact that she had proved that a customary marriage had been registered, the respondent contended that the deceased was automatically precluded, in terms of s 3(2) of the RCMA from entering into a marriage with any other woman. This would automatically render the purported civil marriage between the appellant and the deceased void. There was no dispute on this issue, if the customary marriage was proved.[33]

[61] Bearing in mind that there are a vast number of disputes of fact in this case, and that there are two mutually exclusive versions, this Court must weigh the probabilities to determine which version is most probable.[34] This case falls squarely within the ambit of the *Plascon-Evans* rule.[35] The respondent, being the original applicant, had the onus to prove her case that she and the deceased were married by customary law. As this Court stated in *Skog NO and Others v Agullus and Others:*

'…These being motion proceedings, the application fell to be decided in accordance with the principle laid down in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* (the *Plascon-Evans* principle). In terms of that principle, an applicant who seeks final relief in motion proceedings must, in the event of a dispute of fact, accept the version set up by his or her opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.'[36]

[62] If the appellant's version was not clearly untenable (which it was not), the application must be determined on her version. Not only did the appellant raise

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[33] *Murabi v Murabi* [2014] ZASCA 49; [2014] 2 All SA 644 (SCA); 2014 (4) SA 575 (SCA) para 17. See also *Thembisile v Thembisile* 2002 (2) SA 209 (T).
[34] *Plascon-Evans Paints (TVL) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), as confirmed by the Constitutional Court in *Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma v National Director of Public Prosecutions and Others* [2008] ZACC 13; 2009 (1) SA 1 (CC); (2008) (2) SACR 421 (CC); 2008 (12) BCLR 1197; (CC) para 10.
[35] Id at 634.
[36] *Skog N O and Others v Agullus and Others* [2023] ZASCA 15; [2023] 2 All SA 631 (SCA); 2024 (1) SA 72 (SCA) para 18.

genuine and bona fide disputes of fact, but her version was more probable. It was corroborated by numerous members of both her and the deceased's family, whereas the respondent's version is filled with inaccuracies and patent nondisclosures and failures to provide admissible evidence and/ or corroboration. In instances such as the paternity of her children, her evidence is patently false and misleading. It certainly does not pass the test required to prove her version.

[63] It is noted that the full court failed to deal with the counter-application. In view of the decision to which I have come, it is not necessary to deal with the counter-application. For the reasons set out above, I find that the respondent failed to discharge the onus to prove the existence of the customary marriage between herself and the deceased. The appeal must therefore succeed.

[64] Accordingly, the following order is granted:

1 The appeal is upheld.

2 The order of the full court is set aside and replaced with the following order:

'The appeal is dismissed with costs.'

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S E WEINER

JUDGE OF APPEAL

Makgoka JA (dissenting):

[65] I have read the judgment prepared by my Colleague, Weiner JA (the first judgment). Regrettably I disagree with the conclusion it reaches and the reasoning underpinning it. In my view, the appeal should fail. The factual background has been fully set out in the first judgment and needs no regurgitation here.

[66] Despite what appears to be intractable disputes of fact, the enquiry in this case falls within a narrow compass. It is this: were the first respondent, Mrs Matodzi Joyce Manwadu and Mr Livhuwani Robert Manwadu (the deceased) married to each other in terms of customary law? That question must be answered in the light of the conspectus of the evidence, a major part of which is a copy of a page of the respondent's identity document.

[67] Kgomo J in the first instance treated the copy of the page of the respondent's identity document as follows:

'What [the respondent] could come up with as proof of the customary marriage is an unauthorised or uncertified copy of what [the respondent] states is an extract from her identity documents which only states:

"Married on 1979-03-13"

No names of a spouse or his Identity Document Number accompan[ies] that inscription. Consequently, the authenticity of this inscription is in dispute as it is disputed by [the appellant].'

Later in the judgment, the learned Judge repeated the same line of thought, and proceeded:

'The problem is if Home Affairs has records that [the respondent] was married to someone on 1979-03-13, it definitely will and should have details of that marriage on its records. Now, for the same Home Affairs to tell both [the respondent] and [the appellant] that there is no record of a customary marriage between [the respondent] and the deceased or any other person in those circumstances leads one to no other reasonable inference or inference other than that the inscription . . . is not genuine. It is a forgery.'

[68] As to the merits of the matter, the learned Judge characterised the matter as one of two mutually exclusive versions. The court went on to set out the parties' versions and concluded that the appellant's version was more probable than the respondent's. Among the reasons for that conclusion were that the respondent's version was not corroborated, while the appellant's version was. The learned Judge said that '[a] whole plethora of persons confirmed [the appellant's] story. Nobody confirmed [the respondent's] story'.

[69] The first judgment identifies among the issues in dispute as being: (a) the admissibility of the copy of the respondent's identity document; and (b) the authenticity of the said document. I disagree. As I demonstrate shortly, the admissibility and authenticity of the document were never pleaded by the appellant, and were therefore, never in dispute before the court of first instance, and cannot be an issue in this Court. Thus, the identification of the issue in dispute is foundational to my disagreement with the first judgment. What the issues are in a matter, is dictated by the pleadings. As explained in *Swissborough Diamond Mines v Government of the RSA*:[37]

'It is trite law that in motion proceedings the affidavits serve not only to place evidence before the Court but also to define the issues between the parties. In so doing the issues between the parties are identified. This is not only for the benefit of the Court but also, and primarily, for the parties. The parties must know the case that must be met and in respect of which they must adduce evidence in the affidavits.'

[70] It is with this in mind that I turn to the affidavits, which, in motion proceedings, serve as both the pleadings and the evidence. The first respondent stated in her founding affidavit that she and the deceased married each other on 13 March 1979 at the Thohoyandou Magistrate offices. She further alleged that

[37] *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the RSA* 1999 (2) SA 279 at 323G–324A. See also *National Credit Regulator v Lewis Stores (Pty) Ltd and Another* [2019] ZASCA 190; 2020 (2) SA 390 (SCA); [2020] 2 All SA 31 (SCA) para 29.

from the marriage, three children were born, respectively in 1979, 1983 and 1995. When they got married, they were issued with a small registration certificate marked 'R1' in bold caps. However, she lost the certificate and after a diligent search, she could not locate it. Her attendance at the offices of Home Affairs to obtain a copy yielded no result as she was informed that the information was with the Magistrate's office. The latter office was unable to assist her.

[71] In the absence of the certificate referred to above, the respondent stated that after the marriage, she applied for a new identity document, which was issued to her on 11 March 1993, reflecting her marital status. She attached a copy of a page of her identity document titled '**MARITAL STATUS**'. Underneath the heading is the respondent's identity number, followed by the following particulars:

'SURNAME: MANWADU

NAMES: LIVHUWANI ROBERT

MAIDEN: TSHIKORORO

NAMES: MATODZI JOYCE

MARRIED ON: 1979/03/13'

[72] In her answering affidavit, the appellant responded as follows to the above averments:

'24.1 I am advised by my sister in law that the deceased never registered any form of marriage with [the respondent] and that the deceased's family at large is not aware of the alleged customary marriage concluded between the deceased and [the respondent].

24.2 I am advised by my sister and mother in law that the registration of customary marriage was dependent on the two families of the prospective spouses in that both families were required to confirm through an affidavit that indeed a customary marriage was concluded. The

reason the alleged customary marriage certificate could not be traced is because it never existed to start with.

24.3 I am further advised that the marriage officer before registering the alleged customary marriage must be satisfied first that all the customary marriage requirements were complied with.

24.4 It is clear that [the respondent] failed to deal with the requirements of the alleged customary marriage in her own application. *I am advised by the deceased's family that they do not know how [the respondent] got the new identity document with the family surname.* I have taken the liberty to approach [the Department of Home Affairs] to verify the marriage status of [the respondent] and it was confirmed that [the respondent] is single and has never been married.

24.5 I have requested a copy of this important information which [the Department of Home Affairs] refused to give to me. I challenge [the respondent] to bring forth [a] certificate or any other evidence from [the Department of Home Affairs] confirming that indeed she was married to the deceased.' (Emphasis added.)

[73] It is plain from the extract of appellant's answering affidavit above, that nowhere does she place the admissibility or authenticity of the copy of the respondent's identity document in issue, as the first judgment holds. On the contrary, the appellant accepted the document for what it purported to be. The appellant made only a fleeting reference to the document in her answering affidavit. She stated that she was unable to explain how the respondent came to assume the deceased's surname. This is a far cry from challenging the admissibility and authenticity of a document. Other than that, the appellant contented herself with bare denials, and that she was 'advised' that there was never a customary marriage between the respondent and the deceased. She failed to engage meaningfully with the thrust of the respondent's averments, and the attached copy of a page of her identity document.

[74] As I see it, the appellant was constrained to accept the authenticity of the document, unless she could prove that it was fraudulent. This was not her case.

This is why Kgomo J's conclusion in the first instance that the document was a forgery, cannot be supported. Unsurprisingly, the appellant does not rely on this finding.

[75] Given the above, the first judgment's criticism of the majority judgment of the full court for not dealing with the admissibility or the authenticity of the document, is unwarranted. As stated, that issue was neither before the court of first instance nor the full court, simply because they were not pleaded by the appellant. This explains why it was not addressed in either the majority or minority judgment. As stated, in his minority judgment, Diamond AJ, correctly in my view, criticised the court of first instance for not accepting the copy of the respondent's identity document for what it is, and for holding that it was a forgery.

[76] The basis on which the first judgment holds that the document is inadmissible is different from that of the court of first instance. The first judgment, correctly with respect, does not hold that the document is forgery. It provides four reasons for its conclusion. First, that the document does not constitute a certificate as contemplated in s 4(4) and 4(8) of the RCMA. Second, that it is an 'uncertified' copy. Third, that it does not satisfy the requirements of s 20(1) of the Evidence Act. Fourth, that it was improbable that the respondent could have been married in 1979 as she alleged because she was 18 years old, and the age of marriage was 21 years of age in terms of s 1 of the Age of Majority Act.[38]

[77] Of the four points, only the first was relied upon by the appellant in her answering affidavit. The rest were raised either by the court of first instance or by the majority in this Court. The issue about the age of majority in terms of the

[38] Age of Majority Act 57 of 1972.

Age of Majority Act and of an 'uncertified' copy, were raised mero motu in the judgment of the court of first instance. There is no suggestion that this had been canvassed with the parties. The applicability of s 20(1) of the Evidence Act was raised *mero motu* by a member of this Court for the first time during the hearing of the appeal. Understandably, counsel for the respondent was not able to make any meaningful submissions on it.

[78] Thus, none of the last three points was pleaded in the court of first instance. This Court has repeatedly cautioned against deciding a matter on issues neither pleaded nor canvassed with the parties. In *Fischer v Ramahlele* (*Fischer*) this Court said:

'Turning then to the nature of civil litigation in our adversarial system, it is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues . . . There may also be instances where the court may *mero motu* raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.'[39]

[79] In *Four Wheel Drive Accessory Distributors CC v Rattan NO*[40] Schippers JA, after referring to *Fischer*, cautioned that deciding a matter on unpleaded issues carries a risk of an apprehension of bias, in that '[the court could then be seen to be intervening on behalf of one of the parties, which would imperil its impartiality.'

[39] *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA); [2014] 3 All SA 395 (SCA) para 13.
[40] *Four Wheel Drive Accessory Distributors CC v Rattan NO* ZASCA 124; 2019 (3) SA 451 (SCA).

[80] About technical points raised for the first time on appeal, this Court had this to say in *Transnet Ltd v Newlyn Investments (Pty) Ltd* (*Newlyn*):[41]

'[I]t is a salutary principle that an appeal court will not entertain technical objections to documentary evidence which were not taken in the court below and which might have been met by the calling of further evidence….'

[81] If it is objectionable for a party to raise technical points on appeal, it must even be more so if those points are raised by a court, especially if the parties are not afforded an opportunity of commenting on them. Had this Court given adequate notice to the respondent that it intended to raise the issues referred to above, the respondent would possibly have considered steps to rectify them, if possible, or make submissions on them. Accordingly, on the authority of *Fischer* and *Newlyn*, it is not open to us to determine the appeal on unpleaded technical issues in respect of which the parties were not given a proper opportunity to make submissions on. The prejudice to the respondent, against whom the points are raised, is manifest.

[82] In any event, I do not agree with any of the points, which I consider in turn. Nothing turns on the fact that the respondent's copy of her identity document was uncertified. This is because its authenticity was never disputed by the appellant in her answering affidavit. As mentioned, the appellant accepted the document for what it purports to be. There was no suggestion that it was not a true copy of a page of her identity document, or that it was fraudulent. This Court has held that in the absence of a challenge by the other party as to the authenticity of documentary evidence, copies should be accepted on the principle of the best evidence.[42]

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[41] *Transnet Ltd v Newlyn Investments (Pty) Ltd* [2011] ZASCA 44; 2011 (5) SA 543 (SCA) para 18.
[42] *Botha v S* [2009] ZASCA 125; [2010] 2 All SA 116 (SCA) para 27.

[83] As regards s 20 of the Evidence Act, it simply finds no application here. For context, the provision must be read with s 19. The two sections read as follows:

'**19 Production of official documents**

(1) No original document in the custody or under the control of any State official by virtue of his office, shall be produced in evidence in any civil proceedings except upon the order of the head of the department in whose custody or under whose control such document is or of any officer in the service of the State authorized by such head.

(2) Any such document may be produced in evidence by any person authorized by the person ordering the production thereof.

20 Certified copies of or extracts from official documents sufficient

(1) Except when the original is ordered to be produced any copy of or extract from any document in the custody or under the control of any State official by virtue of his office, certified as a true copy or extract by the head of the department in whose custody or under whose control such document is or by any officer in the service of the State authorized by such head, shall be admissible in evidence and be of the same force and effect as the original document.

(2) Any such copy or extract may be handed in by any party who desires to avail himself thereof.

(3) No such copy or extract shall be furnished to any person except upon payment of an amount in accordance with the tariff of fees prescribed by or under any law or, if no such tariff has been so prescribed, an amount in accordance with such tariff of fees as the Minister in consultation with the Minister of Finance may from time to time determine.'

[84] The two provisions clearly apply in the case of original public documents in custody or under the control of any State official by virtue of his office. Section 19 precludes the production in evidence in civil proceedings of such documents except 'upon the order of the head of the department in whose custody or under whose control such document is or of any officer in the service of the State authorised by such head'. Section 20 regulates the admissibility of copies of, or extracts from, any such original document.

[85] The documents envisaged in these provisions are public documents, ie those in the 'custody or under the control of any State official'. A good example of such a document is the Birth, Marriages and Death Register held by the Department of Home Affairs. If a party wishes to use the entries in such a register, he or she would be obliged to comply with s 20 in two alternative ways provided for in the section. The State official can be ordered to either bring the document to court and produce it, or he or she can make a copy thereof, and certify it as a true copy for a party to use it in court. At no stage would a party who is not a State official have custody or control of such documents.

[86] The respondent did not purport to use any document under the custody or control of the State. The document she attached was not 'in the custody or under the control' of the State, as required in the section. It is a copy of a page of her identity document, which was in her possession. It is therefore not a document of public nature envisaged in the two provisions. In *Hassim v Naik*[43] this Court determined that to be classified as a document of a public nature, it must: (a) be made by a public official; (b) in pursuance of a public duty; and (c) the document must constitute a permanent record and be open to public inspection.

[87] It goes without saying that a person's identity document fulfils none of the above characteristics. But a document such as the Birth, Marriages and Death Register held by the Department of Home Affairs fits neatly into the classification. Therefore, the position would have been different had the respondent purported to use, for example, a copy of such a register to prove her marriage. She would have to subpoena the head of the Department of Home Affairs to bring the register to court. Alternatively, she would have requested the official to make a certified copy of the register. The section is thus not applicable.

[43] *Hassim v Naik* 1952 (3) SA 331 (A) at 339.

[88] There are two methods of certification of documents. The one is by a commissioner of oaths in terms of the Justices of the Peace and Commissioners of Oath Act.[44] The other is in terms of s 20 of the Evidence Act. Of the two, only the Evidence Act obliges certification in s 20. The circumstances under which the certification in terms of s 20 would be necessary have been set out above.

[89] The specific reference to the Evidence Act suggests that the first judgment considers that that Act prohibits the use of a copy of any document unless it is certified. If that is the suggestion, I am, with respect, unable to agree. There is no provision in the Evidence Act which prohibits the use of an uncertified copy of a non-public document, eg an identity document, in court. The only obligatory certification is the one referred to in terms of s 20 of the Evidence Act, which, as I have already explained, finds no application in this case.

[90] The first judgment says because the age of majority at the time of the alleged marriage was 21 years, and the respondent was only 18 years old, it was not legally possible for her to be married without a guardian. The flaw in this reasoning is simply this: the respondent does not allege that she was married in terms of civil rights, which would have been regulated by the Age of Majority Act. She says that she was married in terms of customary law. There is no evidence that in terms of the custom of the Vha-Venda people at that time, the age of marriage was also 21 years.

[91] Thus, in all the circumstances, the admissibility of the copy of the respondent's identity document was never in dispute before the court of first instance and cannot be, in this Court.

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[44] Justices of the Peace and Commissioners of Oath Act 16 of 1963.

[92] With regard to the merits of the appeal, the first judgment states that 'there are vast disputes of fact in this case, and that there are two mutually exclusive versions, the Court must weigh the probabilities to determine which version is most probable'. I do not agree that there are two mutually exclusive versions in this matter. I will explain shortly why. But even if there are, a court in motion proceedings is not at large to 'weigh the probabilities to determine which version is most probable' as the first judgment states. As this Court pointed out in *National Director of Public Prosecutions v Zuma*, motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special, they cannot be used to resolve factual issues because they are not designed to determine probabilities.[45]

[93] Applying the above dictum to the present case, we must identify the legal issue for resolution, based on common cause facts. The common cause facts are these. The respondent, in an endeavour to prove her marriage to the deceased, presented a copy of a page of her identity document. The legal question is whether, based on the copy of a page of her identity document, the respondent had discharged the onus to establish that she was married to the deceased in terms of customary law. That issue must be answered in terms of the established rules of evidence.

[94] Most of the factual matrix traversed in the first judgment does not assist in answering this question. For example, to hold that the appellant's version (that she was married to the deceased is more probable), is with respect, unhelpful.

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[45] *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA); 2009 (1) SACR 361 (SCA); 2009 (4) BCLR 393 (SCA); [2009] 2 All SA 243 (SCA) para 26, as confirmed by the Constitutional Court in *Commercial Stevedoring Agricultural and Allied Workers' Union and Others v Oak Valley Estates (Pty) Ltd and Another* [2022] ZACC 7; [2022] 6 BLLR 487 (CC); 2022 (7) BCLR 787 (CC); 2022 (5) SA 18 (CC) para 47.

This is because this was never in dispute. The very existence of that marriage constituted the foundation of the respondent's cause of action. She contended that it was invalid in the face of a prior customary marriage between herself and the deceased. Accordingly, there can hardly be talk of mutually destructive versions in this regard.

[95] The first judgment holds that the appellant had disputed the existence of the marriage between the respondent and the deceased and challenged the respondent to produce either: (a) a valid marriage certificate, or (b) other corollary evidence from Home Affairs or Magistrate office. The appellant's insistence that the respondent should produce the marriage certificate was sterile in the face of the respondent's explanation that: (a) the marriage certificate is lost; (b) she has attended to both the Home Affairs Department and the Magistrate office with no avail. Under the circumstances, the copy of the page of the respondent's identity document constitutes 'other corollary evidence' demanded by the appellant.

[96] The first judgment embraces the reasoning of the minority judgment where it holds that the document does not constitute a certificate envisaged in s 4(8). I agree with this. But that was only a part of what the minority judgment said about the document. It was preceded by the acceptance in the minority judgment that the document is an endorsement of the existence of a marriage between the respondent and the deceased. I will revert to this conclusion by the minority judgment.

[97] At the risk of repetition, the resolution of the dispute between the parties lies not in whether one version is more probable than the other. It lies in the weight to be attached to the copy of a page of the respondent's identity document, in the light of other common cause facts. In other words, it is about the adequacy of the evidence. It is to that issue I turn to.

[98] The document constitutes secondary evidence. Ordinarily, secondary evidence is in the form of a copy of a missing original document. However, Schwikkard & Van der Merwe[46] make the point that secondary evidence may also be used to prove things other than the contents of the missing document, for example, the existence of a status or a relationship. That is the situation in the present case. The respondent used the copy of her identity document to prove her marital status with the deceased.

[99] This principle was applied in *R v Green (Green)*[47] where the accused was charged with selling liquor in a manner not authorised by his license. The State had to prove that the appellant was the holder of a licence. It could only do so by handing up his licence during the trial. The State requested the appellant to hand over his licence, which the appellant refused to do. In lieu of the licence, the State relied on secondary evidence in the form of what was referred to as a 'counterfoil' to the licence. The trial court considered the counterfoil in the light of the other available evidence and concluded that there was sufficient proof of the existence of the appellant's licence. On appeal, it was submitted on behalf of the appellant that the counterfoil was not a license as envisaged in the statute, and therefore, the State had failed to prove its case. Rejecting that submission, Hopley J explained:

'…I am inclined to think that there are no degrees of distinction of secondary evidence that one is bound by. I do not think that when one is compelled to use secondary evidence he is bound to scan narrowly in what degree of perfection or excellence such evidence stands, whether it is of the first, second, or third degree of goodness . . . In such a case the next best evidence would, of course, be more conclusive than evidence of a degree lower, and so on, but provided it was evidence and did convince the Court, I think it was admissible and proper for the occasion. Well, what was the nature of the evidence produced? Certainly, it was not the best evidence to

[46] Schwikkard and Van der Merwe *Principles of Evidence* 4th ed (2015) Juta 432-433.
[47] *R v Green* 1911 CPD 823.

prove that the accused had a licence, the best being in the possession of the accused, but it was the best evidence under the circumstances.'[48]

[100] In my view, the application of the secondary rule in *Green* applies with equal force in the present case. Contrary to what the majority judgment of the full court held, the copy of the page of the respondent's identity document is not a certificate envisaged in s 4(8) of the Recognition Act. By holding that it is, the majority judgment erred. To borrow from Hopley J's phraseology in *Green*, the document is certainly not the best evidence to prove that the respondent and the deceased were married to each other, the best evidence being lost. But it was the best evidence under the circumstances.

[101] Based on the approach adopted in *Green*, the weight to be attached to the document must be considered in the light of other evidence. In this regard, I consider two factors. The first is that, after the alleged marriage, the respondent was issued an identity document reflecting that she had assumed the deceased's surname. There is no explanation how the respondent could have officially assumed the surname of the deceased without them being married. Confronted with this, all that the appellant could say was that the family did not know how this came about.

[102] Second, a child named Dakalo Manwadu, was born between the respondent and the deceased on 20 January 1995. Although this was initially denied by the appellant in her answering affidavit, the respondent in her replying affidavit provided documentary proof that this was the deceased's child. That was in the form of a next-of kin affidavit which the respondent alleged was completed by the appellant when she reported the deceased's death at the Master's office. The

[48] *Green* fn 13 above at 825.

document reflects the child as the deceased's fifth child, in addition to the appellant's four children.

[103] On its own, the fact that a child was born between the respondent and the deceased, does not prove that they were married. But viewed in the light of the totality of the evidence, it points in that direction. It also serves to refute the appellant's claim the respondent was an imposter whom the deceased never had anything to do with. This averment was made in the replying affidavit and in the normal course, the appellant had no right of response thereto. But the context is that the allegation was made in direct response to the appellant's denial in her answering affidavit that the child was born of the respondent and the deceased. Therefore, it was not case of the respondent making out a new case in the replying affidavit. If the appellant considered the allegation not to be true, she could have sought leave of the court to answer to it.[49] This is especially so since the allegation relate to a document which the respondent alleged, was authored by the appellant. The appellant elected not to seek leave to answer to it, and consequently, the allegation must be accepted as true.

[104] The first judgment holds that because the copy of the respondent's identity document is not a certificate referred to in s 4(8), it was the end of the enquiry, and the respondent had to be non-suited on that basis. This is contrary to the approach adopted in *Green*, which received the imprimatur of this Court in *Newlyn*. There, it was emphasised that once secondary evidence is admissible, a party is entitled to give whatever evidence it could in respect of the contents of the missing document.[50]

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[49] See *Pretoria Portland Cement Co Ltd v Competition Commission* 2003 (2) SA 385 (SCA) para 63; *Tantoush v Refugee Appeal Board and Others* 2008 (1) SA 232 (T) para 15.
[50] *Newlyn* fn 7 above para 19.

[105] Unless we distinguish *Newlyn*, or conclude that it is clearly wrong, we are bound by it and must follow it by virtue of the principle of precedent. As this Court pointed out in *Patmar Explorations v Limpopo Development Tribunal*:

'…The basic principle is *stare decisis*, that is, the Court stands by its previous decisions, subject to an exception where the earlier decision is held to be clearly wrong. A decision will be held to have been clearly wrong where it has been arrived at on some fundamental departure from principle, or a manifest oversight or misunderstanding, that is, there has been something in the nature of a palpable mistake. This Court will only depart from its previous decision if it is clear that the earlier court erred or that the reasoning upon which the decision rested was clearly erroneous.'[51]

[106] As mentioned, in his minority judgment, Diamond AJ characterised the document as an endorsement of the marriage between the respondent and the deceased. He further held that status of the document was that 'it evidences prima facie evidence of marriage', which he said, 'would still be open to an interested party to lead rebutting evidence of the existence of a customary marriage'. This characterisation of the document, is to my mind, undoubtedly correct. It reflects the proper approach to the evaluation of evidence, which should have been adopted in the court of first instance. I do not understand the first judgment to suggest that Diamond AJ was wrong in this regard.

[107] I part ways with Diamond AJ, though, in his conclusion that because the document is not a certificate envisaged in s 4(8) of the RCMA, that should be the end of the enquiry. If the document is an endorsement of the marriage and demonstrates, prima facie, the existence of marriage as he held, the appellant was required to adduce evidence in rebuttal to disturb the prima facie evidence. She did not. In the absence of any such evidence by the appellant, the prima facie case

[51] *Patmar Explorations (Pty) Ltd and Others v Limpopo Development Tribunal and Others* [2018] ZASCA 19; 2018 (4) SA 107 (SCA) para 3.

became conclusive.[52] This obviated the need for the respondent to prove all other requirements of the RCMA such as lobola negotiations, the payment thereof, celebrations, etc.

[108] I end where I started. Viewed objectively and on the face of it, what does the copy of the page of the respondent's identity document convey? Titled **'Marital status'**, it mentions the identity number of the respondent, followed by the full names of both parties, and the inscription: 'Married: 1979-03-13.' Any objective and reasonable person would understand from the document that: (a) the persons mentioned in the document (the respondent and the deceased) were married to each other on the date mentioned, ie 13 March 1979, and (b) as a result, the respondent, as the wife, adopted the surname of the deceased.

[109] It follows that the respondent should have prevailed in the court of first instance. The order of the full court was therefore correct in upholding the appeal, albeit on a wrong basis. For these reasons, had I commanded the majority, I would have dismissed the appeal with costs.

T MAKGOKA
JUDGE OF APPEAL

[52] See *Venter and Others v Credit Guarantee Insurance Corporation of Africa Ltd and Another* 1996 (3) SA 966 (A) at 980B.

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