THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 105/2023

In the matter between:

ELIZABETH THIMBILUNI TSHIVHASE **APPELLANT**

and

AZWIHANGWISI FRANCINAH TSHIVHASE N O **FIRST RESPONDENT**

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

Neutral citation: *Tshivhase v Tshivhase N O and Another* (105/2023) [2025] ZASCA 131 (12 September 2025)

Coram: MOKGOHLOA, WEINER, GOOSEN, SMITH and KEIGHTLEY JJA

Heard: 26 August 2025

Delivered: 12 September 2025

Summary: Customary Law – Recognition of Customary Marriages Act 120 of 1998 – whether the customary marriage relied upon by the respondent was proven – whether the civil marriage concluded between the deceased and the appellant is

valid – declaration of invalidity of joint will – whether the court a quo erred in dismissing the non-joinder point in *limine* – whether the first respondent made out a proper case for declaring the civil marriage concluded between the appellant and the deceased void *ab initio* and setting aside the joint will of the appellant and the deceased.

ORDER

On appeal from: Limpopo Division of the High Court, Thohoyandou (Makhafola J, sitting as court of first instance):

1 The appeal is upheld with costs.

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

'The application is dismissed with costs.'

JUDGMENT

Weiner JA (Mokgohloa, Goosen, Smith and Keightley JJA concurring):

Introduction

[1] This appeal concerns whether the first respondent, Azwihangwisi Francinah Tshivhase (the respondent), and Ndavheleseni Lazarus Tshivhase (the deceased), who died on 26 August 2020, were married to each other by customary law.[1] If so, the issue is the validity of the subsequent civil marriage between the deceased and the appellant, Thimbiluni Elizabeth Tshivhase. The respondent contended that on 24 December 1966, she and the deceased concluded a customary marriage. The appellant denied that such marriage took place, disputed that the respondent has proved same and submitted that it is common cause that she and the deceased entered into a civil marriage in 1977. Aligned to these contentions is the validity of a joint will, executed by the deceased and the appellant.

[1] The first respondent has been cited in her capacity as executrix of the estate of the deceased. The second respondent is not participating in this appeal and has been cited as an interested party.

Background

[2] On 23 October 2020, the respondent lodged an urgent application in the Limpopo Division of the High Court, Thohoyandou (the high court), *inter alia,* to declare the civil marriage concluded between the deceased and the appellant *void ab initio* and to set aside their joint will. Her claim was based on the existence of the prior customary marriage between herself and the deceased, allegedly concluded on 24 December 1966, which, it was submitted, rendered the 1977 civil marriage invalid due to non-compliance with s 22 of the Black Administration Act 38 of 1927 (the BAA)[2] and s 10 of the Recognition of Customary Marriages Act 120 of 1998 (the RCMA).[3] The respondent attached, as proof of her customary marriage to the deceased, a copy of a page from her identity document issued by the then Republic of Venda (the ID), and which she contends is proof of the customary marriage.

[3] On 24 November 2020, the high court per Makhafola J declared the civil marriage *void ab initio* and set aside the joint will. He accepted that the entry in the ID was *prima facie* proof of the customary marriage. In addition to declaring the civil marriage *void ab initio*, the high court dismissed the point in *limine* of non-joinder raised by the appellant based on the failure to join as respondents the beneficiaries of the joint will. No reasons were provided by the judge for his orders.

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[2] Section 22(1) of the s 22 of the Black Administration Act 38 of 1927 (the BAA) provides that '[n]o 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'.
[3] Section 10(1) of the Recognition of Customary Marriages Act 120 of 1998 (the RCMA) provides that '[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'.

[4] The appellant subsequently applied for leave to appeal, which was dismissed on 5 March 2021 by Makhafola J. The appellant thereafter applied to this Court for leave to appeal. That application was accompanied by a request for condonation for the late filing of the application. On 15 March 2022, this Court granted the appellant leave to appeal to this Court. On 19 April 2022, after this Court had granted leave to appeal, Makhafola J delivered a judgment setting out the reasons for granting the orders issued on 24 November 2020. The appellant now seeks to appeal the decision to declare the civil marriage and joint will *void ab initio* and the dismissal of the non-joinder point in *limine*. Furthermore, the appellant applied for condonation for the late filing of the corrected notice of appeal and the appeal record. This is not opposed and condonation is accordingly granted.

[5] The appellant's primary contention on appeal was that the respondent had failed to prove the existence of the customary marriage between herself and the deceased. She disputed that the ID constituted *prima facie* proof of the existence of such a customary marriage or that it constituted a marriage certificate in terms of s 4(8) of the RCMA.

[6] The ID includes an entry recording the respondent's ID number; surname (Tshivhase); forenames; maiden name; the deceased's first name, without an ID number; and the date on which the respondent was allegedly married. It does not specify that she and the deceased were married under customary law. The appellant submitted that the ID falls short of constituting a marriage certificate as contemplated in s 4(8) of the RCMA, which requires specific particulars including proof of registration.[4] In respect of the civil marriage between the

[4] Section 4(8) of the RCMA provides as that '[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'.

appellant and the deceased, there is no dispute that it occurred on 22 February 1977. A valid marriage certificate is attached to the respondent's affidavit.

[7] The respondent argued that the high court correctly found that the civil marriage entered into between the deceased and the appellant was void *ab initio* in view of the existence of the prior customary marriage. The respondent contended further that the beneficiaries of the will had no direct interest in this determination before the high court, as their rights in terms of the will were unaffected and the will could still be presented to the executor or the Master of the High Court. It is on this basis that she argued that the point in *limine* lacks merit and was correctly dismissed.

[8] The respondent further contended that in consequence of the civil marriage being void *ab initio*, the joint will, which purported to disinherit her and her children with the deceased, was invalid and in contravention of s 22(7) of the BAA,[5] which is aimed at protecting the rights of spouses involved in a customary marriage.

Issues

[9] The issues for determination by this Court are:

(a) Whether the ID relied on by the respondent constitutes prima facie proof of the alleged customary marriage concluded between the deceased and the respondent and whether same has been properly proved.

(b) Alternatively, whether the respondent adduced sufficient additional evidence to substantiate the existence of her alleged customary marriage.

[5] The section provides that '[n]o 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'.

(c) Consequently, whether the respondent has made out a proper case for declaring the civil marriage concluded between the appellant and the deceased void *ab initio*.

(d) Whether the high court erred in setting aside the joint will of the appellant and the deceased and by dismissing the non-joinder point in *limine* raised by the appellant.

[10] The appellant contended that no valid prior customary marriage existed between the deceased and the respondent. In the high court, she argued that the entry in the respondent's ID, tendered as proof of the marriage, was insufficient to prove the existence of a valid customary marriage. The appellant further contended that the ID did not constitute a marriage certificate in terms of s 4(8) of the RCMA and consequently did not constitute *prima facie* proof of the customary marriage between the deceased and the respondent. The appellant further submitted that the respondent had failed to disclose which custom of the black people of South Africa was used to negotiate her marriage and that there was compliance with those customs. In addition, the lobola letter was not attached to the founding affidavit, nor were there any confirmatory affidavits attached from the people who were present during the purported lobola negotiations or the customary marriage ceremony. It is on this basis that the appellant argues that in the absence of the customary marriage being proven, her certified civil marriage and the joint will are valid.

[11] The facts in the present matter are strikingly similar to those of this Court's judgment in *Manwadu v Manwadu and Others* (*Manwadu*).[6] I will accordingly deal, in brief, with the requirements for the proof of the customary marriage, and rely upon the reasoning in *Manwadu*. The only significant difference is that in the

[6] *Manwadu v Manwadu and Others* [2025] ZASCA 10; [2025] 2 All SA 27 (SCA); 2025 (3) SA 410 (SCA) (*Manwadu*). See also *Mgenge v Mokoena and Another* [2023] ZAGPJHC 222; [2023] 2 All SA 513 (GJ); *W v W* 1976 (2) SA 308 (W).

present matter, the respondent's ID is a certified copy whereas in *Manwadu*, the copy attached was not certified. This, however, does not assist the respondent, as will be demonstrated below.

[12] In *Manwadu*, this Court found that:

'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. …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 registered, in whatever acceptable form, then the certificate thereof constituted prima facie proof of the existence of the marriage, was ill-conceived…'[7]

[13] The high court, in the present case held that the ID was *prima facie* proof of the marriage and without this being disputed, it became conclusive evidence of the customary marriage. But, as in *Manwadu*, the *prima facie* proof was challenged by the appellant. In *Manwadu*, this Court upheld a similar challenge based on the same type of ID. Consequently, to prove the existence of the marriage, the respondent had to advance collateral evidence of the alleged marriage. The respondent was obliged to provide evidence establishing that all legal and customary requirements were adhered to. Both s 4(4)*(a)* of the RCMA, and in terms of the customary law requirements of a customary marriage, '[b]efore 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… . It was thus incumbent upon the respondent to offer proof, other than her ID document, to prove the customary

[7] Ibid *Manwadu* para 41.

marriage.'[8] 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.

[14] In addition, at the time when the alleged customary marriage took place, the deceased was below the age of 18 and he would have required the assistance of a guardian. There is no reference made of who assisted him to conclude and register the marriage. This was one of the legal pre-requisites for a valid customary marriage and formed part of what the respondent was required to prove. Furthermore, the marriage could only be registered if the registering officer was satisfied that the respondent and the deceased had concluded a valid customary marriage according to the applicable customary law requirements. It is not alleged by the respondent that it was demonstrated to the registering officer that she and the deceased had done so.

[15] Despite the challenge in the appellant's answering affidavit on these issues, the respondent failed to provide any details of any person who could confirm her allegations about the traditional ceremony and other customs having been observed and a customary marriage having been concluded. She also did not provide details of what had transpired, when and where to demonstrate that the traditional rituals and celebrations occurred in terms of Venda Law had been observed. In short, the ID was not a marriage certificate. It, therefore, on its own, did not amount to *prima facie* proof that the respondent and the deceased were married under customary law. Thus, the respondent was obliged to prove the marriage through other means, which she failed to do.

[16] This Court in *Manwadu* was clear that even if the identity document on

[8] Ibid para 46. Citations omitted.

which reliance was placed was certified and the original was attached, once a challenge to the existence of a customary marriage and was mounted, a respondent was not relieved of the burden of proving that the marriage occurred. This is so as the entry in the ID is not a certificate of registration of a customary marriage as contemplated in customary law and in s 4(8) of the RCMA. It therefore does not bear the evidentiary value of a certificate of registration for the reasons set out in *Manwadu*.[9]

[17] This Court is bound by its decision in *Manwadu*, that the customary marriage cannot be declared valid due to the failure of the respondent to produce adequate proof that the customary marriage was validly entered into once a challenge was mounted to it. And accordingly, it must be found that the respondent failed to make out a proper case for declaring the civil marriage concluded between the appellant and the deceased void *ab initio.*

Non-Joinder and the joint will

[18] The test for non-joinder assesses whether a party has a direct and substantial interest in the subject matter of the litigation, such that their exclusion might result in prejudice to them. In *Gordon v Department of Health, KwaZulu-Natal*,[10] this Court held that 'if the order or "judgment sought cannot be sustained and carried into effect without necessarily prejudicing the interests" of a party or parties not joined in the proceedings, then that party or parties have a legal interest in the matter and must be joined.'[11] That is the case here, where a decision on the validity of the joint will would impact third parties not involved in the litigation. These include the appellant in her personal capacity, and the beneficiaries under the will. Consequently, Lindelani Masalautshizwivhona Tshivhase, Mulondo

[9] *Manwadu* para 20, 43 and 46
[10] *Gordon v Department of Health: KwaZulu-Natal* [2008] ZASCA 99; 2008 (6) SA 522 (SCA); [2009] 1 All SA 39 (SCA); 2009 (1) BCLR 44 (SCA); [2008] 11 BLLR 1023 (SCA); (2008) 29 ILJ 2535 (SCA).
[11] Ibid para 9.

Musandiwa Johannes Tshivhase, Nndavheleseni Jacobus Tshivhase, and Nkhumeleni Unarine Rejoyce Tshivhase.

[19] In *Johannesburg Society of Advocates and Another v Nthai and Others* (*Nthai*),[12] Ponnan JA held as follows:

'...[J]oinder of a party is necessary if that party has a direct and substantial interest that may be affected prejudicially by the judgment of the court in the proceedings concerned. This court has set out the test as follows:

"The issue in our matter, as it is in any non-joinder dispute, is whether the party sought to be joined has a direct and substantial interest in the matter. The test is whether a party that is alleged to be a necessary party, has a legal interest in the subject-matter, which may be affected prejudicially by the judgment of the court in the proceedings concerned."

The court went on to hold that *the primary question is the impact of the order that is sought on the interest of third parties. Particularly important is the question whether the order sought cannot be carried into effect without substantially affecting their interests*. For the purposes of assessing whether a party must be joined: "it suffices if there exists the possibility of such an interest. It is not necessary for the court to determine that it, in fact, exists; in many cases, such a decision could not be made until the party had been heard".'[13] (Emphasis added.)

[20] The high court found that joinder was not necessary as the will could still be submitted to the Master. But this is ill-conceived. The practical effect of invalidating the joint will, executed by the appellant and the deceased, is that the estate will no longer be able to devolve testate but would by necessary implication have to devolve intestate, thus prejudicing the beneficiaries.

[21] It is unfortunately necessary to comment on the attitude of the judge in the high court. As stated, the order in the urgent application was granted on 24 November 2020. No reasons were provided by the judge. On 5 March 2021, the

[12] *Johannesburg Society of Advocates and Another v Nthai and Others* [2020] ZASCA 171; 2021 (2) SA 343 (SCA); [2021] 2 All SA 37 (SCA).
[13] Ibid para 31. Citations omitted.

application for leave to appeal was dismissed by the high court. The appellant then petitioned this court without reasons having been furnished by the Judge. She was granted leave to appeal on the 14 March 2022. The appellant was compelled to request reasons from the high court and the judge's response, as set out in his reasons for judgment was as follows:

'[2] This judgment is in response to requested reasons or judgment, which was never brought to my attention at any given time. I have been surprised by a letter dated 12 October 2021, given to me by my registrar at the beginning of February 2022, which is a complaint to the Judicial Service Commission. This letter is authorised by one Mr. Mr. Rendani Sathiel Tshivhase on behalf of Elizabeth Tshivhase, the first respondent in this matter. This letter contains serious unfounded allegations I will not reply to because no request was ever brought to my attention for written reasons because the registrar of the High Court knows about files at his office which are not kept in the judge's chambers after the case has been finalized.

[3] The reasons are not, now, given because the first respondent is represented by Hanson Incorporated Attorneys… I do not need to be convinced to write a judgment. There needs to be a request in terms of the Rule and that request be brought to my attention. This was not done.'

[22] There is no rule that provides that a judgment is only required if reasons are requested. The reasons should, as a matter of course, be handed down when the order was granted, or on a date specified by the judge. It has become a practice in some courts for orders to be granted without reasons, and this is to be frowned upon and offends the rule of law. As stated in *Mphahlele v First National Bank of South Africa Ltd:*[14]:

'There is no express constitutional provision which requires judges to furnish reasons for their decisions. Nonetheless, in terms of section 1 of the Constitution, the rule of law is one of the founding values of our democratic state, and the judiciary is bound by it. The rule of law undoubtedly requires judges not to act arbitrarily and to be accountable. The manner in which they ordinarily account for their decisions is by furnishing reasons. This serves a number of purposes. It explains to the parties, and to the public at large which has an interest in courts

[14]*Mphahlele v First National Bank of South Africa Ltd* [1999] ZACC 1; 1999 (2) SA 667; 1999 (3) BCLR 253 para 12.

being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions. Then, too, it is essential for the appeal process, enabling the losing party to take an informed decision as to whether or not to appeal or, where necessary, seek leave to appeal. It assists the appeal court to decide whether or not the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar matters. It may well be, too, that where a decision is subject to appeal it would be a violation of the constitutional right of access to courts if reasons for such a decision were to be withheld by a judicial officer.'

[22] In the premises, the appeal must succeed and the following order is made:

1 The appeal is upheld with costs.

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

'The application is dismissed with costs.'

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S E WEINER

JUDGE OF APPEAL

Appearances

For the appellants:	D Keet with B Bester
Instructed by:	Hansen Inc. Attorneys, Pretoria Phatshoane Henny, Bloemfontein
For the first and second respondents:	M S Sikhwari SC
Instructed by:	Ramuhuyu Attorneys Inc, Thohoyandou Van Wyk & Preller Attorneys, Bloemfontein.