**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Reportable**

Case no: 630/2018

In the matter between:

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| **L MZALISI NO** | **FIRST APPELLANT** |
| **DIRECTOR-GENERAL OF DEPARTMENT** | |
| **OF HOME AFFAIRS NO** | **SECOND APPELLANT** |
| **MINISTER OF HOME AFFAIRS NO** | **THIRD APPELLANT** |
| **DEPUTY DIRECTOR-GENERAL** | |
| **FOR CIVIC SERVICES NO** | **FOURTH APPELLANT** |

and

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| **EMMANUEL PAULKING OCHE OCHOGWU** | **FIRST RESPONDENT** |
| **ZIZIPHO NKUMANDA** | **SECOND RESPONDENT** |

**Neutral citation:** *Mzalisi NO & others v Ochogwu & another* (630/2018) [2019] ZASCA 138 (01 October 2019)

**Coram:** Petse DP, Tshiqi, Wallis, Mbha and Dlodlo JJA

**Heard:** 5 September 2019

**Delivered:** 01 October 2019

**Summary:** Civil and customary marriages – eligibility of asylum seekers whose status has not been determined to marry whilst lawfully residing in South Africa – validity of departmental circular imposing absolute ban on asylum seekers seeking to marry – circular inconsistent with the law and invalid.

## ORDER

**On appeal from**: Eastern Cape Division of the High Court, Port Elizabeth (Jaji J sitting as court of first instance):

1. The appeal is dismissed with costs on the scale as between attorney and client.
2. The order of the court below is amended to the following extent:

2.1 The structural interdict appended to paragraph (v) of the order is deleted in its entirety.

2.2 Paragraph (vii) of the order is deleted in its entirety.

## JUDGMENT

**Petse DP (Tshiqi, Wallis, Mbha and Dlodlo JJA concurring):**

### Introduction

[1] The first respondent, Mr Emmanuel Paulking Oche Ochogwu, is a Nigerian national. He came to South Africa in 2011 to seek sanctuary in order to escape what he says were increasing attacks directed at Christians by Boko Haram in his home country. He is an asylum seeker who is entitled to reside in South Africa by virtue of an asylum seeker temporary permit issued in terms of s 22(1)[1] of the Refugees Act 130 of 1998 (the Refugees Act). This permit entitles the first respondent to live, work and study in South Africa. His application for asylum under s 21 of the Refugees Act was refused by the Refugee Status Determination Officer.[2] He appealed the rejection of his application to the Refugees Appeal

[1] Section 22(1) of the Refugees Act provides that a Refugee Reception Officer must, pending the outcome of an application in terms of section 21(1), issue to the applicant an asylum seeker permit in the prescribed form allowing the applicant to sojourn in the Republic temporarily, subject to any conditions, determined by the Standing Committee, which are not in conflict with the Constitution or international law and are endorsed by the Refugee Reception Officer on the permit.

[2] Section 24(3) of the Refugees Act empowers a Refugee Determination Officer to:
(a) grant asylum; or (b) reject the application as manifestly unfounded, abusive or fraudulent; or (c) reject the

Board (RAB) in terms of s 24A of the Refugees Act. The appeal has been pending before the RAB for some seven years.[3] Had the first respondent's asylum seeker application succeeded he would have become a refugee and lawfully entitled to reside permanently in South Africa.[4]

[2] In September 2015 the first respondent married the second respondent, Ms Zizipho Nkumanda, a South African citizen by birth, under customary law. There is one child Giovanni, born of this marriage on 23 June 2016. Both respondents live in Port Elizabeth where the first respondent is a Pastor in the Dominion Embassy Church.

[3] During August 2016 the respondents went to the offices of the Department of Home Affairs (DHA), Port Elizabeth to seek registration of their customary marriage under s 4 of the Recognition of Customary Marriages Act 120 of 1998 (RCMA),[5] and also to contract a

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application as unfounded; or (d) refer any question of law to the Standing Committee for Refugee Affairs established by section 9 to 20 of the Refugee Act.

[3] There is reportedly a backlog of some 200 000 appeals pending before the RAB.

[4] 'Refugee' is defined in s 1 as 'any person who has been granted asylum in terms of this Act'.

[5] Section 4 of the RCMA, titled 'Registration of customary marriages' reads as follows:

'(1) The spouses of a customary marriage have a duty to ensure that their marriage is registered.

(2) Either spouse may apply to the registering officer in the prescribed form for the registration of his or her customary marriage and must furnish the registering officer with the prescribed information and any additional information which the registering officer may require in order to satisfy himself or herself as to the existence of the marriage.

(3) A customary marriage-

*(a)* entered into before the commencement of this Act, and which is not registered in terms of any other law, must be registered within a period of 12 months after that commencement or within such longer period as the Minister may from time to time prescribe by notice in the *Gazette;* or

*(b)* entered into after the commencement of this Act, must be registered within a period of three months after the conclusion of the marriage or within such longer period as the Minister may from time to time prescribe by notice in the *Gazette.*

*(4)(a)* A registering officer must, if satisfied that the spouses concluded a valid customary marriage, register the marriage by recording the identity of the spouses, the date of the marriage, any lobolo agreed to and any other particulars prescribed.

*(b)* The registering officer must issue to the spouses a certificate of registration, bearing the prescribed particulars.

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

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

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

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

*(a)* the registration of any customary marriage; or

civil marriage under the Marriage Act 25 of 1961. There they met Mr Faltein, at the time the Acting Office Manager. Mr Faltein told them that for this to happen two things were required: first, their customary marriage had to be proved and secondly, the first respondent's asylum seeker temporary permit had to be verified. Proof of the existence of the customary marriage was duly provided by way of an affidavit from the second respondent's father. And, in February 2017 a new s 22 asylum seeker permit was made available to Mr Faltein, who confirmed that all was now in order.

[4] But, lo and behold, on 14 February 2017, when the respondents returned to the DHA, little did they know what awaited them. To their chagrin, Mr Faltein told them that they could neither marry nor have their customary marriage registered because, in the interim, the law had changed and 'asylum seekers [were] no longer allowed to get married'. For this stance Mr Faltein relied on a circular issued on 12 September 2016 by the Deputy Director-General for Civic Services, the fourth appellant in this case.[6] In particular, Mr Faltein invoked para 2.1*(b)*(iii)*(dd)* thereof. In broad terms, the circular, amongst other things, prescribes elaborate procedures with which marriage officers are required to comply before they may solemnise marriages involving refugees and asylum seekers.

[5] Aggrieved by this bizarre turn of events, the respondents instituted legal proceedings in the Eastern Cape Division of the High Court, Port Elizabeth (the high court). In the main, they impugned the validity and lawfulness of paragraph 2.1*(b)*(iii)*(dd)* of the circular to the extent that it introduced an impediment to them being married. It bears mentioning that this paragraph was the only material innovation introduced to Circular No. 10 of 2013, operative from 19 December of that year, that had until then governed procedures relating to the solemnisation and registration of marriages in South Africa.

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*(b)* the cancellation or rectification of any registration of a customary marriage effected by a registering officer.
(8) A certificate of registration of a customary marriage issued under this section or any other law providing for the registration of customary marriages constitutes *prima facie* proof of the existence of the customary marriage and of the particulars contained in the certificate.
(9) Failure to register a customary marriage does not affect the validity of that marriage.'

[6] Circular No. 4 of 2016: Consolidated Procedures for Solemnisation and Registration of Marriages (the circular).

[6] Barring costs,[7] the extensive relief [8] sought by the respondents as applicants in the high court was, despite opposition by the appellants, as respondents, granted in its entirety. The appellants appeal against that order with the leave of the high court.

**Respondents' cause of action**

[7] The respondents challenged the validity of paragraph 2.1*(b)*(iii)*(dd)* on several grounds. First, it was contended that it offends good morals, is unlawful and unconstitutional as the paragraph in effect nullifies the right of all asylum seekers to get married. Second, that its wording is contradictory and vague in that it recognises the right of asylum seekers to get married, on the one hand, but then, on the other, takes away that right by providing that asylum seekers must not even contemplate marriage. Third, it falls foul of the equality provisions of the Constitution. And fourth, it is in conflict with South Africa's international and continental obligations relating to refugees and asylum seekers.

[8] In response to the respondents' founding papers the appellants filed a single answering affidavit. The deponent, who is the first appellant, called into question the respondents' wisdom in resorting to litigation. He contended that their application was ill-conceived in that the first respondent should have rather waited for the outcome of his appeal to the RAB. In this regard, the implication is that the respondents would be eligible

[7] More about the issue of costs later.

[8] '1. Condoning the filing of the application outside of the 180-day limit prescribed in section 7(1) of PAJA;
2. Declaring paragraph 2.1*(b)*(iii)*(dd)* of Circular no 4 of 2016, which was issued by the Deputy Director-General: Civic Service of the Department of Home Affairs on 12 September 2016, inconsistent with the Constitution of the Republic of South Africa 1996 and invalid, and set aside in so far as it bars the registration of the Applicants' customary marriage and bar the solemnisation of their civil marriage;
3. Declaring that the Applicants are entitled, if they so wish, to enter into a civil marriage.
4. Declaring that the Applicants are entitled to seek registration of their customary union if they prove this union to the satisfaction of the Respondents;
5. Directing the Respondents to permit the Applicants to submit an application for the registration of their customary union forthwith;
6. Directing the First Respondent to within 15 days after such application as contemplated in the previous paragraph to inform the Applicants, their legal representative and this Honourable Court in writing and under oath of the steps taken to register the Applicants' customary union;
7. Directing the Respondents to permit the Applicants forthwith to submit an application for the solemnising of a civil marriage;
8. Directing the First Respondent to within 15 days after such application as contemplated in the previous paragraph to inform the Applicants, their legal representative and this Honourable Court in writing and under oath of the steps taken to solemnise the Applicant's civil marriage;
9. Costs, only in the event of the Respondents opposing this relief set out herein, and only in respect of such Respondents that oppose the relief.'

to marry only if the first respondent's appeal were successful. Moreover, he questioned the existence of the customary marriage, asserting that the respondents' desire to get married was a ruse to enable the first respondent to secure a spousal permit status and ultimately permanent residence and citizenship.[9] This, he said, was calculated to undermine the appeal process underway before the RAB.

[9] The appellants disputed the existence of the customary marriage, alleging that the relief sought in terms of prayer 4 of the respondents' notice of motion was a misrepresentation of the true facts. They denied that the respondents had been barred in any way from entering into a civil marriage. The stance of the DHA, asserted the appellants, was merely that if the respondents wished to marry it was necessary for them to first comply with the laws of the Republic.[10]

**Did the respondents bring a review before the high court?**

[10] It is convenient at this stage to deal with the preliminary point raised by the appellants relative to the nature of the proceedings instituted by the respondents in the high court. It is this. The appellants sought to argue that the respondents did not institute review proceedings in the high court. The foundation for this contention was that the respondents neither requested a record of the decision sought to be reviewed, nor did they canvass any grounds of review in their founding papers.

[11] The respondents joined issue with the appellants on this score. First, they argued that the fact that no record was requested did not detract from the fact that their application was a review coupled with prayers for declaratory relief. In support of this argument they point to their prayer in the notice of motion in terms of which they sought an order condoning the filing of their application outside of the 180-day period as prescribed in s 9(1) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). They also sought an order that paragraph 2.1*(b)*(iii)*(dd)* of the circular be reviewed and set aside. Thus, they asserted that

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[9] According to statistics sourced from the United Nations High Commissioner for Refugees, it appears that South Africa has become the most attractive destination for asylum seekers and it ranks amongst the most sought-after destinations in the world. See, in this regard, http://www.unhcr.org/51628b589.html and http://www.unhcr.org/afr/statistics/country/5a8ee0387/unhcr-statistical-yearbook-2016-16th-edition.html.

[10] Section 34(1)(a) of the Refugees Act provides that:
'[a] refugee must abide by the laws of the Republic'.

they saw no need for a record as contemplated in rule 53 of the Uniform Rules, as the sharp focus of their review was the impugned paragraph of the circular and nothing else.

[12] Secondly, and importantly, they also identified certain paragraphs in their founding affidavit which demonstrated that a review was also contemplated by the respondents. In my view the point taken by the appellants is manifestly without merit. It amounts to no more than a red herring. To uphold it would amount to placing form above substance, something that courts are enjoined to eschew. In any event, in *South African Football Association v Stanton Woodrush (Pty) Ltd t/a Stan Smidt & Sons & another*[11] this court said that a failure to follow rule 53 in review proceedings is not necessarily irregular, 'because the Rule exists principally in the interests of an applicant' and an applicant is free to waive its procedural rights. This court went on to state that if the respondent is an organ of State, as is the case here, it is open to such respondent, in answer to the application, to supply the record of the proceedings and the reasons for its decision. In the context of the facts of this case, and having regard to the primary focus of the respondents' case as stated earlier, nothing turns on the absence of the record.

**Was a structural interdict warranted?**

[13] In coming to the aid of the respondents, the high court also granted a structural interdict in terms of which the DHA was directed to report back to the court on affidavit, within a prescribed period, on the steps taken to register the customary marriage and the solemnisation of the respondents' intended civil marriage. That part of the order was attacked purely on the basis that no case had been made out therefor in the respondents' papers. By way of prelude to a discussion of this topic, it suffices to state that, generally, the grant of a structural interdict is a remedial power vesting in courts in order to retain judicial supervision after a remedy has been granted to ensure satisfactory compliance with their orders.[12] It will not be granted willy-nilly. Ordinarily courts proceed on the assumption that parties against whom an order has been granted will ensure that such an order is

[11] *South African Football Association v Stanton Woodrush (Pty) Ltd t/a Stan Smidt & Sons & another* 2003 (3) SA 313 (SCA) paras 5-6.
[12] *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 96; *Minister of Heath & others v Treatment Action Campaign & others (No 2)* 2002 (5) SA 721 (CC) para 28.

scrupulously complied with. Should this not be the case, the applicant would not be without a remedy.

[14] The grant of a structural interdict entails the exercise of a true discretion.[13] An appellate court is not at liberty to interfere unless it is satisfied that the discretion was not exercised judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that the court below had reached a decision which could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.[14]

[15] Not a single word was said in the judgment of the high court as to what weighed with it to justify the grant of a structural interdict. This alone points to the fact that the high court did not exercise its discretion judiciously. Nor was any factual foundation laid in the respondents' founding affidavit motivating for such an order. Indeed, counsel for the respondents candidly accepted that she could not justify this order. Consequently, a combination of these factors justifies the conclusion that the high court committed a material misdirection in granting the structural interdict. It follows that the structural interdict cannot be allowed to stand.

**What is the legal status of Circular No 4 of 2016?**

[16] In *Ahmed & others v Minister of Home Affairs & another*[15] the Constitutional Court said that the nature and status of a directive – the validity of which was there challenged – was unclear. It went on to state that a directive is 'an official policy document, which guides government departments on how to apply legislation'. It further noted that, according to Baxter,[16] 'departmental circulars and directives are "administrative quasi-legislation" which are neither legislation nor subordinate legislation'.[17] At a practical level, directives and circulars essentially serve the same purpose, which is to give effect to governmental policy and guide officials charged with the duty of implementing governmental policy.

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[13] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd & another* [2015] ZACC 22; 2015 (5) SA 245 (CC) para 85.
[14] *Ibid* para 88.
[15] *Ahmed & others v Minister of Home Affairs & another* [2018] ZACC 39; 2019 (1) SA 1 (CC) para 44.
[16] Baxter *Administrative Law* 3 ed (1991) at 200.
[17] *Ibid* at 202.

[17] The appellants sought to argue that the circular had no force in law and therefore could neither confer rights nor deprive someone of any rights. Consequently, contended the appellants, it was not susceptible to review by a court. A similar argument was advanced to and rejected by the Constitutional Court in *Ahmed*.[18] The Constitutional Court explained that where a directive – in this case a circular – is envisaged in legislation, a court would most likely be willing to review it in the light of the underlying legal authority. The Constitutional Court went on to say that, even where a directive is not statutorily envisaged, the court would still be amenable to review it.[19] The Constitutional Court nevertheless declined to pronounce on the question whether the review would be entertained under the principle of legality or in terms of PAJA. What mattered, the Constitutional Court stated, was whether 'the Directive is treated as binding by the people tasked to implement it [in which event] it is sufficient for [the] Court to make a determination on whether the Directive is *ultra vires* and thus invalid'.[20]

[18] In this case the circular is not statutorily envisaged. Nevertheless it was treated by the appellants as binding, hence the respondents were told that they could not marry. The attitude of the appellants was undeniably clear: the circular constituted law, by which the DHA was bound, and the respondents were duly informed of this.

[19] Accordingly, the appellants are not availed by now seeking to contend that they do not consider themselves bound by the circular. The truth is that their case was argued in the high court on the basis that the circular is a law of general application. Thus, the appeal must be determined on the basis of the case as presented and argued in the high court. Indeed before us counsel for the appellants was constrained to accept that generally the task of an appellate court is to determine whether the court of first instance was correct in coming to the conclusion it did on the facts there presented.[21] Consequently, Circular No. 4 of 2016 was susceptible to review by the high court.

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[18] *Ahmed*, fn 14, para 40.
[19] *Ibid* para 42.
[20] *Ibid* para 45.
[21] *Cole v Government of the Union of South Africa* 1910 AD 263 at 272.

**Should paragraph 2.1*(b)*(iii)*(dd)* of the circular have been declared invalid?**

[20] I turn to consider the appellants' contention that the high court erred in declaring paragraph 2.1*(b)*(iii)*(dd)* of the circular invalid and setting it aside. Counsel for the appellants submitted that, on its proper construction, paragraph 2.1*(b)*(iii)*(dd)*, considered in the context of the circular as a whole, does not bar holders of asylum seeker permits from getting married. In this regard counsel called into aid the oft quoted judgment of this court in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[22] where, amongst other things, the following was said:

'[T]he "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

[21] In elaboration, counsel contended that the purpose of the circular is to guide marriage officers in solemnising marriages. He emphasised that the purpose was not to prevent marriages, but only to prohibit the solemnisation of marriages involving illegal immigrants. Counsel was at pains to point out that the opening sentence of the paragraph explicitly states that '[w]ith effect from 15 September 2016, only Home Affairs Marriage officers are permitted to solemnize marriages to refugees and asylum seekers.' These words, continued the argument, manifest no intention to deny refugees and asylum seekers their right to marry. On the contrary they affirm such a right.

[22] On a complete reading, paragraph 2.1*(b)*(iii)*(dd)* leaves no room for any doubt. The opening sentence, as argued by counsel for the appellants, provides that 'only Home Affairs Marriage officers are permitted to solemnize marriages to refugees or asylum seekers'. It goes on to explicitly prohibit the solemnisation of marriages involving persons who are in the country illegally. It also provides in terms that refugees 'whose asylum seeker application status is pending cannot contemplate marriage', and that '[s]hould there be an inquiry to a refugee or asylum seeker status the marriage cannot be concluded'.

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[22] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18. (Citation omitted)

[23] The portions of paragraph 2.1*(b)*(iii)*(dd)* put in inverted commas above cannot be clearer. They can only mean that the first respondent and similarly situated persons are denied their right to marry. That this is how this paragraph was understood by the officials of the DHA has to be accepted on the basis of the say-so of the respondents, which the appellants now admit as correct. There can be no doubt that the offending parts of paragraph 2.1*(b)*(iii)*(dd)* highlighted above implicate constitutional rights of personal liberty[23] and human dignity.[24]

[24] In *Dawood & another v Minister of Home Affairs & others; Shalabi & another v Minister of Home Affairs & others; Thomas & another v Minister of Home Affairs & others*[25] the Constitutional Court underscored the importance of the right to dignity. It said:

'The value of dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis.'

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[23] Section 12 of the Bill of Rights headed 'Freedom and security of the person', provides as follows:
'(1) Everyone has the right to freedom and security of the person, which includes the right—
(a) not to be deprived of freedom arbitrarily or without just cause;
(b) not to be detained without trial;
(c) to be free from all forms of violence from either public or private sources;
(d) not to be tortured in any way; and
(e) not to be treated or punished in a cruel, inhuman or degrading way.
(2) Everyone has the right to bodily and psychological integrity, which includes the right—
(a) to make decisions concerning reproduction;
(b) to security in and control over their body; and
(c) not to be subjected to medical or scientific experiments without their informed consent.'

[24] Section 10 of the Bill of Rights provides that 'Everyone has inherent dignity and the right to have their dignity respected and protected'.

[25] *Dawood & another v Minister of Home Affairs & others; Shalabi & another v Minister of Home Affairs & others; Thomas & another v Minister of Home Affairs & others* [2000] ZACC 8; 2000 (3) SA 936 (CC) para 35.

[25] That paragraph 2.1*(b)*(iii)*(dd)* of the circular is not a paragon of clarity is self-evident. The third to fifth sentences of paragraph 2.1*(b)*(iii)*(dd)*, for example, contradict the first sentence. The former sentences also contradict preceding paragraphs of the circular that affirm the rights of asylum seekers to marry.[26] The other fundamental shortcoming of this paragraph is that, whenever there is some sort of inquiry pending into the status of an asylum seeker – such as an appeal to the RAB – then the effect would be to deny him or her the right to marry. Given their plain meaning, the words of paragraph 2.1*(b)*(iii)*(dd)* cannot reasonably be construed so as to allow asylum seekers to marry pending the outcome of their asylum applications. The context of the sentences and the apparent purpose of the circular read holistically, cannot assist the appellants.[27] That the impugned sentences contradict other parts of the offending paragraph and indeed other material parts of the circular is no ground to interpret them as the appellants would want. On the contrary, it serves as a basis to declare them unlawful because it is not reasonably possible to interpret this paragraph in any other way that is tenable.

[26] This is all the more so given the importance of the rights at stake in this case. As this court rightly observed in *Minister of Home Affairs & others v Watchenuka & others*,[28] '[h]uman dignity has no nationality'. And most recently the Constitutional Court aptly observed that '[t]he right to family life is not a coincidental consequence of human dignity, but rather a core ingredient of it'.[29]

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[26] See paragraph 2.1(b)(iii)(aa)–(cc), which reads:

'(aa) A letter of no lawful impediment should not be required from a person who is positively identified as a refugee or an asylum seeker. However, a copy of such person's refugee valid identity document and valid section 24 permit, or asylum seeker permit issued in terms of section 22, of the Refugees Act, 1998 (Act No. 130 of 1998) must be attached to the "civil" marriage or civil union register, as the case may be. In addition, a sworn statement must be obtained from the SAPS confirming their marital status in their country of origin.

(bb) Verification of the refugee identity document, refugee permit or asylum seeker permit must also be made by an immigration officer.

(cc) Verification must be done by means of obtaining a printout from the Movement Control System if the foreigner is a holder of a temporary residence permit.'

[27] The approach to interpreting legislation and documents is by now settled. See, for example, *Road Traffic Management Corporation v Waymark (Pty) Limited* [2018] ZACC 12; 2019 (5) SA 29 (CC) paras 29-32.

[28] *Minister of Home Affairs & others v Watchenuka & others* [2003] ZASCA 142; 2004 (4) SA 326 (SCA) para 25.

[29] *Nandutu & others v Minister of Home Affairs & others* [2019] ZACC 24; 2019 (8) BCLR 938 (CC) para 1.

[27] In *Satchwell v President of the Republic of South Africa & another*, [30] albeit in a different context, the Constitutional Court had occasion to say the following concerning marriage:

'In terms of our common law, marriage creates a physical, moral and spiritual community of law which imposes reciprocal duties of cohabitation and support. The formation of such relationships is a matter of profound importance to the parties, and indeed to their families and is of great social value and significance.'

[28] In *Fourie & another v Minister of Home Affairs & another* [31] Cameron JA, writing for the majority, said that the institution of marriage:

'is vital to society and central to social life and human relationships. More than this, marriage and the capacity to get married remain central to our self-definition as humans. As Madala J has pointed out, not everyone may choose to get married; but heterosexual couples have the choice. The capacity to choose to get married enhances the liberty, the autonomy and the dignity of a couple committed for life to each other. It offers them the option of entering an honourable and profound estate that is adorned with legal and social recognition, rewarded with many privileges and secured by many automatic obligations. It offers a social and legal shrine for love and for commitment and for a future shared with another human being to the exclusion of all others.'

It therefore comes as no surprise that the first respondent asserted in his founding affidavit that, '[a]s a pastor in a Christian community I want to set an example by entering into a civil marriage with the Second [respondent] as it indicates to all that this will be a [monogamous] long term relationship'.

[29] The final issue to be considered – in the light of the appellants' belated acceptance of the existence of the respondents' customary marriage – relates to s 10 of the RCMA. Section 10, which is headed 'Change of marriage system', reads as follows:

'(1) 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 No. 25 of 1961), if neither of them is a spouse in a subsisting customary marriage with any other person.

(2) …

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[30] *Satchwell v President of the Republic of South Africa & another* [2002] ZACC 18; 2002 (6) SA 1(CC) para 22.

[31] *Fourie & another v Minister of Home Affairs & another* [2004] ZASCA 132; 2005 (3) SA 429 (SCA); [2005] All SA 273 (SCA) para 14.

(3) …
(4) Despite subsection (1), no spouse of a marriage entered into under the Marriage Act, 1961, is, during the subsistence of such marriage, competent to enter into any other marriage.'

[30] The appellants contended that paragraphs (iii) and (vi) of the order granted by the high court were not competent and thus should never have been granted. In elaboration, counsel argued that the respondents were not eligible to contract a civil marriage under the Marriage Act whilst their customary marriage subsisted. The thrust of counsel's argument was that it is implicit in the heading to s 10 of the RCMA that it was incumbent upon the respondents to change their marriage system, before they could permissibly contract a marriage under the Marriage Act. Counsel emphasised that if it were not so this would lead to an untenable situation where the same couple would be married under two marriage systems, each with its own marital and proprietary consequences. Consequently counsel urged this court to have regard to the heading of s 10 in interpreting the provisions of the section in order to elucidate their meaning. But there is, in my view, a fundamental obstacle in the path of the appellants on this score.

[31] It is of course true that courts have, in certain circumstances, had regard to the heading of sections in a Statute for purposes of elucidating a particular statutory provision. In *Chotabhai v Union Government (Minister of Justice) and Registrar of Asiatics*, [32] Lord De Villiers CJ stated, with reference to English authority, that 'the headings of different portions of a Statute may be referred to for the purpose of determining the sense of any doubtful expression in a section under any particular heading'. More than a century ago in *Turffontein Estates Ltd v Mining Commissioner Johannesburg*[33] Innes CJ held that:

'We are . . . fully entitled to refer to [the heading] for the elucidation of any clause to which it relates. It is impossible to lay down any general rule as to the weight which should be attached to such headings. The object in each case is to ascertain the intention of the Legislature, and the heading is an element in the process. . . . Where the intention of the lawgiver as expressed in any particular clause is quite clear, then it cannot be overridden by the words of a heading. But where the intention is doubtful, whether the doubt arises from ambiguity in the section itself or from other considerations,

[32] *Chotabhai v Union Government (Minister of Justice) and Registrar of Asiatics* 1911 AD 13 at 24.
[33] *Turffontein Estates Ltd v Mining Commissioner Johannesburg* 1917 AD 419 at 431.

then the heading may become of importance. The weight to be given to it must necessarily vary with the circumstances of each case.'

This position was further endorsed by this court over two decades ago in *Chidi v Minister of Justice*.[34]

[32] The principle to be extracted from the authorities cited in the preceding paragraph is that headings in a Statute may be resorted to only where the meaning of a provision under consideration is doubtful. Otherwise headings play no role in the interpretation process where the words are unambiguous and their meaning is clear. That the provisions of s 10 are unambiguous and clear admits of no doubt. Indeed, when pressed, counsel for the appellants was constrained to concede as much. That being so, it must inevitably follow that the appellants' contention relative to this part of their case cannot be upheld.

**Conclusion**

[33] In the light of what is stated above it follows that this appeal cannot succeed. It therefore becomes necessary to say something about the scale of costs. It was foreshadowed in the respondents' written heads of argument that the respondents would ask for costs on a punitive scale. This is premised on the contention that the appellants' conduct fell far short of the standard expected of a State litigant. State litigants have a duty to be fair to their opponents, and honest and forthright with the court. In *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute*[35] Cameron J pointed out that 'there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights'.

[34] The earlier remarks by Sachs J in *Matatiele Municipality & others v President of the Republic of South Africa & others*[36] are particularly apposite in this case. The learned Justice said:

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[34] *Chidi v Minister of Justice* [1992] ZASCA 77; 1992 (4) SA 110 (AD) at 115.
[35] *MEC for Health, Eastern Cape and Another v Kirland Investments t/a Eye & Lazer Institute (Pty) Ltd* [2014] ZACC 6; 2014 (3) SA 481 (CC) para 82.
[36] *Matatiele Municipality & others v President of the Republic of South Africa & others* (1) [2006] ZACC 2; 2006 (5) SA 47 (CC) para 107.

'. . .the Constitution requires candour on the part of government. What is involved is not simply a matter of showing courtesy to the public and to the courts, desirable though that always is. It is a question of maintaining respect for the constitutional injunction that our democratic government be accountable, responsive and open. Furthermore, it is consistent with ensuring that the courts can function effectively, as section 165(4) of the Constitution requires.'

[35] Measured against these constitutional imperatives, the conduct of the appellants is lamentable. I have earlier in this judgment made reference to the sorry saga to which the respondents were subjected by the appellants both prior to litigation and in the course of the litigation in the high court. The appellants' answering affidavit was replete with gratuitous statements impugning the respondents' honesty and motives for instituting review proceedings. The appellants' indifference to the plight of the respondents continued unabated to this court. Some eight months after it dawned on the appellants that their refusal to register the respondents' customary marriage was wrong, they still took no steps to inform the respondents of 'their change of heart' and invite them to their offices in order to register the marriage. Their conduct is inexcusable and deserving of censure by this court. Indeed the appellants must consider themselves extremely fortunate that there was no call for them to pay the costs attendant on this litigation out of their own pockets.[37] For all these reasons therefore a punitive costs order is imperatively called for as a mark of this court's displeasure.

[36] Before concluding, it is necessary to say something in relation to costs in the high court. In their notice of motion the respondents also prayed for costs. But this was only if the appellants opposed the application. And this is what the appellants in fact did. Yet, the high court did not award the respondents costs consequent upon their success. Nor has any word been said on costs by the high court in its judgment.

[37] When this palpable omission was pointed out to counsel they appeared bewildered, seemingly oblivious to this fact. Thus, the inference is inescapable that this omission by the high court was per incuriam and not deliberate. But nothing more need be said on this score

[37] *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening)* [2017] ZACC 8; 2017 (3) SA 335 (CC).

because in the absence of a cross-appeal there is nothing we can do to remedy this omission.[38]

[38] In the result the following order is made:

1. The appeal is dismissed with costs on the scale as between attorney and client.

2. The order of the court below is amended to the following extent:

2.1 The structural interdict appended to paragraph (v) of the order is deleted in its entirety.

2.2 Paragraph (vii) of the order is deleted in its entirety.

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X M Petse

Deputy President

[38] *Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 (2) SA 545 (A) at 560 G-H.

APPEARANCES

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| For Appellant: | W R Mokhari SC (with N J Sandi) |
| | Instructed by: |
| | The State Attorney, Port Elizabeth |
| | The State Attorney, Bloemfontein |
| For Respondent: | E Crouse |
| | Instructed by: |
| | Legal Aid South Africa, Port Elizabeth |
| | Legal Aid South Africa, Bloemfontein |