IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

CASE NO: 1951/2017
Dates Heard: 26/10/2017
Date Delivered: 30/01/2018

In the matter between:

EMMANUEL PAULKING OCHE OCHOGWU	**First Applicant**
ZIZIPHO MKUMANDO	**Second Applicant**

and

L. MZALISI N.O	**First Respondent**
DIRECTOR-GENERAL DEPARTMENT OF HOME AFFAIRS	**Second Respondent**
MINISTER OF HOME AFFAIRS	**Third Respondent**
DEPUTY DIRECTOR-GENERAL: CIVIC SERVICES N.O	**Fourth Respondent**

JUDGMENT

JAJI J:

[1] This is an opposed application wherein the applicants seek the registration of their customary marriage and the right to enter into a civil marriage.

[2] The application to this Honourable Court is for an order in the following terms:

(i) Condoning the filing of the application outside of the 180-day limit prescribed in section 7(1) of PAJA;

(ii) Declaring paragraph 2.1(b)(iii)(dd) of Circular no 4 of 2016, which was issued by the Deputy Director-General: Civil 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;

(iii) Declaring that the Applicants are entitled, if they so wish, to enter into a civil marriage;

(iv) Declaring that the Applicants are entitled to seek registration of their customary union if they prove this union to the satisfaction of the Respondents;

(v) Directing the Respondents to permit the Applicants to submit an application for the registration of their customary union forthwith;

(vi) 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;

(vii) Directing the respondents to permit the applicants forthwith to submit an application for solemnising of a civil marriage;

(viii) 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 applicants' civil union;

(ix) Costs, only in the event of the respondents opposing the relief set out herein, and only in respect of such respondents that oppose the relief.

[3] Applicants contended that they are married to each other by customary law and accordingly seek a declaratory relief in so far is necessary for reviewing and setting aside a directive of the Department of Home Affairs which effectively bars the registration of their marriage and barring them from entering into a civil marriage.

[4] The summary of the circumstances of the applicants is that the first applicant has the status of an asylum seeker waiting an appeal date before the Refugee Appeal Board (RAB). He married the second applicant according to customary law. It is alleged that all customs and customary marriage was concluded in 2015 and at Nxaruni, the home of the second applicant's grandfather. Negotiations on behalf of the first applicant were made by a close friend and lobola was paid. It is further alleged that out of this marriage, one child, a boy named Giovanni was born on 23 June 2016.

[5] Applicants were advised by a certain Mr Faltein of Home Affairs that before they could register their customary union, proof was needed that they indeed entered into customary union and verification of first applicant's asylum seeker permit. A new section 22 permit (asylum seeker) was issued to applicant on 10 February 2017 after the first applicant had to go to Pretoria and back on many occasions. Subsequent to all that, applicants returned to Mr Faltein at Home Affairs where they were told that they could neither be married nor their customary union be registered as the "law has changed" and

asylum seekers were not allowed to get married. A copy of a circular no. 4 of 2016 was obtained with the directive and signed by the fourth respondent on 12 September 2016.

[6] Paragraph 2.1(b)(iii)(dd) of the directive provides specifically that:

"With effect from 15 September 2016, only Home Affairs marriage officers are permitted to solemnise marriages to refugees and asylum seekers. No marriage officers are allowed to solemnise marriages that involve any illegal person in the country. Refugees whose asylum seeker application status is pending cannot contemplate marriage. Should there be an inquiry to a refugee or asylum seeker status' the marriage cannot be concluded. Only if finalised, will the marriage be carried out by Department of Home Affairs official. Religious marriage officers cannot solemnise marriages for asylum seekers or refugees. Such cases must be referred to Department of Home Affairs"

[7] The applicant contended that in so far as paragraph 2.1(b)(iii)(dd) is concerned:

(i) The wording is vague and embarrassing;

(ii) In so far as it takes the right to get married away from any person who is lawfully in South Africa, it must be *contra bonis mores*, unconstitutional and therefore unlawful;

(iii) If it means that asylum seeker cannot marry, it is in conflict with South Africa's international obligations; and

(iv) The paragraph is *ultra vires* the current South African legislation and even *ultra vires* the circular as a whole as it nullifies all asylum seekers'

right to get married. It further takes away the right of the second applicant who is a South African citizen to get married.

[8] Further, the first applicant avers that the impugned paragraph 2.1(b)(iii)(dd) of the directive is contradictory in that:

(i) It confirms the right of an asylum seeker to get married;

(ii) The first sentence states that from 15 September 2016 only officials of Department of Home Affairs may solemnise marriages of refugees and asylum seekers. It is submitted that this confirms what is set out in the previous three sub-paragraphs that an asylum seeker may be married;

(iii) The third sentence determines that an asylum seeker cannot contemplate marriage;

(iv) The fourth sentence states that if there is an inquiry (presumably awaiting a RAB hearing) that an asylum seeker cannot get married;

(v) It then concludes that if that inquiry is "finalised" the marriage may take place.

[9] It is submitted that in so far as it takes away the right to marry, the directive is *contra boni mores*, unconstitutional and therefore unlawful. Marriage being the foundation of family should not be prohibited for a certain class of people.

(i) It infringes upon first applicant's right to equality and not be discriminated against;

(ii) Right to dignity; and

(iii) Right to just administrative action.

[10] The refusal to allow asylum seekers to marry is in conflict with South Africa's international obligations as set out in international legal instruments that South Africa is part of i.e:

(i) Article 16, Universal Declaration of the Human Rights;

(ii) Article 12, UN Convention (Status of Refugees) together with protocol relating to the Status of Refugees of 1967;

(iii) OAU (non AU) convention (specific aspects of Refugee Problems in Africa 1969, adopted in Addis Abbaba 10/09/69);

(iv) 1993 Agreement between South Africa and UNHCR;

(v) IMO and Development resolution adopted by General Assembly on 21 December 2016;

(vi) Customary International Law.

[11] Most importantly, the first applicant stated that taking away the right to marry from a competent adult person who is legally entitled to be married conflicts with South African Legislation and could only be achieved by law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

(i) The directive is not a law of general application;

(ii) The directive is not reasonable or justifiable in the correct handling of the asylum seeker policy and procedure in South Africa;

(iii) The applicant was allowed as asylum seeker to live, work and make South Africa his home since 2012;

(iv) Processing of law status could not be finalized as there has been no functioning RAB for almost 2 years;

(v) The Department of Home Affairs indicated that there were approximately 62 000 new asylum applications for period January to December 2015 with approximately 78 339 active section 22 permits.

[12] The applicants sought relief as per paragraphs 43 – 45 of the application. A confirmatory affidavit of the second applicant, minor's birth certificate, confirmatory affidavit by the Director of NMMM Refugee Rights Centre and annexure "F" being the impugned circular and 2015 asylum statistics are annexed to the papers.

[13] The respondents filed a notice to oppose and an answering affidavit contending:

(i) The first applicant was putting the cart before the horse by instituting this application at a time his appeal to the Refugee Appeal Board was still pending;

(ii) Application is totally unnecessary as both applicants will not suffer prejudice if they wait for the appeal. The appeal will be heard soon and sterling efforts were currently being made to expedite the process and attend to the first applicant's appeal as soon as possible;

(iii) Applicants were not asserting that they were inhibited from entering any transactions in life simply because their marriage was under customary law;

(iv) The department did not prevent the applicants from making an application for registration of their customary marriage, if it exists;

(v) That the first applicant appears to be one of a number of foreigners who enter South Africa and whilst awaiting for the process of refugee status enter into marriage of convenience with South African citizens to secure a spousal permit and last permanent residence. This was one of the problems the department was currently facing;

(vi) The first applicant is temporarily allowed to sojourn in South Africa whilst his status is being looked into. He cannot ignore that process. He is in any event allowed to work and study in South Africa;

(vii) No suggestion that their alleged child is being affected in any way by the fact that their marriage was not registered;

(viii) The present application was calculated to circumvent any negative outcome to secure a spousal permit;

(ix) That there was no evidence that a valid customary union was concluded; and

(x) Further denying paragraphs 1, 2, 3 and 4 of the founding affidavit admitting paragraphs 5, 6, 7, 8, 9, 10 and 11. Denying that the present application was a review application. Alleging that it does not contain a prayer for review as foreshadowed in PAJA, denying that the directive referred to was unconstitutional or unlawful;

(xi) Denying contents of paragraphs 13, 14, 15 and 16. Bearing no knowledge of paragraphs 17, 18 and 19 and denying them putting the applicants to the proof thereof;

(xii) Claiming that applicant's alleged customary marriage did not meet legal requirements for registration;

(xiii) Confirming the existence of the directive and denying that it was unlawful and unconstitutional and accordingly praying for the application to be dismissed with costs.

[14] In reply the first applicant contended that:

(i) Respondent answering contained bare denials and inferences not grounded on facts;

(ii) There were no confirmatory affidavits to the first respondent and therefore assumed that all information contained in the affidavits falls within his own knowledge;

(iii) Denied "putting cart before the horse";

(iv) The circular is *contra bonis mores* and clear infringement of constitutional rights and is clear violation of the constitutional law;

(v) The fact that they were awaiting Refugee Appeal Board hearing date was irrelevant as far as the enforcement of the applicant's constitutional rights was concerned;

(vi) In so far as the respondents allege that the appeal will be heard soon, the deponent does not produce any knowledge, nor does he state on what information such allegation is made;

(vii) The respondent lays no foundation upon which he could allege that applicant's Refugee Appeal Board appeal "will be heard soon and/or that RAB was "expediting the process" and would be attending to the appeal "as soon as possible". Court is accordingly referred to the supporting affidavit of Ms Liesl Fourie, an attorney at NMMU Refugee Rights Centre, annexed marked herein "K".

(viii) Applicant deny that the marriage was that of convenience and attached confirmatory affidavit of the second applicant;

(ix) First applicant deny that he was ignoring the process of asylum seeking. He has been in South Africa as an asylum seeker waiting for a Refugee Appeal Board hearing date since 2012. The consequence of that entailed him travelling to Pretoria at least once every six months in order to renew his section 22 asylum seeker permit to prevent it from expiring;

(x) The contention that applicants have to complete the Refugee Appeal Board hearing process before they will be permitted to register their marriage as directed by respondents s in direct contradiction with the earlier averments and submissions that applicants had not been prohibited by the Department of Home Affairs from registering their customary union;

(xi) That the first applicant has been waiting for a period of five years for a Refugee Appeal Board date;

(xii) That the Department of Home Affairs official, Mr Faltein, was satisfied that applicant's customary union could be registered, but for the circular. Now first respondent claim the customary marriage was not valid and yet give no reasons for the change of stance;

(xiii) The respondents admit that the Department of Home Affairs is obliged to register customary marriages and therefore should not have a defence into registering applicants' marriage;

(xiv) The bare denial that applicants' marriage is in essence a valid marriage is at variance with the findings of Mr Faltein, the official of the

department who stated that everything was in order but the law had changed;

(xv) That the respondents did not deal with the specific allegations as to why the circular was unlawful, did not deal with invitation to state whether the fourth respondent had the necessary authority to stop all asylum seeker marriages and respondents did not state why the department should not be bound by South Africa's own laws and by its international obligations.

[15]

(i) The applicant in its heads of argument dealt with the law pertaining to customary marriages in South Africa. Specific mention was the Recognition of Customary Marriages Act 120 of 1998, section 2(2), section 3, section 4, section 4(6) and section 4(9). Accordingly, marriages entered into after the Recognition of Customary Marriages Act 120 of 1998 complying with requirements, for act purposes recognised as marriages.

(ii) Section 3 of the said Act states:

"***3 Requirements for validity of customary marriages***

(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."

(iii) Section 4 states that:
"4(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."

(iv) Section 4(6) determines that if a registering officer is not satisfied that a valid customary marriage was entered into by spouses, he or she must refuse to register the marriage;

(v) Section 4(9) of the said Act states failure to register a customary marriage does not affect the validity of that marriage;

(vi) Everything was ready to have applicant's customary marriage registered as per the registration official in the employ of the department where they were informed that the "law has changed".

(vii) There is no provision in the Marriage Act that a marriage officer such as the Department's official (who is not a minister of religion) can refuse to solemnise a marriage between persons who are not prohibited from marriage through age or family relation;

(viii) The Act does not sanction any policy that interferes with a person's right to enter into a marriage, other than age or family relationship;

(ix) Applicants dealt with the general value of marriage confirmed by the Constitutional Court that "it was important social pillar that provides security, support and companionship between members of our society and play a pivotal role in the hearing of children." Du Toit and Another vs Minister for Welfare and Population Development and Others 2002 [10] BCLR (CC).

(x) No reason was given in writing to the applicants save to say that the law had changed. In their papers, the respondents did not give any cogent reasons why applicants' customary marriage could not be registered;

(xi) The applicant submitted that the fact that word "review" is not used in the notice of motion is of no moment. The court if necessary could alter the relief sought in the notice of motion to ensure that applicants' constitutional rights are adequately processed.

(xii) The refusal to marry applicants constituted administrative action as contemplated in the definition of Clause (a)(ii) as "exercising a public power or performing a public functions in terms of any legislation.

(xiii) If the issuing of the directive amounted to administrative power, as contemplated in Clause (a)(i) as "(i) exercising s power in terms of the constitution", then PAJA is applicable. If PAJA is not applicable, the directive must still be lawful, rational and not in breach of the constitution of South Africa's international obligations.

(xiv) Paragraph 2.1(b)(iii)(dd) effectively is interpreted as saying that a person waiting for the outcome of the Refugee Appeal Board is unable to marry. The challenge is that the Refugee Appeal Board has not been functioning for more than two years and there is a huge backlog.

(xv) The impugned paragraph in the directive is vague and embarrassing, *contra boni mores*, in conflict with South Africa's international obligations and therefore unlawful. In terms of section 6(2)(d) of PAJA, a court has power to judicially review an administrative action if the action was materially influenced by an "error of law."

(xvi) The circular is ultra vires the current South African legislation. It infringes upon applicants constitutional rights. It contravenes South Africa's international obligations. It is irrational as far as it is now a blanket ban on asylum seekers to marry because of the department's official that some asylum seeker might use marriage in order to gain access to South African citizenship. The applicants contend that there are more effective and rational ways of achieving the department's purpose of rooting out fraud.

(xvii) The court was referred to the matter where the SCA confirmed in ***MEC for Agriculture, Conservation, Environment and Land Affairs vs Sasol Oil (Pty) Ltd and another*** 2006 (5) SA 483 (SCA) the principle stated in ***Computer Investors Group Inc and Another vs Minister of Finance*** 1979 (1) SA 879 (T) at 898 C-E which reads "where a discretion has been conferred upon a public body by a statutory provision, such a body may lay down a general principle for its general

guidance, but it may not treat this principle as hard and fast rule to be applied invariably in every case. At most it can be only a guiding principle, in no way decisive. Every case that is presented to the public body for its decision must be considered on its merits. In considering the matter, the public body may have regard to a general principle, but only as a guide, not as a decisive factor. If the principle is regarded as a decisive factor, then the public body will not have considered the matter, but will have prejudged the case, without having regard to its merits. The public body will not have applied provisions of the statutory enactment."

(xviii) The official who refused to register the applicant's customary marriage followed the directive without any consideration to the merits of the applicants' application and failed to comply with the constitution, Marriage Act and the Recognition Act.

(xix) The applicants sought an order as set out in the notice of motion.

[16] The respondents in their heads of argument contended:

(i) It admitted that the second applicant is a South African by birth;

(ii) It admitted that parties are entitled to enter into any marriage of their choice provided that they comply with the laws of the country;

(iii) The applicants are entitled to submit an application for registration of their customary union, if one exists and such application would then have to be considered in terms of relevant laws of the country;

(iv) The circular is one of such laws and the respondents deny that it is inconsistent with any provision of the constitution;

(v) That there were no confirmatory affidavits from the family friend who allegedly negotiated on behalf of the first applicant;

(vi) That the alleged grandfather of the second applicant did not depose to an affidavit to show that the statute was complied with;

(vii) That the applicants did not deal with the allegation that they are not prejudiced by the non-registration of their marriage. The first applicant only denied that they will not suffer any prejudice by waiting for the asylum seeking process to unfold;

(viii) The application does not comply with Rule 53 and PAJA;

(ix) There is no prayer in the notice of motion which seeks to review and set aside the decision whereby Faltein refused to register the alleged customary union. The application is about a declaratory relief which is not competent in the circumstances of this case;

(x) If the decision of Faltein was invalid, the proper cause of action of the applicants would have been to seek a judicial order setting it aside;

(xi) The restriction is reasonable and of general application, it is necessary to regulate and control the influx of foreigners into the country. It does not in any way offend against the values of an open and democratic society based on freedom and equality;

(xii) The respondents submitted that the application should be dismissed with costs on the basis that the applicant failed to show that the provision is unconstitutional. No case has been made out for the declaratory order sought.

[17] The applicants argued that it has never heard in constitutional law that the applicant should show prejudice. It referred the court to the matter of ***Scalabrini Centre, Cape Town and Others vs Minister of Home Affairs and others*** (1107/2016) [2017] ZASCA 126; [2017] 4 All SA 686 (SCA) (29 September 2017). The matter concerned Refugees Act 130 of 1998, regarding a decision to close a refugee reception office under s 8(1) which decision was challenged for want of rationality, that the decision maker was not taking into account relevant considerations, that it was not complying with the empowering provision and that it was acting with ulterior and improper purpose and making error of law.

[18] It submitted that the principle was the same in the case at hand.

[19] The respondent raised issues with applicants' papers contending that in the relief sought, applicants misconstrued declaratory and review. It contended that there has been non-compliance with Rule 53. It argued that there was no review before court.

[20] It argued that the alleged offending provisions are only alleged in applicants' heads of argument. If the applicant was not happy with the decision, it should apply for review. It argued that there were different categories of asylum seekers even if holder of section 22 permits. It averred that there was no contradiction in the circular and that the applicant was singling out a portion of a paragraph in the circular. It argued that the paragraph should be read in the context of the whole circular. It referred the court to the SCA judgment in the

Endumeni. It argued further in the circumstances that the circular should be read for what it is. Therefore, that should be the collapse of the applicant's case in so far as they seek a declarator.

[21] It submitted that the circular was an internal document to guide marriage officers to do proper verification. It argued that the source of power was enabling legislation. It averred that the circular did not confer any right for persons to be married. It submitted that the relief sought was frivolous and the application should not have been brought. It concluded that the court was asked to make a structural interdict when no case is made.

[22] It claimed that the circular merely set the procedure and did not take away the rights and was an internal document to guide officials. It contended that it cannot be declared unconstitutional but attack decision made. Therefore, proper approach by applicants was the review but was not brought.

[23] In reply the applicant contended that the respondent was bound by section 8 of the National Constitution. The responded was bound as an organ of state. It steered away from the constitution and was now raising technical defences. The respondent simply raised bare denials. It denied that constitutional rights were infringed. It pointed that clearly in the papers at paragraph 35 (page 15) applicants sought to review and set aside the said circular.

[24] The applicant responded that its case is crystallised on the founding affidavit. In any event, the respondents admitted in their papers that this was a directive.

[25] **ANALYSIS OF THE EVIDENCE OF PAPERS**

(i) It is trite law that in motion proceedings, affidavits constitute pleadings and evidence. In paragraph 10 of the answering affidavit, the deponent without laying any basis for the allegation contended that the first applicant appears to be one of asylum seekers that enter into marriages of convenience with local women. No evidence or basis laid for this conclusion;

(ii) In paragraph 12 (page 190) of the answering affidavit, first respondent simply allege that there is no reason why the applicant cannot wait until the pending appeal is heard by the RAB which would be sitting soon. Evidence before court, unchallenged is that first applicant has waited almost more than two years. There is a backlog in dealing with these matters and in any event according to the attorney, Ms Fourie, the first respondent does not deal with asylum applications and therefore not qualified to comment about time anticipated to complete the process;

(iii) In paragraph 2.3.1 (page 193) a contention is made that there is no prayer for review nor does the application set out grounds for review. In paragraph 4 (page 7) and paragraph 35 (page 15) the applicant state the purpose is to review and set aside the directive;

(iv) In paragraph 26.2 (page 194) it is alleged that the customary marriage did not meet the legal requirements. The first applicant has not been advised in writing about the requirements which were not met. The purported lack of confirmatory affidavit by the grandfather of the second applicant are with respect no requirements to conclude a valid customary marriage;

(v) In paragraph 5 (page 188) the first respondent contend that "in respect of the matters not falling within my personal knowledge, I annex hereto the relevant confirmatory affidavits. No affidavits have been annexed in the present matter." In light of the allegation by Ms Fourie, the attorney in the supporting affidavit referred to by the respondent in its heads of arguments, one would have expected response or answering by the responsible officials;

(vi) Allegations in paragraph 20 (page 12) regarding the role of Mr Faltein simply have not been dealt with. The allegations are not denied and there is no affidavit by Mr Faltein disputing same.

(vii) At page 204 (paragraphs 24, 25 and 26) the respondents do not deal with specific allegations why circular was unlawful, whether the fourth respondent had authority to stop all asylum seekers marriages and why the department should not be bound by South African laws and by international obligations;

(viii) Paragraph 13 (page 4) applicants heads of argument, no information was requested to applicant as required by section 4(2) of the Recognition Act. Paragraph 14 (page 4), applicants' heads of argument, Mr Faltein, official of the Department of Home Affairs was satisfied (see para 20) applicants' founding affidavit.

(ix) Paragraph 46.3 (page 14) applicants' heads of argument, applicant contended that there were more effective and rational ways of achieving the department's purpose of rooting out fraud. The case of ***Ahmed and others vs Minister of Home Affairs*** 2017 (2) SA 417 (WCC) was quoted as authority on that point. "Can't deprive asylum seekers of the protections

afforded by the Refugee Convention and the European Convention on Human Rights, for the "end does not justify the use of no matter what means;"

(x) The allegations in paragraph 5 of the respondents' heads of argument that the circular is one of the relevant laws of the country and was not inconsistent with the constitution was at odds with arguments by the respondent that it was simply internal document to guide officials;

(xi) It is not correct that the affidavit of Liesl Fourie does not mention any prejudice to the applicants personally (paragraph 16) respondents' heads of argument. She dealt with prejudice to applicants in paragraphs 6.1, 7, 8 and 10 (pages 209 -2012 of the papers);

(xii) Paragraph 20 (respondents' heads of argument) applicant prays for the declaration in respect of 2.1(b)(iii)(dd), circular no 4 of 2016 inconsistent with our constitution. (See paragraph 2 of page 2 of the papers);

[26] **APPLICANTS' LEGAL PRINCIPLE**

(i) In South Africa, the definition of customary marriage is one that is "negotiated", celebrated or concluded according to any of the systems of indigenous African customary law which exists in South Africa;

(ii) "Doctrine of legality requires that organs of state and other officials must comply with law, including the constitution and they can only exercise the powers and functions authorised by law". The Supreme Court of Appeal referred to a passage in ***Fedsure Life Assurance Ltd and Others vs Greater Johannesburg Trans. Metro Council and others*** 1999 (1) SA 374 (CC) at para 58, where the principle was identified as a fundamental concept of the constitutional order. In

Affordable Medicines Trust vs Minister of Health of RSA 20015 (6) BCLR 529 (CC) at para 49, Chakalson P referring to ***Fedsure*** at para 58 said that the doctrine *". . . entails that both the legislature and the executive are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law*" (see also section 6(2) of PAJA.

(iii) The doctrine of legality applied to state action. It is evident that the first respondent cannot decide on the bona fides of the applicants as this falls outside the scope of the officer's power and authority;

(iv) "It also needs to be emphasized that there is a two stage substantive enquiry heading to the decision whether or not to grant a declaratory order, not only must the court be satisfied that the applicant has the necessary interest but also that the case is a proper one for the exercise of the discretion given to court. The Constitutional Court, in ***Department of Transport vs Tasima (Pty) Ltd*** 2016 para 80 (CC):

> *"Consequently the Supreme Court of Appeal erred in holding that:*
>
> > *"According to the general principle laid down by this court in Oudekraal (para 26) administrative actions must be treated as valid until set aside, even if actually invalid.""*

(v) And again later "the import of section 7 of PAJA is that after the 180 day period, a court is only empowered to entertain a review application if the interests of justice require an extension, the court has no authority to consider the review application at all. Whether or not the

decision was infact unlawful no longer matters. The decision would as it were be validated by delay."

(vi) At (81) "this is in conflict with the rule of law and especially the principle of legality. These principles require administrative functionaries to exercise only public power conferred on them and nothing more. No amount of delay can turn an unlawful act into a valid administrative action. This is because apart from rule of law, section 33(1) of the constitution prescribes that administrative action must be lawful.

(vii) The respondent submitted that the circular's purpose was to guide proper verification. No verification was done herein as far as the evidence is concerned. The other question not answered is "how is it possible for an internal document be the enabling source of legislation if it is made to be internal to guide officials;

CONCLUSION

[27] It is trite that pleadings are for the court not the court for the pleadings. The respondents raised technicality whether there was a review application before court or not. It raised non-compliance with Rule 53. The court in totality of the matter is satisfied that the papers raised a review application and indeed applicants in the papers sought to review and set aside as invalid the circular in so far as it took the universally entrenched rights of marriage and registering same. The court exercised its discretion and accordingly was alive to the serious prejudice currently encountered by applicants and those in similar situation. It is trite that the court should not be bound by printed form of legislation at the expense of intended purpose of such legislation. Procedural

technicalities can never be allowed to trump a right to be heard when a glaring and unlawful conduct has been committed.

[28] The court is satisfied that in its current form, the circular in question infringes on applicants' constitutional rights, equality and discrimination on the basis of foreign origin by first applicants. Accordingly, it is unconstitutional and invalid and stands to be declared as such. Application is granted in terms of paragraphs 1 to 8 of the Notice of Motion.

[29] Therefore, I make the following order:

(i) Condoning the filing of the application outside of the 180-day limit prescribed in section 7(1) of PAJA;

(ii) Declaring paragraph 2.1(b)(iii)(dd) of Circular no 4 of 2016, which was issued by the Deputy Director-General: Civil 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;

(iii) Declaring that the Applicants are entitled, if they so wish, to enter into a civil marriage;

(iv) Declaring that the Applicants are entitled to seek registration of their customary union if they prove this union to the satisfaction of the Respondents;

(v) Directing the Respondents to permit the Applicants to submit an application for the registration of their customary union forthwith;

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;

(vi) Directing the respondents to permit the applicants forthwith to submit an application for solemnising of a civil marriage;

(vii) 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 applicants' civil union.

N.P. JAJI
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the applicants	:	Adv. Crouse
Counsel for the respondents	:	Adv Mokhare SC and Adv Sandi