



IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 23272/24

In the matter between

ZUKISWA NJWAXU

Applicant

AND

THE MINISTER OF HOME AFFAIRS

1st

Respondent

THE DIRECTOR -GENERAL: DEPARTMENT OF HOME

2nd

Respondent

AFFAIRS

THE MASTER OF THE HIGH COURT, CAPE TOWN

3rd Respondent

Heard: 30 April 2025

Delivered: 29 July 2025

JUDGMENT

THULARE J

ORDER

- (a) The issue of the registration of the marriage is remitted back to a registering officer at the Department of Home Affairs.
- (b) The Director-General of DHA is directed to appoint a registering officer within 5 business days of this order.
- (c) The registering officer shall enquire into the existence of the alleged customary marriage and decide thereon on or before Friday 26 September 2025. The enquiry shall include but not be limited to, the immediate family members of the deceased Mzwandile, including his paternal aunts and maternal uncles if any, as well as the friends and neighbours to which the applicant referred to in her application before this court as well as the immediate family members of the applicant including her paternal aunts and maternal uncles if any.
- (d) The registering officer may consider expert evidence.
- (e) Should the registering officer refuse to register the alleged marriage after the enquiry, the applicant shall set the matter down on notice to Mzwandile's immediate relatives, in particular those who but for the applicant and her son, would have been his heirs in intestate succession, for oral evidence in continuation of the investigation by this court, such date of set down to be arranged with Thulare Js secretary.

- (f) Should the registering officer refuse to register the alleged marriage after the enquiry, he/she/they shall file the full record of their enquiry with the registrar of this court within 10 business days of such refusal.
- (g) The first and second respondents, jointly and severally, the one to pay the other to be absolved, to pay the costs.
- (h) The decision on the Master is held in abeyance pending the enquiry by the registering officer or the investigation by this court, whichever brings finality to the applicant's application.

[1] In an unopposed application for default judgment the applicant sought an order that the Minister and Director-General of Home Affairs be directed to accept and recognize posthumously registration of the alleged applicant and late Mzwandile Komsana's customary marriage as a customary marriage in terms of sections 2(1) and 4(7) of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998) (the RCMA); to register the marriage between the two as a valid customary marriage in terms of the RCMA; to issue the applicant with a marriage certificate within 14 days of the date of such order; an order directing the Master to register the estate of the late Mzwandile and appoint the applicant as the executrix of that estate and costs in the event of opposition.

[2] The applicant's case was that she met Mzwandile in 2010 in Cape Town. Very soon after their first meeting they became romantically involved. She was 27 and he was 26 years of age. Mzwandile lived with his brother at the time. After a few months Mzwandile moved in to live with her and her son. After two years he said that he wanted to marry her and spoke to her brother also named Mzwandile. In

December 2013 both went to their different homes in the Eastern Cape. Whilst in Eastern Cape Mzwandile asked her to visit his family, where he introduced her to his father, two brothers and two sisters. She did not know that he planned to marry her that day. His father introduced her to the whole family, friends and neighbours. His father called her father and told him that his daughter was safe and was now part of the Komsana family. The following day Mzwandile's father called her father and lobola negotiations began. The Komsana's slaughtered a sheep which was prepared and all ate. They gave her traditional clothes which was a traditional dress, a black and white dookie and a blanket and she then became a makoti, the wife of Mzwandile. Mzwandile's family paid R20 000 to her father. They had to pay a balance of R30 000-00 which Mzwandile could not afford at the time. Five cows were to be given to her family but there were logistical concerns in transporting the cows to her mother's house. The fathers agreed to abandon this part of the agreement as her home was too far, and what remained outstanding of the lobola was the R30 000-00. Mzwandile's family accepted her, and she was given the name Asakhe, which meant they were to build a home together. They were regarded as married according to custom. After a week they returned to Cape Town.

[3] They struggled to have children and received treatment at the local clinic to assist them. Mzwandile worked as a security guard, and she worked as a technician and both worked shifts. Years later, in 2015, they went to Home affairs to register their marriage. They waited in a long queue only to be told that Home Affairs moved to a new system and they could not register their marriage that day. They had to book to register. She did not recall what happened and they did not book a date. They worked, supported each other financially and tried to get healthy for

conception. They had every intention to register the marriage but did not. They stayed together in rented accommodation for 13 years from 2010 to 2023. They bought a house in Khayelitsha in 2023 and lived in it together as husband and wife with their son, who Mzwandile accepted as his own. Mzwandile died in a car accident on his way from work on 6 July 2024. When she tried to register the deceased estate at the Master's Office in Cape Town she was told to get an attorney. When the attorney approached the Master, the Master advised that she approach the Department of Home Affairs (DHA) to register the marriage first before they could proceed. She approached DHA in Khayelitsha on 4 September 2024, and the manager there told her that the department which dealt with customary marriages was permanently closed in all branches and they did not know when it would open. DHA could not assist her.

[4] All the institutions where Mzwandile held interests required a marriage certificate and letter of authority to assist her. This included his pension fund and the bank's home loan division. Mzwandile Njwaxu deposed to a supporting affidavit where he simply said that he had read the applicants affidavit and confirmed the contents thereof as correct in so far as it related to him. Sanelisiwe Komsana, on 29 July 2024 deposed to an affidavit where she identified Mzwandile as her brother and declared that the applicant was customarily married to Mzwandile in 2013. In her affidavit the applicant alleges that whilst Sanelisiwe initially assisted her, she did not assist her anymore, and that Mzwandile's family did not want to have anything to do with her and her son. The applicant also has a supporting affidavit by one Thandolwethu Komsana, who alleged that Mzwandile was his mother's brother and that he at times lived with Mzwandile. He stated that Mzwandile married the applicant on 25 December 2013 and that since then the

applicant and Mzwandile lived together as husband and wife until his death. The applicant in a supplementary affidavit appended two copies of policies wherein she appears registered as the spouse of Mzwandile.

[5] Section 4(7)(a) of the RCMA provides as follows:

4 Registration of customary marriages

(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;

[6] There are two major concerns with the path of travel of this application on its way to court. The first is that there was no investigation and pronouncement by a registering officer at DHA. The Minister and the Director-General elected to abide the decision of the court. In the absence of countervailing evidence from DHA, I must accept that DHA closed an internal department that deals with the registration of customary marriages permanently in all branches and its branch manager in Khayelitsha did not know when these departments will open. The applicant, and by extension persons who have uncertain or disputed customary marriages, in the main African vulnerable women, which disputes had the tendency to impact adversely on the welfare and in particular inheritance of those vulnerable women and children, were left unattended in their hour of need, by DHA. The Minister and Director-general of DHA need to lead that required public service with conviction, vision and credibility. In a matter like the present, with the serious allegations made by the applicant, to wit, that she was denied a statutory public service to which she was entitled, silence was not an option for the Minister and the Director-

General. Whoever advised them to put their heads in the sand and pray for the issue of such national importance to disappear, needed to explain themselves. It is shocking that a Minister and a Director-General would have no response to an allegation by an emotionally and financially distressed alleged widow that the Department they provide political oversight over and lead, respectively, failed to provide her with a public service that the Department was constitutionally obliged to provide. It seems to me that an answer to Parliament may be called for, unless Parliament saw nothing wrong with what seems to be a condescending attitude to customary law and customary marriages. If DHA did what was its duty, and enquired into the marriage and made a decision, it may be that the application to court would not have been necessary, and the applicant would have been spared high costs of High Court litigation.

[7] The second concern also ties in with and extends the first. There is always a risk of a customary marriage being polygamous. The applicant said nothing about this risk. The papers are silent as to whether there would be other heirs of the deceased by affinity, or through procreation. This leads me to the need for the courts to consider the role of the family in the contract of a customary marriage. It is not clear why the applicant elected not to cause the application to be served on the available family members of Mzwandile. In *Reform of Customary Marriage, Divorce and Succession in South Africa, Living Customary Law and Social Realities, Summary Research Report* by Chuma Himonga and Elena Moore, page 15, 3.1.5, the authors said:

“3.1.5 The role of the family in the contract of marriage

It is evident from both the court decisions reviewed and the practices of people on the ground that meeting the requirements of a customary marriage under the RCMA involves not just the

prospective parties to the marriage but their families as well. The involvement of the families is central to the negotiation of the marriage, particularly with regard to lobolo and the handing over of the wife to her husband's family. The predominance of the family and the greater role played by it in the marriage negotiation than by the parties to the marriage is also evident from cases in which neither of the prospective spouses took part in the negotiation of their marriages, leaving the whole process to their families or elders. '

At page 16 para 3.1.7 the authors continued:

'3.1.7 Broader strategies for proving the existence of customary marriages

The findings of this study on the way marriages are negotiated in practice, particularly with regard to the involvement of the family, suggest that the Department of Justice (through the Bench Book) should direct the courts to pay particular attention to the involvement of the families of the parties in issues concerning proof of a valid marriage. Furthermore, if the court took account of the public nature of the marriage, they could call upon a wider range of witnesses to validate the existence of the marriage. '

[8] This matter required a member of staff in DHA who was skilled in registering customary marriages, who understood the requirements for registering customary marriages. It required a registering officer who also understood the role of a registering officer, including the responsibility to enquire into the existence of a marriage upon application by the person in the position of the applicant. Upon such enquiry and if the registering officer was not satisfied that a valid customary marriage was entered into by the spouses, he or she must refuse to register the marriage. It is not clear whether DHA did not have available registering officers, or its registering officers were not trained. In this matter, there is no record of a refusal of a registering officer to register the applicant's alleged marriage. In fact, DHA by its conduct denied the applicant an opportunity to apply to it for the enquiry.

[9] Under the circumstances, it is necessary that the investigation of this court, which inherently is an inquiry to establish the truth and carry out research into a subject, must include referral of the matter back to DHA for a marriage officer to be appointed and for such marriage officer to amongst others comply with the provisions of sections 4(5) and (6) of the RCMA. It seems to me that DHA had concerns as to whether the marriage was concluded in accordance with the isiXhosa custom. It is worth mentioning that the applicant's alleged marriage appear to have been concluded under different norms and procedures than the ordinary, for example a father to father telephonic call as a form of negotiation as opposed to the inclusion of uDabawo/Rakgadi (paternal aunt) and uMalume/Malome (maternal uncle) as the ordinary elders leading such processes and the sending of uNozakuzaku/Mmaditsela (emissaries), and the absence of the delivery of the bride. DHA should promote research of the cultural and legal norms in our diversity and pluralism through its registering officers, instead of closing internal departments and service centres which were to serve the public in uncertain or disputed customary marriages. Whether the marriage was concluded in accordance with custom or not is a question that should be determined by custom and customary law. The applicant, including her brother Mzwandile, Sanelisiwe and Thandolwethu failed to adduce factual evidence and where necessary even expert evidence to guide any determiner of fact in the determination of the issue [Thulare v Thulare and Others (470/2023) [2025] ZASCA 100 (7 July 2025) at para 10. At para 11 the SCA said:

' [11] Disputes of this kind require evidence-based resolution. In the absence of the requisite evidence, the high court was not properly equipped to make any determination as to who constitutes the royal family. Nor is this Court able to do so on appeal. '

For these reasons the order was made.

Applicant Counsel: Michael Garces michaelgarces@advchambers.com

Instructing Attorney: VPR trish@vprattorneys.com

1st and 2nd Respondent Counsel: Ms Mahlaba NkoMahlaba@justice.gov.za

DM THULARE
JUDGE OF THE HIGH COURT