CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 176/22

In the matter between:

TEREZA RAYMENT	First Applicant
THIERRY ANTOINE GONDRAN	Second Applicant
TAPIWA TEMBO	Third Applicant
TEREZA RAYMENT obo TR AND JR	Fourth Applicant
THIERRY ANTOINE GONDRAN obo MG AND EG	Fifth Applicant
TAPIWA TEMBO obo KM	Sixth Applicant

and

MINISTER OF HOME AFFAIRS	First Respondent
DIRECTOR-GENERAL, DEPARTMENT OF HOME AFFAIRS	Second Respondent
DEPUTY DIRECTOR-GENERAL, DEPARTMENT OF HOME AFFAIRS	Third Respondent
DEPARTMENT OF HOME AFFAIRS	Fourth Respondent

And in the matter between

RICHARD WILLIAM ANDERSON	First Applicant
RICHARD WILLIAM ANDERSON obo CJA	Second Applicant
JOSHUA OKOTH OGADA	Third Applicant
JOSHUA OKOTH OGADA AND TANYA ESTELLA BOSCH obo MWO	Fourth Applicant
and	
MINISTER OF HOME AFFAIRS	First Respondent
DIRECTOR-GENERAL, DEPARTMENT OF HOME AFFAIRS	Second Respondent
DEPUTY DIRECTOR-GENERAL, DEPARTMENT OF HOME AFFAIRS	Third Respondent
DEPARTMENT OF HOME AFFAIRS	Fourth Respondent

Neutral citation:	*Rayment and Others v Minister of Home Affairs and Others; Anderson and Others v Minister of Home Affairs and Others* [2023] ZACC 40
Coram:	Zondo CJ, Kollapen J, Madlanga J, Majiedt J, Makgoka AJ, Mathopo J, Potterill AJ, Rogers J and Theron J
Judgments:	Zondo CJ (unanimous)
Heard on:	28 February 2023
Decided on:	4 December 2023
Summary:	Immigration Act 13 of 2002 — invalidity of sections 10(6), 11(6) and 18(2) — Immigration Regulations — invalidity of regulation 9(9)(a) — inconsistent with the Constitution Sections 8, 21 and 28 of the Constitution — children's rights — section 36 of the Constitution — unjustifiable limitation

ORDER

On application for confirmation of the order of the Western Cape Division of the High Court, Cape Town (Sher J):

Part A

1. The orders in paragraphs 1 to 7 of Part A apply to all applicants other than Mr T Tembo in both capacities in which he features as an applicant.

2. The appeal by the applicants is upheld only to the extent reflected below.

3. It is declared that sections 10(6), 11(6), and 18(2) of the Immigration Act 13 of 2002 ("Immigration Act"), and regulation 9(9)(a) of the Immigration Regulations, 2014 published under GN R413 in *Government Gazette* 37679 of 22 May 2014 (as amended) ("the Regulations"), are inconsistent with the Constitution of the Republic of South Africa, 1996, and invalid, to the extent that they—

   3.1. require a foreigner who:

      3.1.1. is the holder of a section 11(6) visa;

      3.1.2. is a parent of a child who is a citizen or permanent resident; and

      3.1.3. is currently fulfilling his or her responsibilities to that child, or demonstrates an intention to do so,

      to cease working or leave the Republic because that foreigner's good faith spousal relationship has ended;

   3.2. require a foreigner who is a parent of a child who is a citizen or permanent resident to leave the Republic in order to apply for a new visa;

3.3. do not allow a foreigner, who is otherwise eligible for a relative's visa under section 18(1), to work in South Africa where that foreigner:

3.3.1. is the parent of a child who is a citizen or a permanent resident; and

3.3.2. is currently fulfilling his or her responsibilities to that child, or if he or she is not fulfilling his or her responsibilities to that child, at least demonstrates an intention to do so as soon as he or she is able to do so.

4. The declarations of invalidity in paragraph 1 are suspended for a period of 24 months from the date of this order to enable Parliament to correct the constitutional defects relating to Immigration Act identified in this judgment and to enable the first respondent to correct the constitutional defects in regulation 9(9)(a) of the Regulations.

5. During the period of suspension—

5.1. section 11(6)(a) shall be deemed to read as follows:

'(a) such visa shall only be valid while the good faith spousal relationship exists, save that in the case of a foreigner whose good faith spousal relationship has terminated and who:

(i) is a parent of a child who is a citizen or permanent resident; and

(ii) is at the time fulfilling, or demonstrates an intention to fulfil, his or her parental responsibilities to that child,

such visa shall be deemed to be valid, pending the outcome of an application by the foreigner for a new visa which must be made within three months of the end of the good faith spousal relationship. Provided further that, if such application is made

after the expiry of three months, good cause is shown why it was made after that period.'

5.2. section 18(2) of Immigration Act shall be deemed to read as follows:

'The holder of a relative's visa may not conduct work, provided that if:

(a) the South African citizen or permanent resident is a child;

(b) the foreigner is a parent of the child; and

(c) the foreigner is currently fulfilling or demonstrates an intention to fulfil his or her responsibilities to that child,

then the foreigner shall be allowed to work in the Republic for the full duration of the visa.'

5.3. regulation 9(9)(a) is deemed to include a new sub- regulation 9(9)(a)(iv) that reads as follows:

'(iv) is the parent of a child who is a citizen or permanent resident.'

6. Should Parliament fail to correct the constitutional defects in Immigration Act within 24 months from the date of this judgment and should the first respondent fail to correct the constitutional defects in the Regulations within the 24 months from the date of this judgment, the reading-in of the Immigration Act and the Regulations in this order shall become final.

7. With respect to Tereza Rayment, Thierry Gondran, Richard Anderson and Joshua Ogada, it is declared that the visas granted to them have not expired and remain valid until their applications for a new status are determined.

8. The respondents are to pay the applicants' costs in both applications including the costs of two counsel.

Part B

1. The application for leave to appeal by Mr T Tembo in both capacities is refused with costs, including the costs of two counsel, such costs to be paid by Mr T Tembo in his personal capacity.

2. The costs in 8 above shall not include the costs relating to Mr Tembo in his personal and representative capacities in the application arising from WCHC Case No 3919/20.

JUDGMENT

ZONDO CJ (Kollapen J, Madlanga J, Majiedt J, Makgoka AJ, Mathopo J, Potterill AJ, Rogers J and Theron J concurring):

Introduction

[1] These are two applications for the confirmation of a certain order of constitutional invalidity that was made by Sher J of the Western Cape Division of the High Court, Cape Town (High Court). In the High Court the two applications were dealt with together.[1] The High Court made one order which applied to the parties in both applications. The first application was brought by Ms Tereza Rayment and five others. The reference to "five others" includes where some of the applicants represent their minor children. The first respondent is the Minister of Home Affairs (Minister). The second respondent is the Director-General, Department of Home Affairs (Director- General). The third respondent is the Deputy Director-General of the Department of Home Affairs. The fourth respondent is the Department of Home Affairs (Department). To distinguish the first application from the second, I shall refer to it as the Rayment application or the Rayment matter.

[1] *Rayment v Minister of Home Affairs* [2022] ZAWCHC 115; [2022] 3 All SA 918 (WCC); 2022 (5) SA 534 (WCC).

[2] The second application was brought by Mr Richard William Anderson and three others. Here too the reference to "three others" includes instances where some of the applicants represent their minor children. I shall refer to it as the Anderson application or the Anderson matter. In the Anderson application the respondents are the same as in the Rayment application. The applicants also appeal against certain parts of the order of the High Court. The applicants do not need to apply for leave to appeal against those parts of the judgment against which they seek to appeal. This is so because section 172(2)(d) of the Constitution gives them the right to appeal.

Factual Background[2]

[3] In the Rayment application:

(a) the first applicant is Ms Tereza Rayment;
(b) the second applicant is Mr Thierry Antoine Gondran;
(c) the third applicant is Mr Tapiwa Tembo;
(d) the fourth applicant is Ms Tereza Rayment acting on behalf of TR and JR; who are her minor children;
(e) the fifth applicant is Mr Thierry Antoine Gondran acting on behalf of MG and EG who are his minor children; and
(f) the sixth applicant is Mr Tapiwa Tembo acting on behalf of KM, his son.

[4] In the Anderson application:

(a) the first applicant is Mr Richard William Anderson;
(b) the second applicant is Mr Richard William Anderson acting on behalf of CJA, his son;
(c) the third applicant is Mr Joshua Okoth Ogada; and

[2] The High Court summarised the facts of this case in its judgment. The applicants have said that that summary is correct. The respondents have not taken issue with it. In the light of this I shall take the facts from the summary given by the High Court but have re-arranged them for purposes of this judgment.

(d) the fourth applicant is Mr Joshua Okoth Ogada and Tanja Estella Bosch acting on behalf of MWO who is their minor child.

[5] Mr Benjamin JE Güntensperger, Ms Lizette Güntensperger and Mr Benjamin Güntensperger and Ms Lizette Güntensperger on behalf of their daughter, LG, were applicants in the High Court, they are not applicants in this Court. They were successful in the High Court and the respondents have not appealed against those orders.

[6] In the Rayment matter the applicants are German (Ms Rayment), French (Mr Gondran) and Zimbabwean (Mr Tembo) nationals and, in the Anderson matter, they are British (Mr Anderson), and Kenyan (Mr Ogada) nationals.

[7] With the exception of Mr Tembo the applicants in both matters have been residing and working in South Africa on the basis of so called "spousal" visas which were granted to them in terms of section 11(6)[3] of the Immigration Act (Immigration Act).[4] These were extended from time to time. It is common cause that the spousal visas are no longer valid. They ceased to be valid upon the termination of the spousal relationships which existed between the applicants and their respective spouses who are South African citizens. Mr Tembo's case is dealt with separately in this judgment.

[8] During the course of the applicants' relationships with their respective former spouses the applicants had children with their spouses. Their children were born in

[3] Section 11(6) of the Immigration Act 13 of 2002 (Immigration Act) reads:

> "(6) Notwithstanding the provisions of this section, a visitor's visa may be issued to a foreigner who is the spouse of a citizen or permanent resident and who does not qualify for any of the visas contemplated in sections 13 to 22: Provided that—
>
> (a) such visa shall only be valid while the good faith spousal relationship exists;
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> (b) on application, the holder of such visa may be authorised to perform any of the activities provided for in the visas contemplated in sections 13 to 22; and
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> (c) the holder of such visa shall apply for permanent residence contemplated in section 26(b) within three months from the date upon which he or she qualifies to be issued with that visa."

[4] 13 of 2002.

South Africa or they acquired South African citizenship on the strength of their parent's citizenship. All the applicants have been living and working in South Africa for many years. All of them have been dutiful and supportive parents and caregivers to their children, sharing parental responsibilities with their partners both during their spousal relationship and after the termination thereof. This is as far as a summary of the circumstances which are common to all the applicants go. Below I deal with the circumstances of the individual applicants.

Circumstances relating to individual applicants

Ms Tereza Rayment

[9] Ms Tereza Rayment is an adult woman who was born in the Czech Republic and holds German citizenship. She met a South African man in the United Kingdom (UK) in 2004. The following year they moved to Spain. Two sons were born out of their union, in 2008 and 2010. At that time they were living in Berlin. In 2013 they came to Cape Town with the children. Ms Rayment entered the country on a relative's visa in terms of section 18(2)[5] of the Immigration Act. That visa was valid for two years. It did not allow her to work.

[10] The parties were married in the same year. In 2015 she obtained a spousal visa which allowed her to live and to take up employment in Kommetjie in Cape Town. The visa was renewed in 2017 and was valid until 28 November 2020. The marital relationship broke down in 2015. Her husband moved out of the common home, leaving her with the children. Although Ms Rayment's former husband still provides some financial support for the children, this is sporadic and confined mainly to odd contributions towards rental.

[11] Ms Rayment is the principal contributor to the children's maintenance and pays for their school fees and living expenses. She states that, given the length of time that she has been out of Germany and living in South Africa, there are no realistic prospects

[5] Section 18(2) of Immigration Act reads: "The holder of a relative's visa may not conduct work."

of her being able to find a job in Germany or elsewhere if she were to be forced to leave South Africa. She has said that her estranged husband has indicated that he will not be amenable to her taking the children out of the country with her, if she leaves. As in the case of many of the other applicants, her children have friends and extended family in South Africa. At the time when the applicants launched their applications in the High Court, the children had several years of schooling left to complete.

Mr Thierry Gondran

[12] Mr Thierry Gondran is a French baker. He married a South African woman in 2003. Three sons were born in 2004, 2005 and 2007 out of that marriage. At that time the family was living in France. The following year his wife returned to South Africa on her own. Mr Gondran continued looking after the two elder boys in France whilst the youngest went to live with his (paternal) grandmother, i.e. Mr Gondran's mother. In 2010 Mr Gondran entered South Africa on a visitor's visa issued in terms of section 11(2),[6] with the two elder children, to find that his wife was not working and had become addicted to methamphetamines and alcohol.

[13] In 2014 Mr Gondran was granted a spousal visa which was valid for two years. It allowed him to work. It was extended in September 2016 for a further three-year period. In June 2018 he was compelled to return to France to look for work after he had been retrenched. He had to return to South Africa three months later as his wife had abandoned the children and had relocated to Johannesburg. Unable to find sustainable employment in South Africa, he returned to France for a year, leaving the children in the care of a friend and in November 2019 re-entered South Africa on a tourist visa. He is currently living in Milnerton, Cape Town, with his two elder sons who are financially dependent on him and he is solely responsible for their care and maintenance. The youngest child continued living in France with his paternal grandmother.

[6] Section 11(2) of Immigration Act reads:

> "The holder of a visitor's visa may not conduct work: Provided that the holder of a visitor's visa issued in terms of subsection (1)(a) or (b)(iv) may be authorised by the Director-General in the prescribed manner and subject to the prescribed requirements and conditions to conduct work."

Mr Richard Anderson

[14] Mr Richard Anderson is an adult British company executive. He met a South African woman in 2010 while working in South Africa as a business development manager for a UK-based company in terms of a work visa which was renewed for three months at a time. In January 2012 he was granted a spousal visa which was valid for three years. That spousal visa was renewed in May 2015, June 2016 and December 2017. This allowed him to continue his employment with the company. In 2015 the parties were married and they bought a property in Blouberg Rise in Cape Town. In 2018 they had a son. At the commencement of this litigation Mr Anderson was the Chief Executive Officer of a South African company, iSmart (Pty) Ltd.

[15] On 27 July 2018 Mr Anderson applied for the grant of a permanent residence permit in terms of section 26(b) of the Immigration Act on the basis that he had been in a spousal relationship with his wife for more than five years. Nothing came of the application. Mr Anderson was informed by his attorney that applications for permanent residence commonly take between three and five years to be processed and granted. Unfortunately, some two years after submitting the application, the marital relationship broke down and Mr Anderson was due to move out of the common home in September 2020. As a result of this Mr Anderson is no longer eligible to be awarded permanent residence in terms of section 26(b) and his spousal visa is also no longer valid.

[16] The parties are currently embroiled in divorce proceedings. Mr Anderson, nonetheless, continues to play an active and important role in his son's upbringing and contributes the bulk of the family's household income. The parties share parenting responsibilities. Mr Anderson says, were he to be compelled to leave the country and to return to the UK, he would struggle to find employment as he does not have any professional or employment contacts in the UK or elsewhere. He has been working in South Africa since 2011 and living in the country since 2013. His son has developed

and enjoys close relationships in South Africa with an extended family of maternal cousins, aunts, uncles and grandparents. Many of these individuals would not have the means to visit them were Mr Anderson compelled to take his son with him overseas. Mr Anderson's wife is a committed mother and has every intention of continuing to live and work in South Africa.

Mr Joshua Ogada

[17] Mr Joshua Ogada is a Kenyan media researcher/consultant. He met a South African woman in 1999 in Ohio, United States of America (USA), whilst they were both engaged in tertiary studies. They married in Cape Town in August 2002. In 2005 a son was born out of their union in Cape Town. Mr Ogada was issued with a spousal visa in June 2008 which was renewed in February 2011, March 2013, August 2015 and December 2018. The parties experienced marital problems in 2014 and separated in 2016. They were divorced by an order of the Western Cape Division of the High Court, Cape Town in August 2019.

[18] Mr Ogada and his ex-wife contribute equally to the maintenance of their son who spends 50% of his time with him. He has a close relationship with his ex-wife and enjoys a strong bond with his son. He, too, says that he would find difficulty in obtaining employment in Kenya, were he to be compelled to return to Kenya. He has been working in South Africa for some 14 years and considers South Africa his home. He made enquiries on two occasions about applications for permanent residence in terms of section 27(g) of the Immigration Act. However, due to the expense involved, he did not pursue such application.

High Court

[19] The two sets of applicants instituted their respective applications in the High Court and challenged the constitutional validity of various provisions of the Immigration Act and some of the regulations promulgated under that Act. They sought a declaration of invalidity which would be suspended for a specific period. They also

sought a reading-in that would be operative during the period of suspension but would become final if the competent authorities failed to correct the relevant constitutional defects during the period of suspension. The respondents opposed these applications.

[20] The two matters were dealt with together in the High Court. They were heard by Sher J. The High Court concluded that "[t]he effect of the legislative provisions in issue accordingly results in a violation of both the applicants' constitutional rights to dignity as well as those of their children and the children's constitutional and parental rights in terms of section 28 of the Constitution and the [Children's Act]." It rejected the contention that there was unfair discrimination in this matter. The High Court undertook a justifiability analysis in terms of section 36 of the Constitution. It concluded that the respondents had not shown that the limitations were "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".[7]

[21] The High Court made a declaration of invalidity but the order was not competent in that it read in the relevant parts:

> "It is declared that the Immigration Act 13 of 2002 ("Immigration Act") alternatively sections 10(6), 11(1)(b) and 18(2) thereof, as read together with regulations 9(5) and 9(9) . . . is/are inconsistent with the Constitution of the Republic of South Africa, 1996 and invalid"

[22] A court cannot declare one thing alternatively another invalid. The question is: is the first one invalid in such a case? Is the second one invalid in such a case? An order such as the one granted by the High Court here effectively leaves both the Immigration Act and the sections of the Immigration Act not declared invalid. It effectively says either the Immigration Act as a whole is, or, sections 10(6), 11(b) and 18(2) thereof are, invalid. In my view, this is a fatal defect in the order. If there is effectively or in law no order of invalidity, the reading-in that was granted by the

[7] Section 36(1) of the Constitution.

High Court can also not stand because it depends on a declaration of invalidity having been made. This Court should not confirm such an order. Nevertheless, this Court may make an appropriate order if it is satisfied that a declaration of invalidity and other orders should be made.

In this Court

[23] As already indicated earlier, the applicants apply to this Court for the confirmation of certain orders made by the High Court. It is important to also point out that there are certain parts of the order of the High Court about which the applicants are not happy and against which they appeal. Before I can consider the matter further, it is necessary to set out the relevant constitutional and statutory framework.

Constitutional and statutory framework

[24] Section 1 of the Constitution provides in part:

> "1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) human dignity, the achievement of equality and the advancement of human rights and freedoms."

Section 2 of the Constitution reads:

> "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

[25] Section 3 of the Constitution reads in part:

> "3. (1) There is a common South African citizenship.
>
> (2) All citizens are—
>
> (a) equally entitled to the rights, privileges and benefits of citizenship; and

(b) equally subject to the duties and responsibilities of citizenship.

(3) National legislation must provide for the acquisition, loss and restoration of citizenship."

[26] Section 9 of the Constitution deals with equality. It reads:

"9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[27] Section 10 of the Constitution deals with human dignity. It reads:

"Everyone has inherent dignity and the right to have their dignity respected and protected."

Section 28 of the Constitution deals with the rights of children. Insofar as it is relevant, section 28 reads:

> "Children
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> 28. (1) Every child has the right—
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> . . .
>
> (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
>
> (c) to basic nutrition, shelter, basic health care services and social services;
>
> (d) to be protected from maltreatment, neglect, abuse or degradation;
>
> (2) A child's best interests are of paramount importance in every matter concerning the child.
>
> (3) In this section 'child' means a person under the age of 18 years."

[28] Section 29 of the Constitution deals with education. Insofar as it is relevant, section 29 reads:

> "Education
>
> 29. (1) Everyone has the right—
>
> (a) to a basic education, including adult basic education; and
>
> (b) to further education, which the state, through reasonable measures, must make progressively available and accessible."

[29] In interpreting the Bill of Rights, it will be important to bear section 39(1) of the Constitution in mind. Section 39(1) reads:

> "(1) When interpreting the Bill of Rights, a court, tribunal or forum—
>
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
>
> (b) must consider international law; and
>
> (c) may consider foreign law."

In so far as we may need to interpret the Immigration Act – which I discuss next – we have to bear section 39(2) of the Constitution in mind. Section 39(2) reads:

> "(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

Immigration Act

[30] The Immigration Act makes provision for the regulation of the admission of persons to, their residence in, and their departure from, South Africa and for matters connected therewith. Its preamble provides in part:

> "In providing for the regulation of admission of foreigners to, their residence in, and their departure from, the Republic and for matters connected therewith, the Immigration Act aims at setting in place a new system of immigration control which ensures that—
>
> . . .
>
> (l) immigration control is performed within the highest applicable standards of human rights protection;
>
> . . .
>
> (n) a human rights based culture of enforcement is promoted;
>
> (o) the international obligations of the Republic are complied with; and

(p) civil society is educated on the rights of foreigners and refugees."

[31] Before I deal with various provisions of the Immigration Act, it is necessary to draw attention to the definitions of certain terms. The term "illegal foreigner" is defined in section 1 of the Immigration Act as meaning "a foreigner who is in the Republic in contravention of this Act". The word "marriage" is defined in section 1 as meaning:

"(a) a marriage concluded in terms of—

(i) the Marriage Act, 1961 (Act No 25 of 1961); or

(ii) the Recognition of Customary Marriages Act, 1998 (Act No 120 of 1998);

(b) a civil union concluded in terms of the Civil Union Act, 2006 (Act No 17 of 2006); or

(c) a marriage concluded in terms of the laws of a foreign country."

[32] The word "spouse" is defined as meaning a person who is a party to—

"(a) a marriage as defined in this Act; or

(b) a permanent homosexual or heterosexual relationship as prescribed."

The word "work" is said to include:

"(a) conducting any activity normally associated with the running of a specific business; or

(b) being employed or conducting activities consistent with being employed or consistent with the profession of the person, with or without remuneration or reward,

within the Republic."

[33] Section 9 of the Immigration Act reads:

"(1) Subject to this Act, no person shall enter or depart from the Republic at a place other than a port of entry.

(2) Subject to this Act, a citizen shall be admitted,[8] provided that he or she identifies himself or herself as such and the immigration officer records his or her entrance.

(3) No person shall enter or depart from the Republic—

(a) unless he or she is in possession of a valid passport and in the case of a minor, has his or her own valid passport;

(b) except at a port of entry, unless exempted in the prescribed manner by the Minister, which exemption may be withdrawn by the Minister;

(c) unless the entry or departure is recorded by an immigration officer in the prescribed manner; and

(d) unless his or her relevant admission documents have been examined in the prescribed manner and he or she has been interviewed in the prescribed manner by an immigration officer: Provided that, in the case of a child, such examination and interview shall be conducted in the presence of the parent or relative or, if the minor is not accompanied by the parent or relative, any person of the same gender as the minor.

(4) A foreigner who is not the holder of a permanent residence permit contemplated in section 25 may only enter the Republic as contemplated in this section if—

(a) his or her passport is valid for a prescribed period; and

(b) issued with a valid visa as set out in this Act."

[8] In terms of section 1 of the Immigration Act, "admission" means "entering the Republic at a port of entry in terms of section 9".

[34] Sections 10 to 24 deal with the topic of temporary residence in the country. Section 10(1) provides:

> "(1) Upon admission, a foreigner, who is not a holder of a permanent residence permit, may enter and sojourn in the Republic only if in possession of a visa issued by the Director-General for a prescribed period."

[35] Section 10(2) gives a list of visas that may be issued to a foreigner. Some of the visas are a visitor's visa as contemplated in section 11, a study visa as contemplated in section 13, a visa for establishing or investing in a business as contemplated in section 15, a visa for obtaining medical treatment as contemplated in section 17, a visa provided for in section 18 which is a relative's visa and a work visa as contemplated in section 19 or 21.

[36] Section 10(3) to (10) reads:

> "(3) If issued outside the Republic, a visa is deemed to be of force and effect only after an admission.
>
> (4) A visa is to be issued on terms and condition that the holder is not or does not become a prohibited or an undesirable person.
>
> (5) The Director-General may for good cause attach reasonable individual terms and conditions as may be prescribed to a visa.
>
> (6) (a) *Subject to this Act, a foreigner, other than the holder of a visitor's or medical treatment visa, may apply to the Director-General in the prescribed manner to change his or her status*[9] *or terms and conditions attached to his or her visa, or both such status and terms and conditions, as the case may be, while in the Republic.*

[9] "Status" is defined in section 1 of the Immigration Act as meaning "the status of a person as determined by the relevant visa or permanent residence permit granted to a person in terms of this Act".

(b) *An application for a change of status attached to a visitor's or medical treatment visa shall not be made by the visa holder while in the Republic, except in exceptional circumstances as prescribed.*

(7) Subject to this Act, the Director-General may, on application in the prescribed manner and on the prescribed form, extend the period for which a visa contemplated in subsection (2) was issued.

(8) An application for a change in status does not provide a status and does not entitle the applicant to any benefit under Immigration Act, except for those explicitly set out in Immigration Act, or to sojourn in the Republic pending the decision in respect of that application.

(9) The Director-General may at any time in writing notify the holder of a visa issued in terms of this section that, subject to subsection (10), the visa shall be cancelled for the reasons disclosed in the notice and that the holder is thereby ordered to leave the Republic within a period stated in that notice, and upon the expiration of that period the visa shall become null and void.

(10) The holder of a visa who receives a notice contemplated in subsection (9) may, before the expiration of the period stated in that notice, make representations to the Director-General which he or she shall consider before making his or her decision." (Emphasis added.)

[37] It is only necessary to discuss those visas that are relevant to this matter. These will be:

(a) a visitor's visa which is provided for in section 11;
(b) a relative's visa as provided for in section 18; and
(c) a work visa as provided for in section 19.

Visitor's visa

[38] A visitor's visa is provided for in section 11. Section 11 provides:

> "(1) A visitor's visa may be issued for any purpose other than those provided for in sections 13 to 24, and subject to subsection (2), by the Director-General in respect of a foreigner who complies with section 10A and provides the financial or other guarantees prescribed in respect of his or her departure: Provided that such visa—
>
> (a) may not exceed three months and upon application may be renewed by the Director-General for a further period which shall not exceed three months; or
>
> (b) may be issued by the Director-General upon application for any period which may not exceed three years to a foreigner who has satisfied the Director-General that he or she controls sufficient available financial resources, which may be prescribed, and is engaged in the Republic in—
>
> (i) an academic sabbatical;
>
> (ii) voluntary or charitable activities;
>
> (iii) research; or
>
> (iv) any other prescribed activity.
>
> (2) *The holder of a visitor's visa may not conduct work: Provided that the holder of a visitor's visa issued in terms of subsection (1)(a) or (b)(iv) may be authorised by the Director-General in the prescribed manner and subject to the prescribed requirements and conditions to conduct work.*
>
> . . .
>
> (5) *Special financial and other guarantees may be prescribed in respect of the issuance of a visitor's visa to certain prescribed classes of foreigners.*
>
> (6) *Notwithstanding the provisions of this section, a visitor's visa may be issued to a foreigner who is the spouse of a citizen or permanent resident and who does not qualify for any of the visas contemplated in sections 13 to 22:* Provided that—

(a) such visa shall only be valid while the good faith spousal relationship exists;

(b) on application, the holder of such visa may be authorised to perform any of Immigration Activities provided for in the visas contemplated in sections 13 to 22; and

(c) the holder of such visa shall apply for permanent residence contemplated in section 26(b) within three months from the date upon which he or she qualifies to be issued with that visa." (Emphasis added.)

[39] I pause to highlight certain features of section 11. The first is that there are two subsections under which a visitor's visa may be issued. The one is subsection (1). The other is subsection (6). I would refer to the visa issued under subsection (1) as the "visitor's visa" and to the one that may be issued under subsection (6) as the "spousal visitor's visa". Subsection (1) provides that the Director-General may issue a visitor's visa for any purpose other than those provided for in sections 13 to 24 and subject to subsection (2). That visitor's visa may be issued to a foreigner who complies with section 10A and provides the financial or other guarantees prescribed in respect of his or her departure.

[40] There are two conditions attached to a visitor's visa issued under subsection (1). These are that such a visa may:

(a) not exceed three months and upon application may be renewed by the Director-General for a further period which shall not exceed three months; or

(b) be issued by the Director-General upon application for any period which may not exceed three years to a foreigner who has satisfied the Director-General that he or she controls sufficient available financial resources, which may be prescribed, and is engaged in the Republic in—

(i) an academic sabbatical;
(ii) voluntary or charitable activities;
(iii) research; or
(iv) any other prescribed activity.

[41] Another important feature of a visitor's visa issued under subsection (1) is to be found in subsection (2). Subsection 2 makes two points: first, subject to one exception, the holder of a visitor's visa may not conduct work. The exception to the general rule laid down in subsection (2) is that the holder of a visitor's visa issued under subsection (1)(a) or (b)(iv) may be authorised by the Director-General in the prescribed manner and subject to the prescribed requirements and conditions to conduct work. This means that the Director-General may authorise the holder of a visitor's visa to conduct a business or to be employed. Subsection (5) provides that special financial and other guarantees may be prescribed in respect of the issuance of a visitor's visa to certain prescribed classes of foreigners.

[42] The visitor's visa that is provided for in section 11(6) is only available to a foreigner who is the spouse of a South African citizen or permanent resident, if he or she does not qualify for any of the visas contemplated in sections 13 to 22. This means that the spousal visitor's visa cannot be issued to a foreigner who qualifies for one or other of the visas provided for in sections 13 to 22 of the Immigration Act. There are three conditions attached to such a spousal visa. These are that—

"(a) such visa shall only be valid while the good faith spousal relationship exists;

(b) on application, the holder of such visa may be authorised to perform any Immigration Activities provided for in the visas contemplated in sections 13 to 22; and

(c) the holder of such visa shall apply for permanent residence contemplated in section 26(b) within three months from the date upon which he or she qualifies to be issued with that visa."

[43] What this means is that, subject to one exception, a spousal visitor's visa is valid only while the good faith spousal relationship exists. The exception is that the spousal visitor's visa will fall away when the foreigner concerned is granted a permanent residence permit for which he or she is obliged by section 11(6)(c) to apply within three months from the date upon which he or she qualifies to be issued with the spousal visitor's visa. So, if the good faith spousal relationship ends after the foreigner has been granted permanent residence, the foreigner would not need to leave the country. Therefore, if the permanent residence permit were to be issued to such a foreigner within a short space of time, for example, within a month, there would be no need for the foreigner to leave South Africa.

A relative's visa

[44] Section 18 deals with a relative's visa. It provides:

> "(1) A relative's visa may be issued for the prescribed period by the Director-General to a foreigner who is a member of the immediate family of a citizen or permanent resident, provided that such citizen or permanent resident provides the prescribed financial assurance.
>
> (2) *The holder of a relative's visa may not conduct work*." (Emphasis added.)

A foreigner has to be a member of the immediate family of a South African citizen or permanent resident before he or she may be issued with a relative's visa for a prescribed period but the South Africa citizen or permanent resident is required to provide the prescribed financial assurance. A holder of a relative's visa may not conduct a business in South Africa nor may he or she be employed. Whereas in respect of a visitor's visa, the Director-General may authorise the holder thereof to conduct work, in the case of a relative's visa, the Director-General has no power to authorise the holder thereof to conduct work.

Work visa

[45] Section 19(2) of the Immigration Act[10] confers power on the Director-General to issue a general work visa to a foreigner who does not fall within the category of persons who possess skills or qualifications determined to be critical for the country from time to time by the Minister. Where a work visa is issued to a foreigner who has skills or qualifications determined by the Minister to be critical for South Africa, work visas may also be issued to those members of his immediate family determined by the Director-General under the circumstances or as prescribed.

Permanent residence

[46] Section 25 governs permanent residence permits. Section 25(1) provides that "[t]he holder of a permanent residence permit has all the rights, privileges, duties and obligations of a citizen, save for those rights, privileges, duties and obligations which a law or the Constitution explicitly ascribes to citizenship". Section 25(2) provides that, subject to the Immigration Act, upon application, one of the permanent residence permits set out in sections 26 and 27 may be issued to a foreigner. In terms of section 25(3) a permanent residence permit shall be issued "on condition that the holder is not a prohibited or an undesirable person, and subject to section 28". Section 28 provides for the withdrawal of a permanent residence permit under certain circumstances. Section 25(4) provides that, for good cause, as prescribed, the Director-General may attach reasonable individual terms and conditions to a permanent residence permit.

[47] Section 26 governs "Direct residence". It reads:

> "Subject to section 25 and any prescribed requirements, the Director-General may issue a permanent residence permit to a foreigner who—

[10] Section 19(2) of the Immigration Act reads:

> "A general work visa may be issued by the Director-General to a foreigner not falling within a category contemplated in subsection (4) and who complies with the prescribed requirements."

(a) has been the holder of a work visa in terms of this Act for five years and has proven to the satisfaction of the Director-General that he or she has received an offer for permanent employment;

(b) has been the spouse of a citizen or permanent resident for five years and the Director-General is satisfied that a good faith spousal relationship exists: Provided that such permanent residence permit shall lapse if at any time within two years from the issuing of that permanent residence permit the good faith spousal relationship no longer subsists, save for the case of death;

(c) is a child under the age of 21 of a citizen or permanent resident, provided that such visa shall lapse if such foreigner does not submit an application for its confirmation within two years of his or her having turned 18 years of age; or

(d) is a child of a citizen."

[48] It is important to point out that section 26(b) mentions two important periods in relation to a permanent residence permit that may be issued to a foreigner. The one period is five years. The other is two years. A foreigner must have been a spouse to a South African citizen for five years before the Director-General may issue a permanent residence permit to him or her and provided the other requirements are met. In other words, if a foreigner has been a spouse to a South African citizen or permanent resident for less than five years, he or she may not be issued a permanent residence permit in terms of section 26. The period of two years referred to in section 26 is the two years following the issuing of a permanent residence permit under section 26(b). That period is the only period within which the foreigner's permanent residence permit expires if the good faith relationship is terminated. In other words, if the good faith spousal relationship is terminated after the expiry of the two- year period, the permanent residence permit does not expire.

[49] Section 27 deals with the grant of a residence permit on grounds other than those dealt with in preceding sections. Section 27(g) reads:

> "The Director-General may, subject to any prescribed requirements, issue a permanent residence permit to a foreigner of good and sound character who—
>
> . . .
>
> (g) is the relative of a citizen or permanent resident within the first step of kinship."

[50] Section 28 governs the withdrawal of a permanent residence permit. It provides that the Director-General may withdraw a permanent residence permit on certain grounds which are set out in the section. Nothing really turns on section 28. Section 32 reads:

> "(1) *Any illegal foreigner shall depart, unless authorised by the Director-General in the prescribed manner to remain in the Republic pending his or her application for a status.*
>
> (2) *Any illegal foreigner shall be deported.*" (Emphasis added.)

The problem

[51] The problem common to both sets of applicants in these two matters was that, where a foreign national is married to or is in a good faith spousal relationship with a South African citizen or permanent resident and has been issued with a spousal visa which allows him or her to reside and work in South Africa, the spousal visa expires when the marriage or good faith life partnership ends. When the foreign spousal visa expires, the foreign national is required to leave South Africa immediately. His or her continued stay in South Africa becomes illegal.

[52] In terms of the Immigration Act it is a condition of the grant of a spousal visa that the person to whom it is granted must live together with the other person to the good faith spousal relationship or marriage. If he or she does not live with such a person, he or she is in breach of the conditions of the spousal visa. If he or she has a job in South Africa at the time of the termination of the marriage or the good faith spousal relationship, he or she is not allowed to continue working in South Africa. He

or she is required to leave South Africa and he or she commits a criminal offence each day he or she remains in South Africa.

[53] If the foreign national needed to work in South Africa in order to survive, he or she suddenly will have no means of earning his or her livelihood once he or she is not allowed to work. If there is a child born out of the marriage or the good faith spousal relationship between the foreign national and the South African citizen or permanent resident, that child will be adversely affected by the fact that the foreign national – who may be his or her father or mother – is not allowed to work once the spousal visa has expired. This is because the father or mother of the child who is a foreign national may not be able to provide for the child in terms of accommodation, food, clothing and to pay medical bills and school fees relating to his or her child.[11]

[54] If the other parent – that is the one who is a South African citizen or permanent resident – does not work or is otherwise not able to earn an income to provide for the child, the position will be that only one instead of both of his or her parents will be able to provide for the chid. If, however, the parent who is a South African citizen or permanent resident is unemployed and does not earn income in any other way, the effect of the South African legal regime will be that neither parent is able to provide for the child. In other words, the effect of the South African legal regime is that, even when the parent who is a South African citizen or permanent resident is unemployed and the only parent who has a job is the foreign national, one of the consequences of the expiry of the spousal visa is that the only parent who has a job is then prohibited from working

[11] Section 18 of the Children's Act 38 of 2005 (Children's Act) has a list of parental rights and responsibilities and the relevant portions are listed in subsections (1) and (2) which state:

> "(1) A person may have either full or specific parental responsibilities and rights in respect of a child.
>
> (2) The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right-
>
> (a) to care for the child;
>
> (b) to maintain contact with the child;
>
> (c) to act as guardian of the child; and
>
> (d) to contribute to the maintenance of the child."

and is required to leave the country. That requirement may separate members of a family. It may separate a parent from his or her child. It may separate a spouse or partner from his or her spouse or partner.

[55] The result is that the child is placed in a position where both his or her parents have no job and can, thus, not provide for him or her. When the child has only one parent who works or who is able to earn income as opposed to two, depending on the size of the salary or income of that parent, the result may be that this family is no longer able to continue to enjoy the lifestyle that they were used to when both parents were working or earning an income. This may include that, in due course, the family may lose their home or the parents may no longer be able to afford to pay school fees for their child or children. The parents may no longer even have money to pay for adequate food for the family including the child.

[56] If the parent who is a foreign national still wants to continue living in South Africa, he or she is required to apply for another visa from outside South Africa. He or she is not allowed to apply for another visa while within South Africa. If he or she leaves South Africa so as to apply for another visa or permit to enter the country, he or she is not allowed to return to South Africa until his or her application for another visa or permit is granted. Obviously, if it is refused, he or she would not be permitted to re-enter the country. If it is granted, he or she would be allowed to re-enter the country but it may be after a long separation from his or her spouse or partner or child.

[57] These consequences and effects of the expiry of a spousal visa apply irrespective of how long the marriage or good faith spousal relationship has lasted and irrespective of how small the children of the couple are. In other words, these consequences can come about when the couple have a baby who is a few months old, and can also happen when the child of the couple is of school-going age or is attending university. It can happen when the marriage or good faith spousal relationship is a few months old or at a time when the marriage or good faith spousal relationship has been going on for a few years or when it has been going on for 10 or 20 years etc.

[58] Once the marriage or good faith spousal relationship had ended, and because the law does not allow the foreign national to work, this could mean that, if the couple had a mortgage bond during their marriage or good faith spousal relationship in respect of which they made joint monthly payments, the South African citizen or permanent resident might lose property when he or she cannot afford the monthly payments because the foreign national can no longer contribute to the mortgage bond payments.

[59] There can be no doubt that the provision in the Immigration Act that precludes from working or conducting a business a foreign national whose spousal visitor's visa has expired because the spousal relationship has ended quite clearly limits not only the child's right to human dignity but also the right to human dignity of the parents. Indeed this provision also constitutes a limitation of the foreign national's right to human dignity. A law that precludes or makes it a criminal offence for anyone to do any work or conduct any business limits such person's right to human dignity. The indignity is made worse when such foreign national has a child or anyone lawfully dependent upon him or her to maintain and support. Then there is the provision in the Immigration Act that requires the foreign national whose spousal visitor's visa has expired to leave South Africa and apply for a change of status from outside the country.

Dawood

[60] *Dawood*[12] is one of the important judgments of this Court that require consideration in this matter. In *Dawood* the position was that:

(a) section 25(9) of the Aliens Control Act,[13] read in the context of section 23 of that Act, provided that a regional committee of the Immigration Selection Board — the agency empowered to grant

[12] *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) (*Dawood*).

[13] 96 of 1991. The Aliens Control Act was repealed by the Immigration Act, which came into force on 12 March 2003.

immigration permits — could grant immigration permits (which would permit a foreigner to reside in South Africa permanently when the applicant for such permit was not in South Africa);

(b) section 25(9)(a) created an exception to the general rule in (a) above in terms of which an applicant for an immigration permit who possessed a valid work permit did not need to be outside of South Africa when the immigration permit was granted; and

(c) section 25(9)(b) created a further exception in terms of which spouses, dependent children and aged, infirm or destitute family members who were in possession of a valid temporary residence permit issued in terms of section 26 also did not need to be outside South Africa at the time the immigration permit was granted.

[61] It is against the above background that O'Regan J, who wrote for a unanimous Court, framed the second issue in *Dawood* as:

> "[W]hether it was constitutional for the [Aliens Control] Act to require that an immigration permit could be granted to a spouse of a South African citizen who was in South Africa at the time only if that spouse was in possession of a valid temporary residence permit".[14]

This meant that the foreign spouse of a South African citizen had to leave the country and apply for an immigration permit from outside the country if he or she did not hold a valid temporary residence permit. To do that he or she would have to choose whether he or she would leave South Africa alone and leave his or her spouse and children behind in South Africa or whether he or she would take his or her spouse and children with him or her out of the country and come back with them when he or she had been granted the immigration permit.

[14] *Dawood* above n 12 at para 3.

[62] This Court pointed out that our Constitution did not contain any express provision that protects the right to family life or the right to cohabit.[15] However, it pointed out that the new constitutional text met the obligations imposed by international human rights law to protect the rights of persons freely to marry and to raise a family.[16] It referred in this regard to Article 16 of the Universal Declaration of Human Rights[17] (UDHR), Article 23 of the International Covenant on Civil and Political Rights[18] (ICCPR) and Article 18 of the African Charter on Human and Peoples' Rights[19] (ACHPR), all of which South Africa had ratified already at that time.[20]

[63] South Africa has ratified various Conventions which, within the context of children, emphasise the need for states to protect family life. These include the Convention on the Rights of the Child[21] (CRC), African Charter on the Rights and Welfare of the Child[22] (ACRWC) and the International Covenant on Economic, Social and Cultural Rights[23] (ICESCR).

[64] Article 18 of the CRC places an obligation on South Africa to protect family life. It states:

[15] Id at para 28.

[16] Id.

[17] Universal Declaration of Human Rights, 1948, (ratified by South Africa on 10 October 1996) (UDHR).

[18] International Covenant on Civil and Political Rights, 1966, (ratified by South Africa on 10 December 1998) (ICCPR).

[19] African Charter on Human and Peoples' Rights, 1986, (ratified by South Africa on 6 June 1994) (CRC).

[20] *Dawood* above n 12 at para 29.

[21] United Nations Convention on the Rights of the Child, 1991, (ratified by South Africa on 16 June 1995) (UNCRC).

[22] African Charter on the Rights and Welfare of the Child, 1999, (ratified by South Africa on 21 January 2000) (ACRWC).

[23] International Covenant on Economic, Social and Cultural Rights, 1976, (ratified by South Africa on 12 January 2015) (ICESCR).

> "States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern."

[65] The above provision states that both parents, not one parent or the parent that is South African have the primary responsibility for the upbringing and development of the child. The best interests of their child must be their basic concern. Closer to home, the ACRWC takes a step further by containing a provision which specifically deals with children upon the dissolution of a marriage. Article 18 of the ACRWC states:

> "(1) The family shall be the natural unit and basis of society. It shall enjoy the protection and support of the State for its establishment and development.
>
> (2) States Parties to the present Charter shall take appropriate steps to ensure equality of rights and responsibilities of spouses with regard to children during marriage and in the event of its dissolution. In case of the dissolution, provision shall be made for the necessary protection of the child.
>
> (3) No child shall be deprived of maintenance by reference to the parents' marital status."

[66] Article 19(1) of the ACRWC provides:

> "Every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents. No child shall be separated from his parents against his will, except when a judicial authority determines in accordance with the appropriate law, that such separation is in the best interest of the child."

[67] In *S v M*[24] the Court held:

> "Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them. The unusually comprehensive and emancipatory character of section 28 presupposes that in our new dispensation the sins and traumas of fathers and mothers should not be visited on their children."[25]

[68] Article 10(1) of the ICESCR provides:

> "The States Parties to the present Covenant recognise that:
>
> (1) The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children."

[69] O'Regan J said in *Dawood*:

> "[35] In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour.
>
> [36] In this case, however, it cannot be said that there is a more specific right that protects individuals who wish to enter into and sustain permanent intimate relationships than the right to dignity in section 10. There is no specific provision protecting family life as there is in other constitutions and in many

[24] *S v M* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC); 2007 (2) SACR 539 (CC).

[25] Id at para 18.

> international human rights instruments. The applicants argued that legislation interfering with the right to enter into such relationships infringed the rights to freedom of movement and the rights of citizens to reside in South Africa. It may well be that such legislation will have an incidental and limiting effect on these rights, *but the primary right implicated is*, in my view, the right to dignity. As it is the primary right concerned, it is the right upon which we should focus."[26] (Emphasis added.)

[70] This Court also had this to say:

> "[37] The decision to enter into a marriage relationship and to sustain such a relationship is a matter of defining significance for many, if most, people and to prohibit the establishment of such a relationship impairs the ability of the individual to achieve personal fulfilment in an aspect of life that is of central significance. In my view, such legislation would clearly constitute an infringement to dignity. It is not only legislation that prohibits the right to form a marriage relationship that will constitute an infringement of the right to dignity, but any legislation that *significantly impairs the ability of spouses to honour their obligations to one another would also limit that right*. A central aspect of marriage is cohabitation, the right (and duty) to live together, and legislation that significantly impairs the ability of spouses to honour that obligation would also constitute a limitation of the right to dignity."[27] (Emphasis added.)

[71] The Court held that the statutory provision which sought to force the foreign spouse to choose between going abroad with his or her partner while the application was considered and remaining in South Africa alone limited the right of cohabitation of spouses. The Court also said in *Dawood*:

[26] Id at para 36.

[27] Id at para 37.

"[39] The right (and duty) to cohabit, a key aspect of the marriage relationship, is restricted in this way. Accordingly, the right to dignity of spouses is limited by statutory provisions that empower immigration officers and the Director-General to refuse or to grant or extend a temporary permit. Having regard to the general prohibition against remaining in South Africa pending the outcome of an application for an immigration permit, the power to refuse the temporary permit is, in effect, to limit the right of cohabitation of spouses. It is necessary now to consider whether that limitation is justifiable or not."[28]

[72] The Court also stated:

"[43] But temporary permits can also be refused. This is clear from the formulation of section 25(9)(b) read with sections 26(3) and (6). If the Legislature had intended permits *always* to be granted, it would have said so. The requirement in section 25(9)(b) that a foreign spouse be in possession of a valid temporary permit therefore necessarily implies that there are other considerations that must or may be taken into account, and that would be relevant particularly to the refusal of a temporary permit. Yet these considerations are not identified at all. As sections 26(3) and (6) stand there is nothing to indicate what factors or circumstances can or ought to be taken into consideration by the relevant immigration officials and the DG.

[44] …However, section 25(5) of the [Immigration] Act states that a regional committee, *notwithstanding the provisions of section 25(4),* may issue an immigration permit to a spouse of a permanent and lawful resident of South Africa. Section 25(5) does not substitute any other criteria for those provided by section 25(4)(a). There is therefore no guidance to be found in either of these provisions as to the circumstances in which

[28] Id at para 39.

immigration officials or the DG may refuse to issue or extend a temporary residence permit."[29] (Emphasis in the original.)

[73] The Court also pointed out:

> "[51] The exact nature and effect of the deprivation of rights will depend on the circumstances of each case in which the grant or extension of a temporary residence permit is refused. The result of such a refusal will be that the foreign spouse will be required to leave South Africa pending the decision of the Regional Board on his or her application for an immigration permit. Even if the South African spouse is able to accompany his or her spouse to the foreign state, the limitation of the rights of the South African spouse is significant. It is aggravated by the fact that applicants do not know when their applications for immigration permits will be considered by the relevant regional committee. The limitation is even more substantial where the refusal of the permit results in the spouses being separated. Enforced separation places strain on any relationship. That strain may be particularly grave where spouses are indigent and not in a position to afford international travel, or where there are children born of the marriage. Indeed, it may well be that the enforced separation of the couple could destroy the marriage relationship altogether. Although these provisions do not deprive spouses entirely of the rights to marry and form a family, they nevertheless constitute a significant limitation of the right."[30]

[74] In *Dawood*, this Court concluded that section 25(9)(b) read with sections 26(3) and (6) was inconsistent with the Constitution and, therefore, invalid because of the absence of a legislative guidance identifying the circumstances in which a refusal to grant or extend a temporary permit would be justifiable and that, therefore,

[29] Id at paras 43-4.

[30] Id at para 51.

those provisions constituted an infringement of the applicants' constitutional right to dignity which protects their right to marry and cohabit. The inconsistency with the Constitution, therefore, lay in a legislative omission, the failure to provide guidance to the decision-maker.[31]

Nandutu

[75] In *Nandutu*[32] two married couples were involved. Each couple comprised a South African citizen or permanent resident and a foreign national. At least one of the two couples had a child born of their relationship. The foreign spouses had entered South Africa legally on the strength of visitors' visas. They applied for spousal visas in terms of section 11(6) of the Immigration Act which would have given them the right to live in South Africa as long as their marriages or life partnerships were operational and they complied with the terms and conditions of the spousal visas. The Director- General of the Department of Home Affairs rejected the applications for spousal visas.

[76] The reason advanced by the Director-General for rejecting their applications was that in terms of section 10(6) of the Immigration Act the applicants – being holders of visitor's visas – could not apply to change their visa status from within the country. This meant that they were required to leave South Africa and make their applications for spousal visas from outside the country. Section 10(6)(a) of the Immigration Act provided that a foreigner other than one who was the holder of a visitor's visa or medical treatment visa could apply to the Director-General to change his or her status while in the country. Section 10(6)(b) then dealt with holders of visitors' visas and medical treatment visas.

[77] Section 10(6)(b) provided that foreigners who were holders of visitors' visas or medical treatment visas were not to make their applications for a change of status from

[31] *Dawood* above n 12 at para 61.

[32] *Nandutu v Minister of Home Affairs* [2019] ZACC 24; 2019 (5) SA 325 (CC); 2019 (8) BCLR 938 (CC).

within the country "except in exceptional circumstances as prescribed." The term "as prescribed" meant as prescribed by regulations. Regulation 9(9)(a) dealt with the exceptional circumstances contemplated in section 10(6)(b). Regulation 9(9)(a) read:

> "The exceptional circumstances contemplated in section 10(6)(b) of Immigration Act shall—
>
> (a) in respect of a holder of a visitor's visa, be that the applicant—
>
> (i) is in need of emergency lifesaving medical treatment for longer than three months;
>
> (ii) is an accompanying spouse or child of a holder of the business or work visa, who wishes to apply for a study or work visa."

[78] The *Nandutu* case related to the question that, while section 10(6)(b) of Immigration Act envisaged that, in exceptional circumstances as prescribed, holders of visitor's visas could make applications for a change of status from within the country, regulation 9(9)(a) failed, in setting out the exceptional circumstances contemplated in section 10(6)(b), to include the circumstances applicable to foreign holders of visitor's visas who were spouses or life partners of South African citizens.

[79] In *Nandutu* Mhlantla J, writing for a unanimous Court, said:

> "[50] It is clear from the above provisions that there has been a departure from the 2002 framework. While section 10(6) – which appears to be a *Dawood*-based inclusion – allows a certain category of foreigners to change their visa status from within the country, regulation 9(9)(a) does not provide foreign spouses and children with this option. While there are exceptions, it appears that the Legislature may have taken one step forward and two steps back.

> [51] The issue raised in this matter arises from reading section 10(6)(b) and regulation 9(9)(a) together, in that there is no exceptional circumstance listed under regulation 9(9)(a) that covers a foreign spouse or child of a South African citizen or permanent resident. Accordingly, persons falling into that category who are holders of a visitor's visa do not receive the benefit under section 10(6)(b) to apply for a change of status or terms and conditions attached to that visa from within South Africa. Before considering whether this constitutes a limitation of either the right to dignity or the best interests of the child and, if it does, the nature of the limitation, it is important to first consider whether a change from a section 11(1) visitor's visa to a section 11(6) spousal visa actually constitutes a change of visa status. It is only if this is answered in the affirmative that the applicability of section 10(6)(b) arises and the constitutional validity of regulation 9(9)(a) is called into question."[33]

[80] This Court went on to say in *Nandutu*:

> "[57] The scheme of section 10(6)(b) read with regulation 9(9)(a) is that persons who enter the country on a visitor's visa cannot apply for a change of visa status while inside the country regardless of becoming spouses of South African citizens or permanent residents. The Immigration Act requires them to make that application while they are out of the country. This is the position even where the visitor's visa is still valid."[34]

[81] The fact that a foreign spouse or life partner of a South African citizen who was in the country on a visitor's visa would need to leave South Africa and apply for a change of visa status from outside the country meant that he or she might have to leave South Africa alone and stay outside South Africa for possibly many months pending

[33] Id at paras 50-1.

[34] Id at para 57.

the outcome of his or her application for a change of status. If the South African spouse remained in the country during that period, this would mean that the married couple or the two life partners would not be cohabiting and would be forced to live apart. It would mean that this law temporarily tore the family apart for months on end. If the family did not want to be apart for such a long period, then the South African spouse and the South African child, if the couple had such a child, would have to leave South Africa together with the foreign national and live outside South Africa for months on end pending the outcome of the application for a change of visa status. This would be compelling the spouse who is a South African citizen and the child to move out of the country against their will. This limits their rights as South African citizens in terms of section 21(3) of the Constitution "to remain in the Republic."

[82] In *Nandutu* this Court went on to say:

> "[59] As the relevant provisions of the Aliens Control Act did in *Dawood*, here section 10(6)(b) of the Immigration Act read with regulation 9(9)(a) imposes a limitation on the right to dignity. This occurs when families are forced to live apart whilst waiting for a decision on the application for a change of visa status. Section 10(6)(b) singles out holders of a visitor's or medical treatment visa and obliges them, regardless of a change of their status or circumstances, to make their application while they are out of South Africa. This limitation strikes at the core of marital rights and their reciprocal obligations. It interferes with the fulfilment of cohabitation, a central feature of marriage. And as observed in *Dawood*, this impairment of familial rights constitutes a limitation of the right to dignity.
>
> [60] In my view, *Dawood* thus makes it clear that there is a limitation of the right to dignity in this instance. That limitation extends to the right to dignity of the South African citizen or permanent resident who is forced to be separated from their spouse, in addition to the foreign spouse. Further, given that the right to dignity is extended to include the right to family life, it is clear that the rights of children protected by section 28(1)(b) and (2)

> are limited, in that where a parent is required to leave the Republic in order to apply for a change of visa status, this may result in the child's family being separated. Section 28(2) of our Constitution provides that a child's best interests are of paramount importance in every matter concerning the child. Although the words 'paramount importance' appear in section 28(2), our jurisprudence holds that they do not automatically override other rights as every right is itself capable of being limited. In *De Reuck v Director of Public Prosecutions*, this Court made it clear that the word 'paramount' in section 28(2) does not automatically mean that a child's best interests can never be limited by other rights, and that therefore, in certain instances, section 28(2) may be subjected to limitations that are reasonable and justifiable in terms of section 36."[35]

[83] It is clear from the above paragraphs that in *Nandutu* this Court concluded that section 10(6)(b) of the Aliens Control Act read with regulation 9(9)(a) constituted a limitation on the right to dignity of not only the foreign national spouse or life partner but also that of the South African citizen and the child. The Court rejected the contentions that section 31(2)(c) of the Act prevented a limitation of the right to human dignity because it empowered the Minister to waive procedural requirements. In *Nandutu* this Court conducted the justifiability analysis provided for in section 36 of the Constitution and concluded that the limitation was not reasonable and justifiable in a democratic society based on human dignity, equality and freedom.

Other relevant authorities

[84] This Court's decision in *Booysen*[36] came after *Dawood.* It raised essentially the same issues as were raised by *Dawood*. Accordingly, it was decided on the basis of *Dawood.* In that case a foreign national who was a spouse of a South African citizen

[35] Id at paras 59-60.

[36] *Booysen v Minister of Home Affairs* [2001] ZACC 20; 2001 (4) SA 485 (CC); 2001 (7) BCLR 645 (CC).

and wanted to apply for her work permit was required to apply from outside of South Africa and not to enter the country until the work permit had been issued. This was required by section 26(2)(a) of the Aliens Control Act. The reasons given in *Dawood* for the conclusion that the statutory provisions therein unjustifiably limited the right to dignity and other fundamental rights mentioned in that judgment applied with equal force in the *Booysen* case.

[85] In *Dladla*[37] the applicants, who were some of the beneficiaries of this Court's judgment in *Blue Moonlight*,[38] lived, together with others, in an accommodation provided to them by a certain entity at the instance of the City of Johannesburg. That accommodation had certain rules including a rule that was called the lockout rule and the family separation rule. The family separation rule prevented males and females, including married couples, from living together in that accommodation. The lockout rule prevented the people who lived in that accommodation from being in the accommodation during the day with the result that, if they were not working, they had to find a way of how and where to spend their time and were only allowed back into the accommodation at a certain time in the evening.

[86] Dealing with these rules, the Court had this to say in *Dladla*:

> "[47] The temporary accommodation given by the City implicates the rights to dignity, freedom and security of the person, and privacy. The applicants are thus entitled to the protection of their constitutional rights in sections 10, 12 and 14. Again, the fact that *Blue Moonlight* called for temporary accommodation only does not mean the applicants are not entitled to the full protection of their constitutional rights. They flow from this Court's order. I will show below that the Shelter did not give

[37] *Dladla v City of Johannesburg* [2017] ZACC 42; 2018 (2) SA 327 (CC); 2018 (2) BCLR 119 (CC).

[38] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Limited* (CC) [2011] ZACC 33; 2012 (2); 2012 (2) SA 104 (CC); BCLR 150 (CC).

> effect to the applicants' rights to dignity, freedom and security of the person, and privacy.
>
> [48] The lockout and family separation rules limit the applicants' right to dignity. The lockout rule limits the right to dignity because it is cruel, condescending and degrading. It forces the applicants out onto the streets during the day with no place whatsoever to call their own and to rest. As a result, people seek refuge on the street while they wait for the Shelter to re-open. The lockout rule also disproportionately affects people who work the night shift and sleep during the day. They have nowhere to rest and get ready for the next shift. For them in particular the Shelter is no shelter at all. The lockout rule also treats people like children. It undercuts the ability of the applicants to make plans and to make use of their time as they see fit. Clearly, the implication is that the applicants cannot manage their own affairs and have to be shepherded to and fro."

[87] As is reflected above, the family separation rule limited the right to human dignity and the freedom of movement and the limitation was not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account the matters listed in section 36.

[88] In *Dladla* this Court reaffirmed that the right to dignity encompasses the right to family life and declared unconstitutional a policy that separated male and female evictees in state accommodation.[39] Plainly, the concept of a family encompasses a spousal relationship that obviously extends to a parental relationship, perhaps more so given the vulnerability of the children involved and the lack of choice within the relationship. Even a short separation as currently mandated under sections 10(6) and 32 of the Immigration Act must thus be seen as an interference with the right to family life as part of the right to dignity and a limitation on that right.

[39] *Dladla* above n 37 at paras 49 and 54.

[89] In *Pridwin*[40] the parents of a certain child, namely, AB, had concluded an agreement with Pridwin School which regulated the admission to, and, attendance at, the school. Owing to the child's father's alleged unacceptable conduct, the school terminated the agreement without affording the child or his or her parents the opportunity to be heard. The main, if not the sole, question was whether the failure of the school to afford the child or his or her parents the opportunity to be heard offended the child's right to basic education and the paramountcy of a child's best interests.[41] Through Theron J, who wrote the majority judgment, this Court said:

> "[141] This Court has held that section 28(2) incorporates a procedural component, affording a right to be heard where the interests of children are at stake. This was made clear in *C*, where this Court dealt with statutory provisions which permitted a child to be removed from his or her parents' care, but did not afford any automatic opportunity to make representations. The concurring judgment of Skweyiya J held that this was impermissible, because section 28(2) required that the family and the child concerned be afforded an opportunity to make representations:
>
> > 'Section 28(2) of the Constitution requires an appropriate degree of consideration of the best interests of the child. Removal of a child from family care, therefore, requires adequate consideration. As a minimum, the family, and particularly the child concerned, must be given an opportunity to make representations on whether removal is in the child's best interests.'"

This Court held in *Pridwin* that the school was obliged to afford the child the opportunity to be heard before it could cancel the agreement between itself and the parents of the child.

[40] *AB v Pridwin Preparatory School* [2020] ZACC 1; 2020 (5) SA 327 (CC); 2020 (9) BCLR 1029 (CC).

[41] Id at para 4.

[90] In *S v M* Sachs J concluded that the regional magistrate passed sentence without giving sufficient independent and informed attention as required by section 28(2) read with section 28(1)(b) of the Constitution to the impact on the children of sending M to prison. Sachs J continued:

> "This failure carried through into the approach adopted by the High Court. Though the High Court was not unsympathetic to the plight of M and her children, and noted that imprisonment would be hard both for her and the children, it should have gone further and itself made the enquiries and weighed the information gained. In these circumstances the sentencing Courts misdirected themselves by not paying sufficient attention to constitutional requirements. This Court is therefore entitled to reconsider the appropriateness of the sentence imposed by the High Court."[42]

Constitutionality of section 10(6)(b) of Immigration Act

[91] Section 10(6)(b) of the Immigration Act reads:

> "An application for change of status attached to a visitor's visa shall not be made by the visa holder while in the Republic, except in exceptional circumstances as prescribed."

[92] In *Nandutu* regulation 9(9)(a) of the Regulations under the Immigration Act contained the exceptional circumstances contemplated in section 10(6)(b) but those circumstances did not include the situation of the applicants in *Nandutu*. This Court held that regulation 9(9)(a) of the Immigration Regulations was inconsistent with the Constitution and, therefore, invalid because, in purporting to provide the exceptional circumstances contemplated in section 10(6)(b) of the Immigration Act, the regulation did not include the case of the spouse or child of a South African citizen to change the status while in the Republic. To remedy the situation in the interim, this Court read in

[42] *S v M* above n 24 at para 48.

another exception, numbered (iii), into regulation 9(9)(a), namely, is the spouse or child of a South African citizen or permanent resident".

[93] Counsel for the applicants submitted that unfortunately *Nandutu* did not extend to a foreign person who is the parent of a South African child but no longer a spouse of a South African adult. He submitted that this was the dilemma faced by the applicants. In my view an applicant who is a foreign national whose permanent spousal relationship with a South African citizen or permanent resident has ended, but who has a child with such South African citizen or permanent resident where the child is a South African citizen, is entitled to relief. This is so because section 10(6)(b), in so far as it does not recognise his or her situation as an exceptional circumstance, limits his right to dignity and the limitation is neither reasonable nor justifiable under section 36(1) of the Constitution, just as it was found in *Nandutu*. Indeed, it also limits the child's right to dignity.

[94] Furthermore, the provision also offends sections 28(1)(b) and 28(2) of the Constitution which are children's rights. As to how this situation should be addressed in the order, counsel for the applicants submitted that the word "parent" should simply be read into the reading-in that was made by this Court to regulation 9(9)(a)(iii) in *Nandutu.* The agreed position between the parties is that, regulation 9(9)(a) should simply be amended by the insertion of a new sub-regulation 9(9)(a)(iv) that reads as follows:

> "(iv) is the parent of a citizen or permanent resident child"

Constitutionality of section 18(2) of the Immigration Act

[95] I quoted section 18(1) and (2) earlier. Subsection (1) confers on the Director-General the power to issue a relative's visa to a foreigner who is a member of the immediate family of a citizen or permanent resident of South Africa provided that such citizen or permanent resident provides the prescribed financial assurance. Subsection (2) reads:

"The holder of a relative's visa may not conduct work."

[96] Where the foreigner is a parent of a child who is a South African citizen or permanent resident, section 18(2) limits the right to human dignity of both the child and the parent who is a foreign national. It also limits the right to family life as dealt with both in *Dawood* and in *Nandutu,* given the family nature of the relationship between the foreign national and his or her South African child. Indeed, this statutory provision limits the child's rights entrenched in section 28(1)(b) and (2) of the Constitution. This is so because it may compel a foreign national to remove his or her child from South Africa against the child's will because the parent would need to go to a country where he or she would be allowed to live with his or her child and work – thereby also limiting the child's citizenship right to remain in South Africa.

[97] I, therefore, emphasise that, in requiring the foreign national to leave the country, the provisions of the Immigration Act may separate a parent from his or her child and may prevent such a foreign national from living with his or her child. The provisions thus also limit the child's right to human dignity: Indeed, both provisions of the Immigration Act – sections 10(6)(b) and 18(2) – require a foreign national whose spousal visitor's visa has expired to leave the Republic and the provision which prohibits such a foreign national from working or conducting a business also limits the rights of the child protected by section 28(1)(b) and (2) of the Constitution as was also held to be the case by this Court in *Nandutu*.[43] There may be other rights entrenched in the Bill of Rights that are also limited by the Immigration Act. However, it is not necessary to deal with them all at the same time.

[98] To sum up, the statutory requirement that a foreign national must leave South Africa in order to apply from outside to change his or her visa status limits:

[43] Id at para 60.

(a) his or her right to dignity;
(b) the right to human dignity of the spouse or partner who is a South African citizen or a permanent resident;
(c) the child's right to human dignity if the couple have a child;
(d) the child's section 21(3) right as a citizen; and
(e) the child's right under section 28(2) of the Constitution.

Section 36 analysis

[99] Having concluded that the Immigration Act limits the rights referred to above, the next question is whether such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including those listed in section 36(1). Only a law of general application may limit a right entrenched in the Bill of Rights. The Immigration Act is a law of general application. The factors listed in section 36(1) are the following:

> "(a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose."[44]

Nature of the right

[100] The rights that the Immigration Act limits are very important. The one is the right to human dignity. In this context the right to human dignity includes the right to family life.

[101] Another one is the right not to be unfairly discriminated against which is entrenched in section 9 of the Constitution. Yet another one is the right of every child

[44] Section 36(1) of the Constitution.

to have his or her best interests considered in every matter that affects a child. The factors relevant to the consideration of the best interests of the child are enumerated in section 7 of the Children's Act. This includes these parental rights and responsibilities:

(a) caring for and protecting children;

(b) keeping contact;

(c) acting as a guardian; and

(d) making financial contributions to the child's maintenance.

[102] The Immigration Act also limits the right of the child to the parental care of his or her parents or of the parent who is a foreign national who is required to leave the country and apply for a change of status from outside of the Republic. In terms of section 15(2) of the Maintenance Act,[45] the duty to support a child is that of both parents. The section confirms the common law position which is that the support includes that which a child reasonably requires for his or her proper living and upbringing, which includes the provision of food, clothing, accommodation, medical care and education.[46]

[103] South Africa's international obligations emphasise that the primary responsibility for the protection, upbringing and development of the child rests with the family. Certain familial rights have found definition in human rights law, including the right to (respect for) family life; the right to found a family; the right to family care; and the right not to be arbitrarily separated from the family.[47]

Importance of the purpose of the limitation

[104] With regard to the importance of the purpose of the limitation, the respondents have not explained what legitimate purpose is served by these provisions of the Immigration Act that require the foreign parent of a child which is a citizen of the

[45] 99 of 1998.

[46] Spiro *The Law of Parent and Child in South Africa* (1985) at 397.

[47] Article 9 of the CRC; Articles 19 and 25 of the ACRWC.

Republic and whose other parent is a citizen or permanent resident of South Africa to leave the country when the spousal relationship ends so that he may apply for a change of status from outside the country. Nor have they explained what legitimate governmental purpose is served by the provision of the Immigration Act that requires a foreigner who is a parent of a South African child to cease to work when his spousal relationship with the other parent of that child who is a South African citizen or permanent resident comes to an end. It seems irrational. How can one law in a country's legal system oblige parents of a child to support and maintain their child but another one oblige the same parent to stop working just because the spousal relationship has ended even though such parent's legal obligation to support and maintain that child has not ended?

The nature and extent of the limitation

[105] The nature and extent of the limitation will be apparent from the discussion that preceded the conclusion that the Immigration Act limits a number of rights entrenched in the Bill of Rights.

The relation between the limitation and the purpose

[106] As I have already said, I can see no legitimate purpose that is served by these limitations and the respondents have not suggested any.

Less restrictive means to achieve the purpose

[107] When no legitimate purpose has been shown for a limitation of a right entrenched in the Bill of Rights, as is the case here, one can obviously not even begin to talk about less restrictive means to achieve a purpose. Less restrictive means can only be considered in relation to a legitimate purpose that has been shown.

[108] In the light of the above it has not been shown that the limitations on the rights entrenched in the Bill of Rights as discussed above are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

Accordingly, the Immigration Act and its Regulations unjustifiably limit the rights entrenched in the Bill of Rights as discussed above. To that extent the Immigration Act and the Regulations are inconsistent with the Constitution and, therefore, invalid.

[109] I have also concluded that section 18(2) of the Immigration Act limits the right to human dignity of both the child and the parent who is a foreign national, the right to family life as well as the child's rights in section 28(1)(b) and (2) of the Constitution. These limitations have not been shown to be reasonable and justifiable in terms of section 36(1) of the Constitution. To the extent that section 18(2) of the Immigration Act is inconsistent with the Constitution, it is invalid. Before I can deal with the remedy, I propose to deal with the separate case of Mr Tembo.

Mr Tembo

[110] One of the applicants in the Rayment matter is Mr Tapiwa Tembo. Mr Tembo is an adult boxing coach. He is a Zimbabwean and came to South Africa illegally many years ago. He has been in and out of South Africa a number of times, each time illegally. Mr Tembo had a relationship with a woman who is a South African citizen and they had a child, namely, K. The Director-General of the Department of Home Affairs declared Mr Tembo undesirable in terms of section 30 of the Immigration Act. He did so without considering the interests of Mr Tembo's minor child. Section 30 reads:

> "Undesirable persons
>
> 30. (1) The following foreigners may be declared undesirable by the Director-General, as prescribed, and after such declaration do not qualify for a port of entry visa, visa, admission into the Republic or a permanent residence permit:
>
> (a) Anyone who is or is likely to become a public charge;
>
> (b) anyone identified as such by the Minister;

> (c) anyone who has been judicially declared incompetent;
>
> (d) an unrehabilitated insolvent;
>
> (e) anyone who has been ordered to depart in terms of this Act;
>
> (f) anyone who is a fugitive from justice;
>
> (g) anyone with previous criminal convictions without the option of a fine for conduct which would be an offence in the Republic, with the exclusion of certain prescribed offences; and
>
> (h) any person who has overstayed the prescribed number of times.
>
> (2) Upon application from the affected person, the Minister may, for good cause, waive any of the grounds of undesirability."

[111] Mr Tembo instituted an application in the High Court for the review and setting aside of the Director-General's decision to declare him undesirable. In the founding affidavit Mr Tembo challenged the Director-General's decision to declare him undesirable on one ground. That was that the Director-General did not take into account the interests of his minor child when he decided to declare him undesirable. In written submissions other grounds of challenge were added which had not been foreshadowed in the founding affidavit. It is not permissible for an applicant to argue a case different from the case foreshadowed in the founding affidavit. It is, of course, permissible to argue a point of law not previously raised within certain limited parameters.

[112] Mr Tembo's ground of challenge was obviously based on the provisions of section 28(2) of the Constitution. Section 28(2) reads:

> "A child's best interests are of paramount importance in every matter concerning the child."

Mr Tembo was also obviously advised about the judgments of this Court in cases such as *S v M* and *Pridwin.*

[113] The Director-General did not dispute that he was obliged to have taken the interests of Mr Tembo's minor child into account nor did he dispute that he did not take them into account. However, he pointed out that the interests of the child would not be the only factor to take into account in making the decision. The Director-General emphasised the fact that Mr Tembo had entered and left South Africa illegally on many occasions and was approaching the Court with dirty hands. The Director-General pointed out that in April 2009 the Government of South Africa had introduced a special dispensation for visa permits for Zimbabweans which had been extended from time to time and which Mr Tembo could have taken advantage of to regularise his stay in South Africa but he had not done so.

[114] The Director-General also took the point that in terms of section 31(2) of the Immigration Act Mr Tembo could have applied to the Minister to waive his undesirability status before approaching the Court but he did not do so nor did he appeal to the Minister against the decision of the Director-General declaring him undesirable. For these reasons the Director-General submitted that Mr Tembo had failed to exhaust internal remedies before approaching the Court to have the Director-General's decision reviewed and set aside. The Director-General submitted that for those reasons Mr Tembo's and his minor child's application should be dismissed.

[115] In my view the High Court was right to dismiss Mr Tembo's application on the basis that he was approaching the Court with dirty hands. He had contravened the Immigration Act on numerous occasions. He has not provided any explanation as to why he entered this country illegally when he could have entered the country legally. Not only did he do this once but he entered and left South Africa illegally many times. He has stayed in South Africa illegally for many years and now he approaches our courts for relief. As long as Mr Tembo has not provided an acceptable explanation for engaging in a series of contraventions of the Immigration Act, his hands remain dirty

and our courts should not entertain his application for benefits of the very Act of Parliament which he has contravened deliberately for many times. No self-respecting country can allow someone who has conducted himself towards its laws the way that Mr Tembo has conducted himself towards our Immigration Act to approach its courts and seek benefits under the same Act when it suits him or her after deliberately contravening that Act countless times.

[116] The "dirty hands" principle is not the only basis on which Mr Tembo's application stands to be dismissed. Another basis is that Mr Tembo did not exhaust internal remedies. Counsel for Mr Tembo accepted that Mr Tembo failed to exhaust internal remedies because he failed to approach the Minister and request him to waive the declaration made by the Director-General that Mr Tembo was an undesirable person. Mr Tembo also failed to lodge an appeal to the Minister against the decision of the Director-General to declare him an undesirable person.

[117] Section 7(2)(a), (b) and (c) of the Promotion of Administrative Justice Act[48] (PAJA) provides:

> "7 Procedure for judicial review
>
> . . .
>
> (2) (a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
>
> (b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

[48] 3 of 2000.

> (c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice."

[118] Mr Tembo did not exhaust the internal remedies available to him. His counsel sought to persuade this Court that there were exceptional circumstances in this case as contemplated in section 7(2)(c) which would justify him being exempted from first exhausting the internal remedies.

[119] The first basis on which Mr Tembo relied to contend that there were exceptional circumstances was that, even if he had approached the Minister and asked him to waive his status as an undesirable person in terms of section 30(2), he would still not have been able to apply for any status to stay and work in South Africa to support his child. He says that this is because he is a foreign parent no longer in a spousal relationship with the child's South African parent. He says that no visa would have entitled him to work in South Africa and that it, therefore, made no sense to apply for a waiver. He says what made sense was for him "to join this application and add a review to the undesirability decision".

[120] This argument has no merit. Mr Tembo has created additional work for this Court in circumstances where this Court might not have had to deal with the declaration that he is an undesirable person if he had exhausted the internal remedies. He should have approached the Minister and sought to get that hurdle out of the way. The explanation that Mr Tembo gave in this regard for not exhausting internal remedies is not a valid reason for his failure to exhaust internal remedies.

[121] Another explanation that Mr Tembo gives for his failure to exhaust internal remedies is that, to remain in South Africa, he would have had to apply to the Director- General for an authorisation in terms of section 32(1) while he was waiting

for the outcome of his application to the Minister for a waiver. He then says that the Director-General would have rejected his request for a consideration of his child's best interests. He then submits that it was just and equitable for him to join this application without applying for authorisation. This explanation falls to be rejected, too. It is based on an assumption that the Director-General would have decided the application against him. There is no basis for that. It wrongly assumes that the Director-General would not apply his mind properly to the application.

[122] The third explanation is not very different from the second one. Mr Tembo says that, if he had appealed to the Minister against the Director-General's decision declaring him an undesirable person without first obtaining a court order that the Director-General erred in not taking into account his child's best interests, the Minister would have dismissed his appeal. There is no merit in this explanation. Mr Tembo would have dealt with the relevance of the child's best interests in his representations to the Minister in regard to the appeal. There is simply no basis for Mr Tembo to say that the Minister would have rejected his contention about the relevance of his child's best interests.

[123] Mr Tembo is not entitled to any order of this Court directing the Minister to consider his child's best interests in dealing with the appeal should Mr Tembo appeal to the Minister. Mr Tembo cannot obtain any order from this Court before he exhausts his internal remedies. Normally, one would not order Mr Tembo to pay costs but I am of the view that in this case this Court should award costs against Mr Tembo as a mark of its disapproval for his illegal conduct over many years. Accordingly, Mr Tembo's application for leave to appeal against the decision of the High Court in regard to the Director-General's decision to declare him an undesirable person should be dismissed with costs on the basis that it is not in the interests of justice to entertain it.

Remedy

[124] When one has regard to the papers filed by the parties in the High Court in this matter, one can see that the dispute between them was quite wide. However, following the judgment of the High Court and when the matter was referred to this Court, the

dispute between the parties narrowed considerably. The result was that, even at the hearing before us, it was clear that there was room for a further narrowing of the disagreements between the parties, if not a complete agreement. The parties were then asked to have further discussions after the hearing to see whether they could not reach an agreement as to the terms of the order that this Court should grant because by then the respondents had largely conceded that the Immigration Act and the Regulations promulgated thereunder were inconsistent with the Constitution and, therefore, invalid in substantially the respects contended for by the applicants. By that time the bone of contention between the parties was the scope of the order of invalidity and the reading-in that this Court was required to do. There was also agreement that the declaration of invalidity had to be suspended for 24 months.

[125] As far as section 18(2) of the Immigration Act is concerned, the parties have agreed that after the word "work" in subsection (2) and, before the full stop, the following words must be added to subsection (2):

> "provided that if:
>
> (a) the South African citizen or permanent resident is a child;
>
> (b) the foreigner is a parent of the child; and
>
> (c) the foreigner is currently fulfilling or demonstrates an intention to fulfil his or her responsibilities to that child;
>
> then the foreigner shall be allowed to work in the Republic for the full duration of the visa."

[126] Subsequent to the hearing, the parties held further discussions to try and narrow down their areas of disagreement. They filed a joint note which recorded that they were able to agree on further matters although there were still matters in respect of which disagreement remained. The Court appreciates the efforts made by both sides to try and narrow the issues on which they disagreed which, to a very large extent, they succeeded in doing, though not completely.

[127] It is appropriate to reproduce the contents of the joint note of the parties. The parties attached to that joint note separate draft orders they respectively asked this Court to grant. The different draft orders reflected each party's position which was informed both by what it was prepared to agree to and its disagreement with the other. Here is the joint note (the underlining and italics are in the original):

> "I INTRODUCTION
>
> 1. At the hearing of this matter, the parties undertook to engage to attempt to narrow their disagreements on the appropriate order this Court should make.
>
> 2. The parties have not been able to reach complete agreement.
>
> 3. However, they have significantly narrowed the areas of disagreement.
>
> 4. We attach the Applicants' revised draft order marked A, and the DHA's revised draft order marked B.
>
> 5. In this Note, we identify the areas on which the parties now agree, and the issues on which they still disagree.
>
> 6. This is a joint note, and the parties therefore do not seek to argue for or against either position, but merely to describe agreements and disagreements.
>
> II NEW AREAS OF AGREEMENT BETWEEN THE PARTIES
>
> 7. The parties have reached agreement on four issues that were previously in dispute.
>
> 8. First, the parties now agree that, contrary to the High Court's order, there must be an interim reading-in to section 11(6) of the Immigration Act. They have also agreed on the basic structure of that interim reading-in. It would deem that, despite the termination of the good faith spousal relationship, the section 11(6) visas of spouses who meet defined criteria (on which the parties disagree) will remain valid until the outcome of an application for a new visa, provided that an application therefor is made within three months.
>
> 9. Second, the parties now agree that – if either proposed reading-in to section 11(6) is made – it is not necessary to declare section 43 of the Immigration Act invalid, or to craft an interim reading-in to that section. The Applicants had sought that reading-in because section 11(6) visas contain a standard condition that the foreign spouse reside with the South African spouse, and a breach of that condition would trigger section 43. In light of the proposed interim

reading- in to section 11(6), the Applicants accept that is unnecessary. The deemed validity of the section 11(6) visa following the termination of the spousal relationship would apply even if the parties ceased to reside together.

10. Third, the parties agree that the High Court's declaration that section 11(1)(b) of the Immigration Act is unconstitutional, and its interim reading-in to regulation 11(4), are unnecessary and should not be confirmed.

11. Fourth, the parties agree that it is not necessary to make an interim reading-in to section 10(6)(a), provided that the Court orders an interim reading-in to regulation 9(9).

THE REMAINING DISAGREEMENTS

12. The parties continue to disagree about five issues.

13. First, the parties disagree about the scope of the declaration of invalidity. While they agree about which sections of the Immigration Act and which regulations should be declared invalid, they do not agree about the extent of that invalidity:

13.1. The DHA contends that the impugned provisions are unconstitutional only to the extent that they require a foreigner who meets various conditions to cease working in South Africa and to make application for a status from outside South Africa.

13.2. The Applicants agree that Immigration Act and Regulations are invalid to this extent (although they disagree about the conditions the foreigner must meet in the ways set out below). But the Applicants contend that Immigration Act is also invalid to the extent that it does not allow a foreigner (who meets various conditions) who is otherwise eligible for a relative's visa under section 18(1), to work in South Africa.

14. Second, the parties disagree about whether the interim reading-in orders to section 11(6), section 18(2), and regulation 9(9) should be limited to parents or extended to non-parents:

14.1. The Respondents contend that only parents should be covered by those interim reading-in orders;

14.2. The Applicants contend that the interim reading-in orders should also cover other holders of parental rights and responsibilities under the Children's Act. In order to address the concern about abusive agreements under section 22 of the Children's Act, the Applicants propose an additional requirement that the conferral of those rights and responsibilities must have been made or confirmed by a court order.

15. Third, the parties disagree about whether the interim reading-in to section 18(2) – creating a relative's visa with a right to work – should only be available to people who previously held a section 11(6) visa, or to all foreigners:

15.1. The DHA's position is that only '*a foreigner who was the holder of a spousal visa in terms of section 11(6) which is no longer valid because the good faith spousal relationship on which it was based has terminated*' will be eligible for the new visa under section 18(2).

15.2. The Applicants' position is that any foreigner who meets the other requirements – (a) parent or holder of parental responsibilities; and (b) supports or intends to support the child – will be entitled to work, no matter their prior status.

16. Fourth, the parties disagree about whether, in order to benefit from the extension of a section 11(6) visa, or to qualify for the right to work under section 18(2), a foreigner must demonstrate that they need to work in order to fulfil their rights and responsibilities:

16.1. The Applicants' position is that all foreigners should benefit from both interim reading-in orders without demonstrating that they need to work;

16.2. The DHA's position is that the two extensions should be available only to a foreigner '*who demonstrates that she or he is required to work in South Africa in order to fulfil their parental responsibilities to their South African citizen or permanent resident child*'.

17. Fifth, the parties disagree about whether any of the requirements, other than being a parent/holder of parental responsibilities, should apply to the reading-in to regulation 9(9):

17.1. The Applicants' view is that as the regulation merely determines whether a foreigner may be in the Republic when they apply for a visa, it is not necessary to repeat the requirements for the deemed extension of section 11(6) visas, or the right to work under section 18(2), to that preliminary step.

17.2. The DHA takes the view that only foreigners who meet their defined criteria – (a) a previous holder of a section 11(6) visa; (b) currently supporting or intends to support the child; and (c) needs to work – should be entitled to the benefit of regulation 9(9)."

[128] Section 172 of the Constitution reads:

> "172. (1) When deciding a constitutional matter within its power, a court—

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including—

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

(2) (a) The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it has been confirmed by the Constitutional Court.

(b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.

(c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.

(d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an

> order of constitutional invalidity by a court in terms of this subsection."

[129] Section 172(1) obliges this Court to declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency. The law contemplated in section 172(1) includes regulations promulgated under an Act of Parliament.

[130] To the extent that the High Court may have declared any provisions of the Immigration Act constitutionally invalid, its order did not come into force because in terms of section 172(2) it only comes into force if it is confirmed by this Court. To the extent that the High Court may have declared any regulation constitutionally invalid, its order would have come into force unless suspended by virtue of an appeal because such an order does not require to be confirmed by this Court before it may come into force.

[131] The parties are agreed that whatever declaration of invalidity this Court makes will have to be suspended for 24 months to enable the competent authorities to correct the constitutional defects in the Immigration Act and Regulations that have been identified in this judgment. I agree with this. The parties have also agreed that the remedy of reading-in should be invoked in respect of certain sections of the Immigration Act and the Regulations. I agree that the remedy of reading-in is appropriate in this case.

[132] I have considered both draft orders submitted by the parties. Subject to certain amendments, I have adopted the order proposed by the applicants. Although I have not limited the order to persons who were previously issued with a spousal visitor's visa under section 11(6) of the Immigration Act, I have declined the invitation to extend this order to guardians and other caregivers. Apart from persons who had previously been issued with a section 11(6) spousal visitor's visa, I have extended the order to parents of a child who is a South African citizen or who is a permanent resident. In my view it is inadvisable to extend the order to other categories of persons because their cases have

not been dealt with properly and adequately in the affidavits. The persons in those categories are not similarly situated to the applicants. This Court has dealt incrementally with the cases involving the granting of visas and permits to various categories of persons. This can be seen from the cases of *Booysen*, *Dawood* and *Nandutu*. The cases of persons falling under other categories of persons will be dealt with only as and when they are brought before our courts.

[133] In the result I make the following order, which shall apply to both matters:

Part A

1. The orders in paragraphs 1 to 7 of Part A apply to all applicants other than Mr T Tembo in both capacities in which he features as an applicant.

2. The appeal by the applicants is upheld only to the extent reflected below.

3. It is declared that sections 10(6), 11(6), and 18(2) of the Immigration Act 13 of 2002 ("Immigration Act"), and regulation 9(9)(a) of the Immigration Regulations, 2014 published under GN R413 in *Government Gazette* 37679 of 22 May 2014 (as amended) ("the Regulations"), are inconsistent with the Constitution of the Republic of South Africa, 1996, and invalid, to the extent that they—

   3.1. require a foreigner who:

      3.1.1. is the holder of a section 11(6) visa;

      3.1.2. is a parent of a child who is a citizen or permanent resident; and

      3.1.3. is currently fulfilling his or her responsibilities to that child, or demonstrates an intention to do so,

   to cease working or leave the Republic because that foreigner's good faith spousal relationship has ended;

   3.2. require a foreigner who is a parent of a child who is a citizen or permanent resident to leave the Republic in order to apply for a new visa;

3.3. do not allow a foreigner, who is otherwise eligible for a relative's visa under section 18(1), to work in South Africa where that foreigner:

3.3.1. is the parent of a child who is a citizen or a permanent resident; and

3.3.2. is currently fulfilling his or her responsibilities to that child, or if he or she is not fulfilling his or her responsibilities to that child, at least demonstrates an intention to do so as soon as he or she is able to do so.

4. The declarations of invalidity in paragraph 1 are suspended for a period of 24 months from the date of this order to enable Parliament to correct the constitutional defects relating to Immigration Act identified in this judgment and to enable the first respondent to correct the constitutional defects in regulation 9(9)(a) of the Regulations.

5. During the period of suspension—

5.1. section 11(6)(a) shall be deemed to read as follows:

'(a) such visa shall only be valid while the good faith spousal relationship exists, save that in the case of a foreigner whose good faith spousal relationship has terminated and who:

(i) is a parent of a child who is a citizen or permanent resident; and

(ii) is at the time fulfilling, or demonstrates an intention to fulfil, his or her parental responsibilities to that child,

such visa shall be deemed to be valid, pending the outcome of an application by the foreigner for a new visa which must be made within three months of the end of the good faith spousal relationship. Provided further that, if such application is made

after the expiry of three months, good cause is shown why it was made after that period.'

5.2. section 18(2) of Immigration Act shall be deemed to read as follows:

'The holder of a relative's visa may not conduct work, provided that if:

(a) the South African citizen or permanent resident is a child;
(b) the foreigner is a parent of the child; and
(c) the foreigner is currently fulfilling or demonstrates an intention to fulfil his or her responsibilities to that child,

then the foreigner shall be allowed to work in the Republic for the full duration of the visa.'

5.3. regulation 9(9)(a) is deemed to include a new sub- regulation 9(9)(a)(iv) that reads as follows:

'(iv) is the parent of a child who is a citizen or permanent resident.'

6. Should Parliament fail to correct the constitutional defects in Immigration Act within 24 months from the date of this judgment and should the first respondent fail to correct the constitutional defects in the Regulations within the 24 months from the date of this judgment, the reading-in of the Immigration Act and the Regulations in this order shall become final.

7. With respect to Tereza Rayment, Thierry Gondran, Richard Anderson and Joshua Ogada, it is declared that the visas granted to them have not expired and remain valid until their applications for a new status are determined.

8. The respondents are to pay the applicants' costs in both applications including the costs of two counsel.

Part B

1. The application for leave to appeal by Mr T Tembo in both capacities is refused with costs, including the costs of two counsel, such costs to be paid by Mr T Tembo in his personal capacity.
2. The costs in 8 above shall not include the costs relating to Mr Tembo in his personal and representative capacities in the application arising from WCHC Case No 3919/20.

For the Applicant:	A Katz SC, M Bishop and E Cohen instructed by Eisenberg & Associates
For the Respondents:	I Jamie SC, M Adhikari and M Mokhoaetsi instructed by Webber Wentzel