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

**CASE NO: 12520/2015**

In the matter between:

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| **HEATHCLIFFE ALBYN STEWART** | **First Applicant** |
| **LEA SUZANNE STEWART** | **Second Applicant** |
| **JOSHUA DANIEL STEWART** | **Third Applicant** |
| **AIDEN JASON STEWART** | **Fourth Applicant** |
| **LUKE BENJAMIN STEWART** | **Fifth Applicant** |
| **ETHAN JESSE STEWART** | **Sixth Applicant** |

And

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| **THE MINISTER OF HOME AFFAIRS** | **First Respondent** |
| **THE DIRECTOR GENERAL, HOME AFFAIRS** | **Second Respondent** |

Coram: Donen AJ
Date of hearing: 4 November 2015
Date of judgment: 29 January 2016

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JUDGMENT

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[1.] The applicants have applied for the following orders, *inter alia:*

[1.1] Declaring that s.10(6) of the Immigration Act, No. 13 of 2002 (as amended), is inconsistent with the Constitution of the Republic of South Africa, 1996 and invalid to the extent that it requires applicants, for a visa and/or permanent residence permit on the basis of their being a spouse of a South African citizen or permanent resident, (a "*spousal visa*") to make such application from outside the Republic and/or to await determination of such application from outside the Republic;

[1.2] Declaring that the decision to reject the second applicant's application for a "*spousal visa*" is inconsistent with the Constitution and invalid;

[1.3] Reviewing the decision, and setting it aside;

[1.4] Directing the second respondent to issue a "*spousal visa*" to the second applicant forthwith;

[1.5] Ordering the respondents to pay the applicants' costs of suit, including those occasioned by the employment of two counsel.

[2.] The first applicant is a South African citizen. The second applicant is his wife. They were married on 4 January 1997 in Harare, Zimbabwe. The second applicant is a Zimbabwean citizen. The first and second applicant, together with their four minor sons, the third to sixth applicants, are ordinarily resident in Protea Valley, Cape Town, Western Cape Province. All four of the children are South African citizens, having become so by virtue of their being the children of a South African citizen, the first applicant. The children attend school in Cape Town.

[3.] Third to sixth applicants are aged 17, 14, 12 and 10 years old respectively. They are cared for from day to day, without any assistance from nannies or *au pairs* or the like, by the second applicant who has no other employment. The first applicant is their sole provider of financial support.

[4.] The applicants direct their challenge, *inter alia*, at the constitutionality of the alleged requirement, in s.10(6) of the Immigration Act, that the foreign spouse of a South African permanent resident wishing to apply for a "*spousal visa*" must apply from outside the country; and secondly, against the

department's decision to reject the second applicant's application for a "*spousal visa*". The aforementioned relief is sought in terms of s.172(1)(a) of the Constitution. Ancillary to that relief, the applicants also seek an order substituting the department's decision to refuse second applicant's application for a "*spousal visa*" with an order that such a visa be issued to the second applicant forthwith.

[5.] The facts pertaining to the second applicant's position are as follows. She is a foreigner, being a Zimbabwean citizen. The applicants arrived as a family from Zimbabwe on 14 May 2014 and established their home in Cape Town. The second applicant entered the country at OR Tambo International Airport on a 90 day visitor's visa. According to the stamp in her passport, dated 14 May 2014, her entry was valid until 12 August 2014. The conditions are described as "*visit*".

[6.] On 26 May 2014 the Immigration Regulations, 2014, came into effect. These included a regulation determining the circumstances under which the holder of a visitor's visa could apply for a change of status while in the Republic.

[7.] Before coming to South Africa the applicants had made enquiries at the South African Embassy in Harare in regard to obtaining some form of permanent residence entitlement for the second applicant. They were advised that she would first require an initial "*spousal visa*", before she could apply for permanent residency, and that both visas could be applied for once she was in the Republic. Should this advice have proved to be correct the present application would be unnecessary.

[8.] In terms of s.11(6) of the Immigration Act 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 the visas contemplated in sections 13 to 22 of the Act. Second applicant was such a person. Section 11(6)(c) further provides that the holder of such a visa must apply for permanent residence within three months from the date on which she qualifies for such a visa. It would seem that the Embassy were referring to these provisions when they advised the applicants.

[9.] As first and second applicant believed that a requirement for the temporary residence visa was a certificate from the police

authorities in the applicant's country of origin (to the effect that the applicant had no police record) the second applicant returned to Zimbabwe in early August 2014, before her initial visa had expired, in order to obtain this police clearance certificate. On her return she obtained a further ninety day visitor's visa. This was stamped on 6 August 2014 and was valid until 4 November 2014. The conditions are described as "*family visit*". It is apparent from this that the status determined by the visa granted to second applicant was that of a visitor.

[10.] The applicants began the process of applying for the so-called "*spousal visa*" immediately upon the second applicant's return. A South African Police Service Clearance Certificate was apparently necessary for this purpose. One was stamped in Pretoria on 11 September 2014. However, due to a Post Office strike, the certificate took eight weeks to reach the applicants. They were then required to attend the offices of an entity by the name of VFS on 27 October 2014. According to second respondent's answering affidavit, applications for "*spousal visas*" are submitted to the department via the offices of VFS, on terms agreed upon with VFS pursuant to a tender

awarded to them. A copy of second applicant's application for a "*spousal visa*" is not attached to the papers. The outcome of the application was received by letter via the offices of VFS on 27 November 2014, some weeks after second applicant's visa had expired.

[11.] The document in question emanated from the Department of Home Affairs. It was headed:

"***NOTICE OF DECISION ADVERSELY AFFECTING PERSON****"*

*(Section 10 read with section 8(3); Regulation 7(2).*")

[12.] In passing it is worth noting that section 10 of the Immigration Act deals with visas to temporarily sojourn in the Republic, including a visa for a visit as contemplated in section 11. Section 8(3) requires any decision, in terms of the Act, that materially and adversely affects the rights of any person to be communicated to that person and to be accompanied by the reasons for that decision.

[13.] The notice in question was directed to the second applicant and provided as follows:

"*With reference to your application for **Relative Visa**, in terms of the provisions of section 8(3) of the Act, hereby, notified that the decision is as follows:*

***REFUSED***

*The reason(s) for the decision is/are the following:*

***Change of conditions for status not allowed in terms of section 10(6) of the immigration act of 2002.***"

[14.] The notice afforded the second applicant ten working days to make written representation to the Director-General to review the decision.

[15.] It is worth noting that, according to in this notice, the application apparently made by the second applicant, (and refused) was for a "Relative Visa". Relative's visa is dealt with in section 18 of the Act, which provides that such a visa may be issued for the prescribed period to a foreigner who is a member of the immediate family of a citizen or a permanent

resident, provided that such citizen or permanent resident provides the prescribed financial assurance.

[16.] Second applicant elected to make representations to the Director-General. She did so through the offices of immigration consultants by the name of SA Migration International ("SAMI"). Their representation made reference to the aforementioned application for "Relative Visa." In response to the department's reason for refusal (i.e. that change of conditions or status were not allowed in terms of section 10(6) of the Act), SAMI quoted part of the section 10(6)(a) which suggests that a foreigner may apply to change his or her status or conditions attached to her temporary residence permit, or both such status and conditions, as the case may be while in the Republic. The qualification expressed in section 10(6)(a), namely "*other than a holder of a visitor's … visa*", was not referred to. Certain points were then made on second applicant's behalf.

[17.] Second applicant is married to a South African citizen and has four children. The family had entered the Republic before the regulation (i.e. determining the circumstances under which a

holder of a visitor's visa could apply for a change of status while in the Republic) had come into effect. The family had used its life savings to set up a house and home in the Republic. If they had to travel back to Zimbabwe to bring the application the entire family would have to return. If that happened the first applicant would potentially lose his job and house, and would suffer great financial loss. The delay in submitting the application had been caused by the Post Office strike. It would be necessary for all the applicants to travel to Zimbabwe because the children could not be left in South Africa as they had no other support structure in the Republic. Second applicant had researched the position before they came to the Republic and they had come here on the advice received from the Embassy in Harare. They had no way of knowing that the laws would change shortly after they arrived in the country.

[18.] The application for review was rejected. A letter was directed to second applicant by the Department of Home Affairs in the name of a person bearing the designation of ASD Appeals, and dated 26 March 2015. It informed the second applicant that the decision to reject her application for temporary residence had

been upheld. This decision was based on the fact that she did not qualify for a temporary residence permit in terms of s. 18(1) of the Act, because she was not permitted to change the conditions of her current visitor's visa in terms of Immigration Regulation 9(5)(b) and 9(9)(a) – (b) and section10(6) of the Act as amended. Her application for a temporary residence permit was rejected. Second applicant was also informed that she could, within ten working days of receipt of the decision, submit an application for the review or appeal of the decision; failing which the decision would remain effective.

[19.] As stated above, section 18(1) of the Act – on which this decision was based – relates to a relative's visa.

[20.] SAMI then submitted an appeal to the Minister. In that appeal the further points were made that the first and second applicant had been married since January 1997; and that her "*case should be reviewed in terms of the recent Johnsons case in the High Court*; *and in terms of the Constitution a family may not be separated*". It was emphasised that the first applicant was employed in South Africa and that the family had no support structure in Zimbabwe.

[21.] The application before this Court was launched on 18 May 2015. No outcome had been received from the Minister by the time it was heard.

[22.] The applicants emphasise that the sole reason for the rejection of second applicant's application was that she had not complied with sub-section 10(6) of the Immigration Act, which deals only with whether one may or may not apply from within the country for a change of status or terms and conditions attached to a visa. But for the provisions of that sub-section, so they submit, the application would have been granted. As will appear below this submission does not accurately reflect how the administration by VFS and the Department operated in relation to second applicant's application for a "*spousal visa*".

[23.] Under a heading "*Visas to temporary sojourn in Republic*", sub-section 10(6) provides as follows:

"*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 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.*

*(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.*"

[24.] It is worth noting that s.10(6)(b) refers only to a change of status and makes no mention of conditions. Status is expressly defined in s.1 of the Act as meaning, "*… status of a person as determined by the relevant visa or permanent residence permit granted to a person in terms of the Act.*" It is common cause that, at the time of her application, second applicant held a visitor's visa.

[25.] The applicants contend that their constitutional rights have been infringed by the introduction of the requirement into the Immigration Act, as read with the 2014 Regulations, that has the effect of obliging an applicant for a "*spousal visa*" to make

such application from outside the Republic in their country of origin.

[26.] It would appear that exceptional circumstances necessary to allow a person – in the applicant's alleged position – to apply for a change of status attached to her visitor's visa while in the Republic, were never promulgated. Section 10(6) of the Act stands to be read with Regulation 9(9) of 2014. Together the section and the Regulation – so it is alleged – have the effect of obliging the applicant for a "*spousal visa*" to make such application from outside the Republic in her country of origin. This is alleged to be an infringement of applicant's rights to dignity for the reasons set out in the *Dawood* judgment.[1]

[27.] Accordingly, the applicants claim that they are entitled to an order declaring that s.10(6) of the Immigration Act is inconsistent with the Constitution to the extent described above; and that the decision to reject the second applicant's application for a *spousal visa* is inconsistent with the Constitution, invalid, and should be set aside. The unconstitutionality would allegedly be cured by inserting the

[1] *Dawood, Shalabi, Thomas & Another v Minister of Home Affairs 2000 (1) (SA) 997 (C); and Dawood, Shalabi & Thomas v Minister of Home Affairs 2000 (3) SA 936 (CC)*

words "*unless they are a spouse of a South African citizen or permanent resident*" before the exception clause in section 10(6)(b) of the Act.

[28.] On the face of it section 10(6)(b) recognises that there are circumstances where an application for a change of status may be made by the visa holders identified while they are in the Republic and that these should be prescribed by the Minister in the Regulations. (See the definition of "*prescribed*" in section 1 of the Act). The apparent violation of the second applicant's rights would therefore seem to be caused by a lacuna in the regulations rather than by the application of s.10(6). For the reasons below it has become unnecessary to determine the issue of whether the words quoted above should appear in s.10(6)(b), or whether a further exception to those set out in Regulation 9(9) should be promulgated.

[29.] The applicants claim that they are entitled to an order that the Director-General forthwith issue a "*spousal visa*" to the second applicant. In regard to such order they accept that the Department would have acted in good faith in making the decision according to the law as it stood prior to the challenge.

They make no submission as to whether the department simply acted erroneously in denying second applicant a "*spousal visa*". They submit that there is not sufficient reason in the circumstances of the case to remit the matter to the department for the following reasons.

[30.] Firstly, given the narrow ground of rejection of the second applicant's application for a *spousal visa*, the court is in no worse position than the department to make the decision to issue the "*spousal visa*" to second applicant, (save for a consideration of reasonable conditions that ought to be attached to such a visa). Secondly, the department is not called upon to exercise unique expertise considering the application. Thirdly, the court has all the pertinent information before it. Fourthly, nothing in second applicant's circumstances or that of the family has changed to make a reappraisal of the matter necessary. The decision is therefore a foregone conclusion. In the circumstances of this case, as they emerge more fully below, I am in agreement with these five submissions.

[31.] Applicants further contend that once the provisions of s.10(6) are found to be invalid, to the extent that they prevent

applications for visa changes such as second applicant's from being granted while the applicant is within the Republic, the outcome can only be that a "*spousal visa*" must be issued to the second applicant.

[32.] In his answering affidavit the Director-General admits that the second applicant's application for a "*spousal visa*" was rejected. He alleges that a final decision on the second applicant's application for a "*spousal visa*" remains outstanding as the appeal is pending before the Minister, who has been made aware of the need for expedition in bringing finality to the matter. The respondents deny that the provisions of section 10(6) of the Immigration Act and the refusal of the second applicant's application for a "*spousal visa*" are unconstitutional. They contend that the applicants have not applied to be exempted from exhausting internal remedies before approaching the court for relief. Nor have they made out a case for such exemption. Consequently the court cannot review a decision pending second applicant's appeal. Nor can it order the respondents to issue second applicant with a "*spousal visa*". An order directing

respondents to grant second applicant a "*spousal visa*" would offend the principle of the separation of powers.

[33.] Applicants' riposte is that the respondents have failed to recognise that the matter involves constitutional review, and not a review under the PAJA to which the requirements of exhausting internal remedies applies.

[34.] On the facts the respondents allege that when the second applicant returned to Zimbabwe in early August 2014 to obtain police clearance she could have made her application for a "*spousal visa*" in Zimbabwe at the same time. She could then have entered South Africa on a 90 day visitor's visa and waited for the outcome of her application in South Africa.

[35.] The respondents further contend that s.10(6) is rational and constitutional because it allows exemptions on demonstration of prescribed exceptional circumstances.

[36.] The respondents also allege that instead of applying for a visitor's visa prior to entering South Africa in May 2014, the second applicant could have applied for a "*spousal visa*". She

has not given any reasons for failing to do so. Had she done so it would not have been necessary for the other applicants to accompany her to Zimbabwe. The respondents further allege that the application for a "*spousal visa*" in Zimbabwe would allow the second applicant to return to South Africa within two to three days and that she need not await the outcome of the application in Zimbabwe, but could enter South Africa on a visitor's visa pending the outcome of her application for a "*spousal visa*".

[37.] During the course of argument it became apparent that the references to "*spousal visa*" by the parties on both sides were inaccurate, vague and confusing. What is meant by this general term when the Immigration Act is accurately applied is a visitor's visa as contemplated by s.11(6) of the Act. [2]

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[2] Section 11 of the Act provides as follows:

"*11.* ***Visitors visa***

*(1) A visitor's visa may be issued for any purpose other than those provided for in sections 13 to 24, and subject to sub-section (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.*

[38.] Mr Mokhari, who appears on behalf of the respondents, has conceded that second applicant is entitled as a matter of law to a visa contemplated in s.11(6). It would appear therefore that had the VFS and the department acted consistently with the advice of the South African Embassy in Harare and initially provided for a "*spousal visa*", meaning a visa contemplated in s11(6)), the present imbroglio would never have occurred.

[39.] In their answering papers respondents do not dispute that second applicant applied for a "*spousal visa*". As is apparent from the notice of decision adversely affecting second applicant they seem to have treated the application as an application for a "*relative's visa*" which may be issued, in terms of s. 18 of the Act, to a foreigner who is a member of "*the*

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*(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 sub-section 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.*

*(3&4) …*

*(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 the activities provided for in the visas contemplated in sections 13 – 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.*"

*immediate family of the citizen*". It is clear from the definition of "*visa*", (in part (h) of s.1 of the Act) that what is contemplated in section 18 is "*staying with a relative*". It may be inferred, from the provisions of s. 27(g) of the Act, that the word "*relative*" is contemplated to mean someone "*within the first step of kinship.*" The provisions of the Act would therefore seem to contemplate a relative of a citizen to be someone who is "*a member of the immediate family*" other than a spouse. "*Spouse*" is defined by section 1 (for present purposes) as a person who is a party to a marriage as defined in the Act. The department therefore erred by treating second applicant's application for a "*spousal visa*" as an application for a relative's visa.

[40.] As the respondents neither dispute, in their answering papers, applicants' allegations that second applicant applied for a *spousal visa*, nor expressly allege that she applied for a relative's visa, one cannot for present purposes assume that second applicant ever applied for a relative's visa.

[41.] Mr Mokhari also asserts that it is not necessary for the applicant to leave the country in order to apply for a visa in

terms of s. 11(6) of the Act. He seems to be correct in this regard. Such a visa falls under the general heading in s.11 of "Visitor's visa". That is the visa the parties agree applicant held after her arrival at OR Tambo on 6 August 2014. Section 11(6) describes the visa that may be issued in terms thereof as a "visitor's visa". That is the "*spousal visa*" second applicant seeks. No question of a change of status as described in s.10(6)(b) of the Act therefore arises.

[42.] When the second applicant applied for a "*spousal visa*" it could only have meant a (visitor's) visa in terms of s. 11(6). As an existing holder of a visitor's visa (under s.11(1)) she could not have been making an application for a change of status attached to a visitor's visa.

[43.] In the circumstances I agree with Mr Mokhari that second applicant is entitled as of right to a visitor's visa under s.11(6) of the Immigration Act; as well as the consequence thereof, namely, the liberty/duty of applying for permanent residence as contemplated in s.26(b) of the Act within three months from the date upon which she qualifies to be issued with that visa.

For present purposes that date would be the date on which this judgment is delivered.

[44.] Mr Mokhari has submitted that the resolution of the issue in this case should be achieved by an application, on the part of the second applicant, for a visa in terms of s.11(6), coupled with an application in terms of s.31(2)(c) of the Act for exemption and a waiver of any prescribed requirement or form according to the definition section of the Act. It is suggested that the requirement of good cause, upon which the Minister may waive the requirement or form, would be constituted by the fact that the applicant had applied for the wrong visa. However, on the papers as they stand the respondents have not disputed that the applicants began the process of applying for a "*spousal visa*" immediately upon second applicant's return from Zimbabwe in early August 2014, that is, while second applicant was the holder of a visitor's visa. For the reasons above respondents must be regarded as having admitted that the applicant applied for a *spousal visa*. The only possible visa this could refer to is a visa in terms of s.11(6) of the Act. No reason therefore exists why the second applicant should have to apply for exemption at all.

[45.] As the appeal before the Minister is entirely founded on wrong assumptions there is no need to exhaust this remedy before giving effect to second applicant's uncontested rights.

[46.] The material relief that applicants seek is that the second applicant should be granted a "*spousal visa*". She is entitled to such relief without further ado.

[47.] The impugned provision challenged by the applicants is s.10(6)(b), which prohibits an application for a change of status attached to a visitor's visa from being made by the visa holder while in the Republic. It has emerged that second applicant does not have to leave the Republic in order to obtain the visa she is applying for. Her rights are unaffected by the section challenged and any lacuna in the regulation which describes the exceptions referred to in s.10(6)(b).

[48.] There is no dispute on the papers that a good faith spousal relationship exists between the first and second applicant; that first applicant is a citizen of South Africa; that second applicant

is a foreigner; and that she does not qualify for any of the visas contemplated in ss.13 – 22.[3]

[49.] In all the circumstances I make the following order:

[49.1] The second respondent is directed to issue the second applicant with a visitor's visa as contemplated in s.11(6) of the Immigration Act 13 of 2002, and to afford her the right and liberty to apply for permanent residence contemplated by s.26(b) of the Act within three months of this judgment.

[49.2] The respondents shall pay the applicants' costs, including those occasioned by the employment of two counsel.

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**DONEN AJ**

[3] That is a study visa, a treaty visa, a business visa, a crew visa, a medical treatment visa, a relative's visa, a work visa, a retired person visa, a corporate visa, or an exchange visa.