IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]

[REPORTABLE]
Case no: 3919/20

In the matter between:

T[....]1 R[....]1	applicant
T[....]2 A[....]1 G[....]1	Second applicant
T[....]4 T[....]5	Third applicant
T[....]1 R[....]1 obo T[....]3 & J[....]1 R[....]1	Fourth applicant
T[....]2 A[....]1 G[....]1 obo M[....]3 & E[....]2 G[....]1	Fifth applicant
T[....]4 T[....]5 obo K[....] M[....]1	Sixth applicant

and

THE MINISTER OF HOME AFFAIRS	First respondent
THE DIRECTOR-GENERAL,	

DEPT OF HOME AFFAIRS	Second respondent
THE DEPUTY DIRECTOR-GENERAL, **DEPT OF HOME AFFAIRS**	Third respondent
THE NATIONAL DEPT OF HOME AFFAIRS	Fourth respondent

AND:

Case no: 12667/20

In the matter between:

R[....]2 W[....] A[....]2	First applicant
R[....]2 W[....] A[....]2 **obo C[....] J[....]2 A[....]2**	Second applicant
J[....]3 O[....]1 O[....]2	Third applicant
J[....]3 O[....]1 O[....]2 & T[....]6 E[....] B[....]1 **obo M[....]2 W[....]2 O[....]2**	Fourth applicant
B[....]2 JE G[....]	Fifth applicant
L[....]1 G[....]	Sixth applicant
B[....]2 JE G[....] & L[....]1 **G[....] obo L[....]2 G[....]**	Seventh applicant

and

THE MINISTER OF HOME AFFAIRS	First respondent
THE DIRECTOR-GENERAL, **DEPT OF HOME AFFAIRS**	Second respondent
THE DEPUTY DIRECTOR-GENERAL, **DEPT OF HOME AFFAIRS**	Third respondent
THE NATIONAL DEPT OF HOME AFFAIRS	Fourth respondent

JUDGMENT DELIVERED (VIA EMAIL) ON 7 JUNE 2022

SHER, J:

1. I have before me two applications (which will be referred to as the *R[....]1* and *A[....]2* applications) which were consolidated for hearing, in which the primary relief which is sought are orders declaring the Immigration Act[1]('the Act') or certain sections thereof, read together with certain of the Immigration Regulations which were promulgated in terms thereof,[2] to be inconsistent with the Constitution and therefore unconstitutional, to the extent that they require foreigners who are parents and caregivers of SA children to cease working and to leave SA when their spousal relationships with their SA spouses[3] come to an end, or they no longer cohabit together.[4]

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[1] Act 13 of 2002.
[2] In GNR 413, GG 37679 of 22 May 2014.
[3] As in *Nandutu v Minister of Home Affairs* 2019 (5) SA 325 (CC), for the purposes of this judgment a 'spouse' is to be understood to include persons who are (a) a party to a marriage concluded in terms of the Marriage Act 25 of 1961 or the Recognition of Customary Marriages Act 120 of 1998, a civil union concluded in terms of the Civil Union Act 17 of 2006 or a marriage concluded in terms of the laws of a foreign country or (b) a party to a permanent homosexual or heterosexual relationship as prescribed in terms of s 1 of the Act and regulation 3 (1) of the regulations.
[4] In both applications an order is sought, in the alternative, declaring ss 11(6), 18(2) and 43 of the Act to be unconstitutional. In *Anderson* ss 10(6) and 27 are also impugned, as is regulation 30, whereas in *Rayment* regulation 17 is in issue, as well as Immigration Directive 9 of 2014. In both applications ancillary orders

The relevant facts

2. In *R[....]1* the applicants are German (R[....]1), French (G[....]1) and Zimbabwean (T[....]5) nationals, and in *A[....]2* they are British (A[....]2), Kenyan (O[....]2) and Swiss (G[....]).

3. Save for T[....]5 (who has not been in the country legally since at least 2012-2013 and who never married) and G[....] (who is still married but failed to renew his visa before it expired in 2017), both of whom were subsequently declared to be undesirable persons,[5] the remaining applicants have been residing and working in South Africa on the basis of so-called 'spousal' visas which were granted to them in terms of s 11(6) of the Act, which were extended from time to time, and which it is common cause are according to a subsection[6] of the selfsame provision no longer valid, following the termination of the spousal relationships which existed between the applicants and their spouses, who are SA citizens.

4. During the course of these relationships the applicants had children (with their SA spouses), who are SA citizens, having been born in SA or having acquired SA citizenship on the strength of their SA parent's citizenship. All the applicants have been living and working in SA for many years and all of them have been dutiful and supportive parents and caregivers to their children, sharing parental responsibilities with their partners both during and after the termination of their spousal relationships. That then by way of a summary of the circumstances which are common to all the applicants.

5. As far as their individual circumstances are concerned, these are briefly as follows. T[....]1 R[....]1 is a 47-year-old woman who was born in the Czech Republic and holds German citizenship. She met a South African man in the UK in 2004. The following year they moved to Spain. Two sons were born of their union, in 2008 and 2010, by which time they were living in Berlin. In 2013 they came to Cape Town with the children. T[....]1 entered the country on a relative's visa in terms of s 18(2) of the Act, which was valid for 2 years and which did not allow her to work. In the same year the parties were married and pursuant thereto in 2015 she obtained a spousal visa which allowed her to

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are also sought setting aside declarations of undesirability which were made in respect of Tembo and Guntensperger.

[5] In terms of s 30 of the Act.

[6] S 11(6)(a).

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, at which time her husband moved out of the common home, leaving her with the children. Although he still provides some financial support for the children this is sporadic and confined mainly to odd contributions towards rental. T[....]1 is the principal contributor to the children's maintenance and pays for their school fees and living expenses. She avers that given the length of time that she has been out of Germany and living in SA there are no realistic prospects of her being able to find a job in Germany or elsewhere (and certainly not one which would allow her to continue to maintain her children) were she to be compelled to leave the country, and her estranged husband has indicated that he will not be amenable to her taking the children with her, were she to leave. As in the case of many of the other applicants, her children have friends and extended family in South Africa and have several years of schooling left to complete.

6. T[....]2 G[....]1 is a 48-year-old French baker. He married a SA woman in 2003, from which union 3 sons were born in 2004, 2005 and 2007, at which time the family was living in France. The following year his wife returned to SA on her own. T[....]2 continued looking after the 2 older boys in France whilst the youngest went to live with his (paternal) grandmother i.e T[....]2's mother. In 2010 T[....]2 entered South Africa on a visitor's visa (in terms of s 11(2)), with the 2 older children to find that his wife was not working and was addicted to methamphetamines and alcohol. In 2014 he was granted a spousal visa which was valid for 2 years which allowed him to work, which was subsequently 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 was retrenched. He had to return to SA 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, in Cape Town with his 2 eldest sons who are financially dependent on him and is solely responsible for their care and maintenance.

7. T[....]4 T[....]5 is a 31-year-old Zimbabwean boxing coach. He entered SA on an asylum-seeker's permit [7] in 2010, which lapsed. By his own admission, in 2012 he paid off an immigration official R 12 000 to obtain a fraudulent work visa. In August 2013 he was arrested at OR Tambo airport and after being convicted and paying a fine was compelled to return to Zimbabwe. Three months later he crossed back into SA illegally. In 2015 he met a SA woman with whom he commenced a relationship, out of which a child was born in September 2017. The parties lived together in Cape Town for a year before the relationship broke down irretrievably, at which time his son moved to Johannesburg with his mother. In February 2019 T[....]4 was again arrested at OR Tambo airport after flying to Johannesburg to visit his son, and was declared an undesirable person, on the basis that he had overstayed his visa by some 251 days, pursuant to which he was compelled to buy a one-way ticket to Zimbabwe. Despite this he again returned to SA illegally. He is currently living with his son in Cape Town, and contributes substantially towards his maintenance, educational and living expenses.

8. R[....]2 A[....]2 is a 31-year-old British company executive who met a South African woman in 2010, while working in SA as a business development manager for a UK-based company, in terms of a work visa which was renewed for 3 months at a time. In January 2012 he was granted a spousal visa which was valid for 3 years, which was renewed in May 2015, June 2016 and December 2017, which allowed him to continue his employment with the company. He is currently its CEO. In 2015 the parties were married and bought a property in Blouberg Rise, in Cape Town, and in 2018 they had a son. On 27 July 2018 R[....]2 applied for the grant of a permanent residence permit, in terms of s 26(b) of the Act, on the basis that he had been in a spousal relationship with his wife for more than 5 years. Nothing came of the application. He was informed by his attorney that applications for permanent residence commonly take between 3 and 5 years to be processed and granted. Unfortunately, some two years after submitting the application the marital relationship broke down and R[....]2 was due to move out of the common home in September 2020. As a result of this R[....]2 is no longer eligible to be awarded permanent residence, in terms of s 26(b), and his spousal visa is also no longer valid. The parties are currently embroiled in divorce proceedings. R[....]2 nonetheless

[7] In terms of the Refugees Act, 130 of 1998.

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. 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 United Kingdom 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 SA with an extended family of maternal cousins, aunts, uncles and grandparents. Many of these individuals would not have the means to visit them were R[....]2 to be compelled to take his son with him overseas. R[....]2's wife is a committed mother and has every intention of continuing to live and work in South Africa.

9. J[....]3 O[....]2 is a 40-year-old Kenyan media researcher/consultant. He met a South African woman in 1999 in Ohio, USA whilst they were both engaged in tertiary studies. They were married in Cape Town in August 2002. In 2005 a son was born of their union, in Cape Town. J[....]3 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 order of this Court in August 2019. J[....]3 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 would find difficulty in obtaining employment in Kenya where he to be compelled to return to it. He has been working in SA for some 14 years and considers SA his home. He made enquiries on two occasions as to applying for permanent residence, in terms of s 27(g) of the Act, but did not proceed therewith due to the expense involved.

10. B[....]2 G[....] is a 37-year-old Swiss carpenter, who lives in Parklands, Cape Town with his SA wife, who he met in 2009 and married in 2012. A daughter was born of their union in 2014. He was issued with a spousal visa in May 2009 which was renewed in May 2012 and June 2015. However, unlike the three-year extension in 2012 the extension in 2015 was only for a period of two years, until 2 June 2017, and B[....]2 failed to notice this until it was pointed out to him by a bank official, a day after the visa had expired. He then made application for renewal of his visa and for authorization to remain in the country, pending his application for a status. His application was refused on 23

January 2018, and an internal appeal/review which he lodged was declined by the Director-General on 17 July 2018. Ten days later he received a notice declaring him to be an undesirable person[8] for a period of 12 months, on the basis that he had 'overstayed' his spousal visa by 10 days, and he was ordered to leave the country. An appeal to the Minister was turned down on 18 August 2020, on the basis that he had failed to renew his visa within 60 days from the date of its expiry and had not provided any reasons which demonstrated that he had been unable to apply for the renewal thereof, as a result of circumstances beyond his control.[9]

The legislative provisions in issue

11. The Act regulates the admission of foreigners to and their residence in SA, which may be temporary or permanent. Temporary residence is provided for [10] by way of a series of 12 specific visas which include visitors',[11] study,[12] business,[13] medical treatment,[14] relatives',[15] work[16] (which includes so-called corporate[17]), and so-called 'retired person'[18] and exchange[19] visas. Permanent residence is provided for by way of permits.[20] A foreigner's immigration status is determined by the relevant visa or permanent residence permit which has been granted to them in terms of the Act.[21]

12. As previously indicated, the visa which is in issue in this matter is the so-called 'spousal' visa, which is provided for in terms of s 11(6), as a species of the general category of visitors' visas in s 11 of the Act. Although it affords temporary residence it was held by the Constitutional Court in *Nandutu* [22] that the nature of the rights and the conditions and obligations which attach to it differ from those which attach to an ordinary

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[8] In terms of s 30(1).
[9] As required in terms of regulation 30(1)(a).
[10] In terms of ss 10(2)(a) -(l) and ss 10B-23.
[11] S 10(2)(b) rtw s 11.
[12] S 10(2)(c) rtw s 13.
[13] S 10(2)(e) rtw s 15.
[14] S 10(2)(g) rtw s 17.
[15] S 10(2)(h) rtw s 18.
[16] S 10(2)(i) rtw ss 19 and 21.
[17] S 21.
[18] S 10(2)(j) rtw s 20.
[19] S 10(2)(k) rtw s 22.
[20] In terms of ss 25-26. Prior to the promulgation of the Immigration Amendment Act 13 of 2011, as in the case of permanent residence temporary residence was also provided for by way of a residence 'permit', as opposed to a 'visa', as it is now called.
[21] S 1.
[22] Note 3, para 54.

visitor's visa, as it is intended to offer a foreign spouse a 'permanent route to residency'. In this regard the provisions of s 11(6) link up with those in s 26(b), which provides that a foreigner who has been the spouse of a SA citizen (or permanent resident) for 5 years may be issued with a permanent residence permit, although such permit will lapse if at any time within a period of 2 years from the date of issue thereof the 'good faith' spousal relationship between the parties no longer 'subsists',[23] which I understand to be a synonym for 'exists', the operative verb which is used in other related provisions of the Act, notably s 11(6), which deals with 'good faith' spousal relationships insofar as temporary, as opposed to permanent, residence is concerned.

13. The Act does not define the circumstances, or moment, when a spousal relationship no longer 'subsists' or 'exists', or is deemed to no longer subsist or exist, and there do not appear to be any reported cases on the point. As a spouse is defined[24] as a person who is party to a marriage (which includes a customary marriage or a civil union), the formal dissolution thereof by order of court would no doubt, on an ordinary, contextual and purposive interpretation signify the moment when, for the purposes of the Act, such a relationship is considered legally to have come to an end.[25] However, insofar as the definition of a spouse also includes persons who are party to a permanent heterosexual or homosexual relationship, but who are not formally married, the circumstances under which and the moment when such a relationship will no longer subsist/exist, is less easily capable of being ascertained. However, given the facts before me the point does not require determination as it appears to be accepted as common cause between the parties that in the case of all the applicants (except for G[....]), including those who were never formally married (T[....]5) or who have not yet been formally divorced (R[....]1 and A[....]2), the spousal relationship which existed between them and their partners has come to an end.

14. In the circumstances (save for G[....]) none of the applicants are accordingly eligible to apply for permanent residence, in terms of s 26(b). Notionally, they would be

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[23] Unless the cause of the termination of the relationship is the death of the SA spouse.

[24] In s 1 *vide* note 3.

[25] Of course, when interpreting any legislation which affects constitutional rights one is also required in terms of s 39(2) of the Constitution to do so in a manner which will promote the spirit, purport and objects of the Bill of Rights.

able to apply for permanent residence in terms of s 27(g) of the Act, on the basis that they are relatives of their SA citizen children, within the first step of kinship.

15. But the immediate difficulty which faces the applicants, even before they were to consider making application for permanent residence on that basis is that, for the same reason, they no longer enjoy temporary residence rights because s 11(6)(a) similarly provides that a spousal visa shall only be valid while the good faith spousal relationship between the parties 'exists', and s 43(b) of the Act provides that upon the expiry of their status foreigners are to ('shall') depart SA. If they do not, they are considered to be illegal foreigners[26] and unless authorized by the Director-General to remain pending an application for status[27] become liable to be deported.[28] In this regard it is common cause that the applicants do not qualify for any of the various visas previously referred to, save possibly for visitors visas[29] and relatives visas, neither of which will allow them to work.[30] In addition, following upon the termination of their spousal visas they can no longer legally be employed in SA, as the Act provides[31] that no person shall employ an illegal foreigner or one whose status does not authorize them to be employed.

16. To compound the applicants' difficulties, because of the provisions of s 10(6) of the Act, in order to apply for either a change of temporary status i.e for a different visa (the respondents aver that the applicants cannot do so as they have no formal status to be in the country because by operation of law the temporary residency status which they enjoyed in terms of their s 11(6) spousal visa has come to an end and is no longer valid), or if they were to apply for a temporary status to be conferred on them afresh, they can only do so from outside the country. In this regard s 10(6)[32] provides that whereas the holders of any other visas may make such applications from within the Republic, this is not permitted in the case of the holders of visitors' or medical treatment visas, save in

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[26] In terms of s 1.
[27] In terms of s 32(1).
[28] S 32(2).
[29] In terms of s 11(1)(a). The applicants allegedly do not qualify for the 3-year visitor's visa which can be issued in terms of s 11(1)(b)(i)-(iv).
[30] In terms of s 18(2) holders of relatives' visas may not work, and because being a parent and caregiver does not qualify as a 'prescribed activity' in terms of s 11(1)(b)(iv) the holder of a visitor's visa can also not lay claim to a right to work on this basis.
[31] S 38(1)(a).
[32] And regulation 9(5).

certain exceptional circumstances, as prescribed by regulation.[33] To this end, currently the only exceptional circumstances which have been prescribed[34] in respect of visitors visas are those pertaining to visitors who require emergency life-saving medical treatment for longer than 3 months, and those who are the accompanying spouses or children of foreigners who are in the country on a business or work visa, and who wish to apply for a study or work visa.

17. In *Nandutu* the Constitutional Court read into the regulation concerned a third instance[35] of what would constitute exceptional circumstances for the purpose of s 10(6), to wit where the holder of a visitor's visa is the foreign spouse or child of a SA citizen or permanent resident. In their case, such persons would be able to apply for a change of status, or a status, from within SA. Consequently, in *Nandutu* it was held that the foreign spouse of a permanent resident and the life partner of a SA citizen, who were in the country on the basis of a general visitor's visa, were entitled to apply for the issue of a spousal visa whilst in SA and were not compelled to leave and to apply for it from their respective countries of origin. However, inasmuch as the dispensation which was provided in *Nandutu* was formulated to assist foreign spouses, and not foreign *parents* of children who are SA citizens, it seemingly does not avail the applicants.

18. Finally, insofar as applying for a permanent status is concerned by way of s 27(g), an amendment which was made to the Act in 2016[36] which has apparently been assented[37] to and only needs to have a date for its commencement to be proclaimed, will similarly bar the applicants as illegal foreigners from applying for permanent residence from within SA once it is put into operation.

19. By way of summary therefore, the combined effect of the various provisions which have been referred to is to render the applicants illegal foreigners who are no longer able to continue residing or working in SA, and who are required to depart the country, failing which they are liable to be deported. In addition, in order to regularize their immigration

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[33] Prior to an amendment in 2014 the Act and regulations allowed a foreigner to apply to change their status, and to obtain a permanent status, from within SA.

[34] In regulation 9(9)(a)(i)-(ii). Anomalously, as far as the holders of medical treatment visas are concerned exceptional circumstances will only be present where their continued stay in SA is required for 'any purpose related to' a criminal trial and not their medical treatment.

[35] As regulation 9(9)(a)(iii).

[36] Sections (1A) and (1B) of the Immigration Amendment Act, 8 of 2016.

[37] GG 40302, 27 September 2016.

status, either on a temporary or on a permanent basis, they are similarly required to leave and to make application therefor from outside the country.

The applicants' challenge

20. The applicants contend that the legislative provisions in question are unconstitutional inasmuch as their effect is to unjustifiably limit their constitutional rights and those of their children, to dignity and equality, and to parental care and legislative processes that give effect to the best interests of the children. Insofar as the right to dignity is concerned the applicants aver that it is unjustifiably impacted upon in several respects. They contend, principally, that an important facet of the expression of this right is their need and ability to care for and nurture their children not only financially, but also emotionally and psychologically, so that they may be raised to become healthy, self-sustaining and responsible adults. They point out that although their spousal relationships may have come to an end their parental relationships have not, and they continue to share parental responsibilities and rights with their former partners. So too, the broader familial relationships that came into existence as a result of their spousal relationships and the children they have had out of these relationships, also continue. The applicants contend that the mandatory effect of the legislative provisions, which require them to cease working and living in the country and to leave SA, on pain of being deported, without having regard for the effect this would have on these relationships is similarly unconstitutional, because, were they to be compelled to leave the country these relationships would be damaged and they would be unable to continue providing for their children's needs, not only financially but also developmentally and emotionally. In the circumstances, they aver that the legislative provisions do not give effect to the constitutional imperatives that require that the best interests of children are always to be considered and given effect to. Finally, the applicants also aver that the legislative provisions unfairly discriminate against them on the grounds of their marital status.

An assessment

21. In its preamble the Act declares that in seeking to regulate the admission of foreigners to and their residence in South Africa it aims at putting in place not only a system of immigration control which will ensure that the state's security considerations are satisfied and the entry and departure of foreigners is effectively facilitated and

managed, but also one that is performed with the 'highest applicable standards of human rights protection',[38] and which promotes a 'human rights based culture of enforcement'[39] and ensures that the Republic's international obligations are complied with.[40] Such obligations are those which are set out in the various treaties and conventions which SA has entered into and adopted. It is in this legislative context that the provisions of the Act must accordingly be considered. In addition, they must obviously also be considered in our constitutional setting.

22. Thus, the legislative provisions in issue must be viewed through the prism of the Constitution[41] and must be interpreted and given effect to in a manner that will promote the spirit, purport and objects of the Constitution and the rights contained therein,[42] which rights with reference to this matter include rights to dignity, equality and the rights of children, as set out in sections 10, 9 and 28 thereof, respectively. The State is constitutionally enjoined[43] to respect, protect and promote these rights, especially insofar as the legislative enactments concerned may affect or implicate them.[44]

(i) Ad the right to dignity

23. In *Makwanyane* [45] the Constitutional Court recognized the importance of dignity as a foundational value of the Constitution and held that together with the right to life it is one of the most important of all human rights and the font of all other personal rights in the Bill of Rights.[46]

24. Like many of the other rights in the Bill of Rights, in its formulation the right to dignity is afforded to 'everyone'. In *Lawyers for Human Rights* [47] the Constitutional Court held that where the Constitution provides that a constitutional right is available to 'everyone' it should be understood to apply to all persons, both citizens as well as

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[38] Para (l).
[39] Para (m).
[40] Para (o).
[41] *Investigating Directorate; Serious Economic Offences and Ors v Hyundai Motor Distributors (Pty) Ltd and Ors In re: Hyundai Motor Distributors (Pty) Ltd and Ors v Smit NO and Ors* 2001 (1) SA 545 (CC) para 21.
[42] Section 39(2) of the Constitution.
[43] *Id*, section 7.
[44] *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) para 88; *Fraser v ABSA Bank Ltd* 2007 (3) SA 484 (CC) para 43.
[45] *S v Makwanyane* 1995 (3) SA 391 (CC).
[46] Para 144.
[47] *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC).

foreigners, including those who may be in the country but have not been granted permission to enter or remain.[48] Consequently, whereas the Constitution provides that only citizens have the right to enter, remain and reside in South Africa and the right to a passport,[49] all persons in the country have the right to have their dignity respected. The Court warned that the fabric of our society and the values embodied in our Constitution will be demeaned if the dignity of illegal foreigners is violated in the process of preserving our national sovereignty.[50]

25. Likewise, in *Watchenuka* [51] the Supreme Court of Appeal held that because dignity has no nationality and is inherent in all persons, both citizens and non-citizens alike, whilst a foreigner is in the country (for whatever reason), their dignity is to be protected and respected.[52]

26. In several decisions over the last 20 years the Constitutional Court confirmed that analogous provisions in immigration legislation violated foreigners' rights to dignity. In *Dawood* [53] foreign spouses of SA citizens challenged legislative provisions of the Aliens Control Act[54] which required them to make application for the issue of permanent residence permits in the country of which they were nationals and not from within SA. The effect of these provisions was that a SA citizen who was married to a foreigner was forced to choose between going abroad with their foreign partner, whilst their partner's application for permanent residence was being considered, or to remain behind in the country on their own.

27. The Constitutional Court pointed out[55] that marriage and family were social institutions of 'vital importance'. Marriage imposed moral and legal obligations on both spouses including a reciprocal duty of support and cohabitation, and joint responsibility

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[48] Paras 26 – 27. In *Kiliko v Minister of Home Affairs and Ors* 2006(4) SA 114 (C) paras 27-28 this Court also confirmed that foreigners are entitled to all the fundamental rights entrenched in the Bill of Rights, save for those specifically reserved for citizens.
[49] In terms of ss 21(3) and (4) of the Constitution.
[50] *Id*, para 20.
[51] *Minister of Home Affairs and Ors v Watchenuka and Ano* 2004 (4) SA 326 (SCA).
[52] Para 25.
[53] *Dawood and Ano v Minister of Home Affairs and Ors; Shalabi and Ano v Minister of Home Affairs and Ors; Thomas and Ano v Minister of Home Affairs and Ors* 2000 (3) SA 936 (CC).
[54] Act 96 of 1991.
[55] At para 30.

for supporting and raising children born of it.[56] And as far as family was concerned, both the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples Rights (to which SA has acceded) provided[57] that, as the 'natural unit' and 'basis' of society, the family was entitled to protection by the State. Consequently, the Court held that although the Constitution contained no express provision protecting the right to family life or the right of spouses to cohabit, their right to dignity would be infringed in the case of any legislation which significantly impaired their ability to honour their marital obligations to one another.[58] In the circumstances, those provisions of the Aliens Control Act which compelled foreign spouses to make application for permanent residence from outside of the country were held to have violated their right to dignity.

28. In like vein, in *Booysen* [59] the Constitutional Court similarly held that a provision in the Aliens Control Act which stipulated that an application for a temporary work permit (i.e a visa) could only be made by a foreign national who was married to a SA citizen, whilst he or she was out of the Republic, constituted a violation of their right to dignity, as it impaired their ability to honour their marital obligations to one another, because it effectively prevented the foreign spouse from working and thereby fulfilling their duty of support to their partner.

29. In *Dladla*[60] the Constitutional Court reaffirmed that the right to dignity encompasses the right to 'family life' and held that it was infringed by a municipal policy which provided for the accommodation of evictees who were to be supplied with temporary housing, in separate dormitories for males and females, as the policy eroded the 'basic associative privileges that inhere in' and form the basis of family life.

30. In its most recent decision in *Nandutu,* [61] the Constitutional Court held that the right to family life was not a 'coincidental consequence of human dignity but a core ingredient' of it and inasmuch as s 10(6) of the Act, read together with regulation 9 thereof, barred a foreign spouse who had entered the country on a visitor's visa from

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[56] At para [31].
[57] Article 23 of the International Covenant on Civil and Political Rights and Article 18 of the African Charter on Human and Peoples Rights.
[58] *Id*, paras 36 – 37.
[59] *Booysen & Ors v Minister of Home Affairs & Ano* 2001 (4) SA 485 (CC).
[60] *Dladla & Ors v City of Johannesburg & Ano* 2018 (2) SA 327 (CC) para 49.
[61] Note 3, para 1.

applying for a change of status to a spousal visa from within SA, the provisions unjustifiably limited the foreigner's right to dignity as they interfered with their right and duty of cohabitation, which was a central feature of the marital relationship.[62]

31. But the Court went further and held that inasmuch as the effect of the provisions concerned was to require a parent to leave the country in order to apply for a change of status, it also unjustifiably limited the rights of the parties' children in terms of sections 28(1) and (2) of the Constitution.[63]

(ii) Ad the rights of children

32. Section 28 provides that every child has the right to parental (or family) care[64] and to be protected from maltreatment and neglect,[65] and in every matter concerning a child their 'best interests' are of 'paramount' importance.[66]

33. The Children's Act[67] ('the CA') was enacted in order to give effect to these constitutional rights and injunctions[68] and to give effect to the Republic's obligations concerning the well-being of children, in terms of international instruments which are binding on it,[69] which instruments amongst others include the Convention on the Rights of the Child[70] ('the CRC') and the African Charter on the Rights and Welfare of the Child[71] ('the Charter').

34. Both these instruments recognize and assert the inherent right to dignity of children and their parents, and both require that in all 'actions' concerning children (whether (in the words of the CRC[72]) undertaken by public or private institution or (in the words of the Charter[73]) by any person or authority, including all arms of the state i.e. administrative authorities, legislative bodies and courts of law[74]) the best interests of the

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[62] *Id,* para 59.
[63] *Id*, para 60.
[64] Section 28(1)(b).
[65] Section 28(1)(d).
[66] Section 28(2).
[67] Act 38 of 2005.
[68] *Vide* the opening words of the introduction to the Act and s 2(b)(i) and (iv) of the objects clause.
[69] Section 2(c).
[70] Adopted by the UN General Assembly in 1989 and ratified and acceded to by SA in 1995.
[71] Adopted by the OAU in 1990 and entered into force in SA in November 1999.
[72] Article 3.1.
[73] Article 4.1.
[74] Article 3.1 of the CRC.

child shall be a 'primary consideration'.[75] Both instruments require that member states shall take all appropriate legislative and administrative measures to ensure that children within their jurisdiction are protected against all forms of discrimination of any kind, not only in respect of the traditionally cited grounds[76] but also in regard to their nationality and status, or that of their parents. Both instruments provide for extensive and far-reaching obligations on member states in regard to the protection of parent-child relationships. Thus, the Convention provides[77] that member states shall take all appropriate legal and administrative measures to ensure that a child receives such protection and care as is necessary for their well-being, having regard for the rights and duties of their parents, legal guardians or other persons who are legally responsible for them. The Charter in turn provides that every child shall be entitled to the enjoyment of parental care and protection and shall 'where possible' have the right to reside with their parents.[78]

35. Both instruments also contain the injunction[79] that a child is not to be separated from their parents against their will except when this is necessary, in their best interests, and upon the determination of a competent authority, in accordance with the law. And both provide[80] that where a child is separated from one (or both) of their parents, member states shall respect their right to maintain 'personal relations and direct contact' with such parent(s).

36. The fact that SA has adopted these instruments, which are duly recognized in the preamble to the CA, does not mean that it is bound to adhere to the obligations which are set out therein only for the purposes of the CA. It is also bound to do so insofar as the Immigration Act is concerned which, as previously pointed out, states in its preamble that the regulation of the admission of foreigners to and their residence in the country is to be performed by means of a system of immigration control which ensures that the international obligations of the Republic are complied with[81] according to the 'highest

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[75] In terms of Article 4.1 of the Charter they are 'the' primary consideration.
[76] Which (as per Article 2.1 of the CRC and Article 3 of the Charter) include race, colour, sex, language, religion, political expression and ethnic or social origin, disability and birth.
[77] Article 3.2.
[78] Article 19.1.
[79] Article 9.1 of the CRC, Article 19.2 of the Charter.
[80] Article 9.3 of the CRC, Article 19.2 of the Charter.
[81] Para (o) to the preamble.

applicable standards of human rights protection'.[82] Inasmuch as the CRC and the Charter afford such rights to and impose obligations in respect of children in this country, our system of immigration control is required to adopt and promote a 'human rights based culture' (sic) of enforcement of such rights and obligations.[83]

37. Many of these treaty/convention-based obligations and injunctions have been incorporated, in substance, into the CA itself. Thus, s 6(2) confirms that all 'proceedings, actions or decisions' involving a child must not only respect, protect, promote and 'fulfil' the rights of children as set out in the Bill of Rights and the CA, but also the best interests of the child. To this end, in arriving at a determination of what such interests are in a particular matter the factors which must be considered include 1) the nature of the personal relationship between the child and his/her parents or other caregivers[84] 2) the likely effect on the child of any change in his/her circumstances including the likely effect of any separation from one (or both) of its parents or any other sibling or caregiver with whom the child has been living[85] and 3) the need for the child to remain in the care of his/her parent, family and extended family,[86] to maintain a 'connection' with his or her family, extended family and culture or tradition,[87] to be brought up within a 'stable' family environment[88] and the need to be protected from any physical or psychological harm[89] (including harm which may be caused not only by positive acts of commission but also of those of omission, such as neglect).[90] Just as the Constitution enjoins all organs of state to comply with the provisions contained therein so too the CA provides[91] that all organs of state in any sphere of government (including all officials, employees and representatives of an organ of state) must respect, protect and promote the rights of children, as referred to in the Act.

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[82] *Id,* para (l).
[83] *Id*, para (n).
[84] Sections 7(1)(a)(i)-(ii).
[85] Sections 7(1)(d)(i)-(ii).
[86] Sections 7(1)(f)(i).
[87] Section 7(1)(f)(ii).
[88] Section 7(1)(k).
[89] Section 7(1)(l)(i).
[90] In addition, regard must also be had for the age, maturity, stage of development and background of the child (ss 7(1)(g)(i) and (iii)), and their emotional 'security' and their intellectual, emotional, social and cultural development (section 7(1)(h)).
[91] Section 8(2)(a).

38. As is evident, the termination of the applicants' status as visitors who were entitled to lawfully reside and work in the country occurred automatically, as a matter of law, on the termination of their spousal relationships, without regard for the nature and extent of their parental responsibilities, which in terms of the CA[92] include their duty to care for their children, to maintain contact with them and to maintain them, and their relationships with their children, and without regard for the needs of the children and the likely effect of such termination of status on them. As a consequence of the termination of their status the applicants can no longer stay in the country with their children and can no longer continue working to support them from within the country, and in order to be able to do so are required to make application for a temporary or permanent status from outside of the country.

39. In effect, the applicants have the Hobson's choice of either breaking the law by continuing to live and work in the country in order to maintain their parental responsibilities and relationships and contact with their children, or to uphold the law by leaving the country, thereby breaching their parental duties and severing their contact and relationships with their children.

40. In my view, the 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 s 28 of the Constitution and the CA.

(iii) Ad the right to equality

41. The applicants also challenge the provisions in issue on the grounds that they unfairly discriminate against them on the basis of their 'marital status', contrary to the provisions of the equality clause i.e s 9(3) of the Constitution.

42. In response, the respondents deny that the effect of the provisions in question results in unfair discrimination on this basis and they contend that there is a cogent and legitimate legislative purpose behind the provision in s 11(6)(a) of the Act that a spousal visa which has been issued to a foreigner shall only be valid while a 'good faith' spousal relationship exists, and that is to prevent abuse of the immigration system by foreigners who enter into sham marriages (or supposedly permanent relationships) with SA citizens

[92] Sections 18(2)(a), (b) and (d).

only in order to obtain rights of entry to and residence and work rights in, SA. Without such a qualification in place there would be no way to control the migration of foreigners who purportedly marry locals simply to get a foot into the country. Thus, the requirement that there be a good faith spousal relationship in place, is necessary both for the issue and for the continued validity of a visa in terms of s 11(6). The respondents accordingly deny that there is any unfair discrimination in the legislative scheme on this ground and contend, in the alternative, that any limitation of rights which may occur in this regard constitutes a reasonable and justifiable limitation in terms of s 36 of the Constitution, as it is one commonly found in many open and democratic countries, throughout the world.

43. Leaving aside for a moment the fact that the provision does not only affect and apply to those who are formally married to one another (be it by way of a civil or customary marriage or a civil union) and applies equally to those who are in permanent relationships,[93] in considering the challenge which has been brought on this ground it is important to note that, from a reading of the averments which are made in support thereof in the founding affidavit in both applications[94] it is in fact *not* one that is based on marital status, such as would perhaps be the case in an alleged discrimination between foreign *spouses* who manage to maintain their spousal relationships with their SA partners and those who do not, even in circumstances where they are not responsible for the break-down of such relationships (such as in the case of R[....]1, whose husband abandoned her and the children and that of G[....]1, whose wife appears to have abandoned the family as a result of a drug problem). The challenge as formulated is one based on an alleged discrimination between foreign *parents* of SA children in a spousal relationship with a South African and foreign *parents* of SA children whose spousal relationship with a South African has ended, with the resultant impact on family life, the applicants' constitutional right to dignity and their children's rights to parental care and maintenance.[95] Thus, although dressed up as a further challenge on the basis of discrimination on the grounds of marital status, in effect it is a challenge that goes to *parental* status, the basis of which amounts to an alleged infringement of the right to

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[93] *Vide* note 3 above.

[94] *Vide* paras 93-97 of the founding affidavit in *Rayment* and paras 106-110 of the founding affidavit in *Anderson.*

[95] Para 97.1 of the founding affidavit in *Rayment* and para 110.1 of the founding affidavit in *Anderson.*

dignity and the parental rights of children.[96] In the circumstances I am not persuaded that the applicants have therefore made out a separate case on this ground.

(iii) A limitations analysis

44. It is trite that in order for the limitations of the applicants' rights and those of their children which have been set out above to pass constitutional muster the respondents bore the onus of proving that they were reasonable and justifiable in an open and democratic society which is based on dignity, equality and freedom, having regard for all relevant factors, including the nature of the rights that have been infringed, the importance of the purpose of the limitations and the nature and extent thereof, the relationship between the limitations and their purpose, and whether there were less restrictive means available to achieve the purpose sought to be achieved by the limitations.[97]

45. In this regard it is noticeable that in contrast to the approach which they adopted in relation to the alleged discrimination on the grounds of the applicants' marital status (where they put forward an argument as to why, in the event that there was any limitation of rights on this basis it was reasonable and justifiable), in regard to the limitations of the rights of dignity and parental rights the respondents failed to set out anything of any substance, and from a perusal of their answering affidavits it is apparent that their response is principally directed at the nature and ambit of the relief which is sought and not at the merits of the applicants' constitutional challenge. Thus, the respondents object to the relief which is sought on the basis that, according to them it 1) would fundamentally alter the current SA immigration system in respect of foreign spouses and place it at variance with almost every other country in the world 2) would create an unworkable, impractical and bifurcated system where foreigners with dependent children would be treated differently from those without 3) would create a blanket authorization for foreign parents of dependent children to work in SA irrespective of their means or personal circumstances or those of their children and irrespective of whether they are the sole or primary caregiver of a child/children, and would therefore effectively result in all

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[96] See further in this regard for example the averment (para 97.5 of the founding affidavit in *Rayment* and para 110.5 of the founding affidavit in *Anderson*) that whereas the limitation may be justifiable in the case of a foreigner whose spousal relationship has terminated and who has no children, it is not in the case of one who has.

[97] Sections 36(1)(a)-(e) of the Constitution.

foreign parents being allowed to work in SA. Very little, if anything, of substance is said about the infringements of the rights of dignity and parental rights, and very little is offered up by way of justification thereof.

46. In *Nandutu* the Constitutional Court considered the factors which are set out in the limitations clause, in some detail [98] and given the circumstances I respectfully adopt the Court's reasoning in this regard and endorse its comments, particularly those made in relation to the nature of the right to dignity and the limitations thereon. In my view, although these comments were made in the context of a foreigner's spousal relationship and obligations they are of equal application in relation to a foreigner's parental relationship and obligations i.e the relationship between foreign parents and their SA children, and their parental responsibilities to such children. In similar vein, as in *Nandutu*,[99] whilst I accept that there are legitimate policy objectives and purposes which are sought to be achieved by the provisions in issue, namely the regulation of the entry of foreigners into our country in the interests of national security and our economy, by preventing them from gaining a foothold on the basis of sham marriages, civil unions or so-called permanent relationships and then being allowed to stay and work here because they have children who are SA citizens, in my view the respondents have not established that the limitations imposed constitute a proportionate means of achieving these objectives.

47. Similarly, as in *Nandutu* [100] I am also of the view that the respondents have not shown why it is necessary for foreign parents such as the applicants to leave the country and their children in order to regularize their status, and why they cannot apply for a change of their status (from spousal to visitor's or relative's status) from within our borders, and there appears to be no reason why the necessary security checks and enquiries to enable this cannot be made from within SA. In fact, in most instances given the length of time that the applicants have been living and working in the country the best place for them to be in order for these checks and enquiries to be carried out by the Department of Home Affairs, would be SA. On this aspect the respondents contend that there is no need for the applicants to leave the country in order to make application for a

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[98] At paras 72-79.
[99] *Id*, paras 75-76.
[100] *Id*, para 77.

status because, in terms of s 31(2)(c) of the Act the Minister is empowered to waive any 'prescribed requirement or form', for good cause. This is an argument which was also advanced in *Nandutu*, and roundly rejected by the Constitutional Court,[101] which pointed out that in terms of the Act a prescribed requirement is defined as one which is prescribed by regulation. Thus, inasmuch as the requirement that a foreigner who is the holder of a visitor's visa (of which a spousal visa is a species) may only apply for a change of status from outside the Republic is a requirement that is imposed by statute[102] it is not one which can be waived by the Minister.[103]

48. Finally, I may point out that the preamble to the Act not only indicates that it aims to set in place a system of immigration control which ensures that the country's security considerations are satisfied and the State retains control over the immigration of foreigners,[104] and that their contribution does not adversely impact on the rights and expectations of SA workers,[105] but also that the country's economy may have 'access at all times to the full measure of needed contributions' (sic) by them.[106] In order to ensure that the country is not burdened with additional SA children who are destitute and need to be provided for at State expense, the contribution which is provided by their foreign parents in lieu of maintenance and care is surely a necessary and 'needed' one, and as long as their foreign parents entered and are working in the country lawfully, at the time of the termination of their spousal visa, one can expect that they should, if possible, continue to be accommodated in the country so that they can continue to support their children and care for them, both financially and emotionally.

Ad appropriate relief

49. Given that the respondents have failed to show that the limitations concerned are reasonable and justifiable, it follows that insofar as the Act or the provisions in issue are inconsistent with the Constitution they must be declared to be such, to the extent of such

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[101] At paras 63-68.
[102] In terms of ss 10(6)(a)-(b).
[103] There are provisions in the Act which expressly allow for a ministerial (s 30(2)) or official (s 32(1B)) power to waive conditions of undesirability or disqualification, respectively. These are not conditions prescribed by regulation, but by statute.
[104] Para (b).
[105] Para (i).
[106] Para (h).

inconsistency, [107] and pursuant to such a declaration the Court must make an Order which is just and equitable.[108] In doing so it must balance the need to provide appropriate and adequate relief to the applicants with the need to respect the separation of powers. Thus, the Court must take care not to usurp the executive's power to determine and set policy and the legislature's power and duty to give effect to it by way of the passing of necessary and appropriate legislation.[109]

(i) Ad the relief originally proposed

50. In its original iteration in their respective notices of motion the applicants proposed certain amendments to several provisions of the Act, as well as to certain regulations, which they contended were permissible and did not breach the separation of powers as they merely amounted to a necessary reading-in. As was pointed out in *Nandutu*[110] the Constitutional Court has frequently resorted to reading-in as a remedy, in matters involving statutory provisions that deal with family units.

51. The respondents contended that what was proposed was not only unworkable and impractical but went beyond what is envisaged by such a remedy and amounted to a substantive legislative amendment, which the Court was not entitled to grant, as it constituted an intrusion into the domain of the legislature and involved policy choices which the Court was not entitled to make. They pointed out that in *Dawood*[111] the Constitutional Court refused to apply a reading-in, as there were a range of legislative possibilities that could be adopted to rectify the unconstitutionality complained of [112] and in *National Coalition*[113] the Constitutional Court warned that reading words into a statute will not be an appropriate remedy unless in doing so the Court is able to define with

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[107] Section 172(1)(a) of the Constitution, *Dawood* note 53 para 59.
[108] Which may include an order limiting the retrospective effect of the declaration (s 172(1)(b)(i)) and/or suspending it for such period and on such conditions as may be deemed appropriate, in order to allow the legislature to correct the defect (s 172(1)(b)(ii)).
[109] *National Coalition for Gay and Lesbian Equality & Ors v Minister of Home Affairs & Ors* 2000 (2) SA 1 (CC) paras 65-66.
[110] Note 3 para 88.
[111] At paras 63-64.
[112] This approach was also adopted in *Hassan v Jacobs NO & Ors* 2009 (3) SA 572 (CC), para 39.
[113] *Id*, para 75.

sufficient precision how the statute is to be extended, in a manner which will be both constitutionally compliant and consonant with its legislative scheme.

52. The applicants originally proposed that a reading-in be effected to the section of the Act which makes provision for a spousal visa (s 11), which would provide[114] that it would not cease to be valid on the termination of a spousal relationship and would not expire or terminate during the period for which it was issued, unless the Director-General had investigated the family in question's circumstances and had taken into account all relevant considerations and determined that it would be in the best interests of the dependent children of the relationship for it to terminate. In order that such a proposed reading-in be consonant with s 43 of the Act, which requires that the holders of a visa are to abide by the terms and conditions which attach to it, failing which the status afforded by the visa shall expire, the applicants proposed that an amendment be made which would provide that such status would not expire if a condition which required a foreign spouse (who was the parent and caregiver of a SA child) to reside with their SA spouse, was contravened. In addition, the applicants proposed that insofar as the section which dealt with relatives' visas was concerned (s 18), which bars the holder thereof from working, it should be read to allow for an exception in the case of a foreigner who is the parent of a SA child or permanent resident, who contributes or 'intends to contribute' to the child's 'care and maintenance'. Finally, the applicants proposed that regulation 17 which sets out the requirements which are prescribed for the issue of a relative's visa, should be amended by the inclusion of 3 new sub-regulations[115] which would provide that a relative's visa must ('shall') be granted to the relative of a minor or dependent SA child citizen or permanent resident, if the relative is a 'caregiver' of such child, unless the Director-General was satisfied that there were exceptional circumstances[116] which justified the refusal thereof. In addition, the amendment proposed that every application for a relative's visa in the case of a minor SA child citizen or permanent resident, should be determined with due regard to the best interests of the child, which interests shall be of 'paramount importance'. As an alternative to the proposed amendments to ss 11 and

[114] By way of an amendment to s 11(6)(a) and the addition of a new subsection 11(6)(d).
[115] As regulations 17(4)-17(6).
[116] Which would include a history of abuse or a criminal record on the part of the foreign parent, or where the foreign parent represented a 'credible threat' to anyone in SA.

18 and regulation 17, which deal with spousal and relatives' visas, the applicants proposed that s 27(g) of the Act, which deals with applications for permanent residence, should be amended by reading in a requirement that such applications be determined by the Director-General within 30 days from date of the submission thereof.

53. The respondents took issue with the proposed readings-in on several grounds. In the first place, they contended that providing that a spousal visa shall not cease to be valid when the spousal relationship on which it is based has terminated would subvert the very purpose for which such a visa is to be granted and would encourage the very mischief which the legislature sought to avoid. It would allow a marriage of convenience to be entered into simply so that a foreigner could obtain a visa to sojourn in the country, and as long as there was a dependent child 'of' the spousal relationship i.e even a child who was not born out of the relationship and/or was not a SA citizen or permanent resident, the foreigner could not be required to cease working and to leave the country. Thus, perhaps perversely, a child born of an adulterous relationship between the foreigner and another person outside of the spousal relationship with their SA spouse, which may have precipitated the breakdown of the spousal relationship, would serve to legalize the foreigner's continued stay and right to work in the country, as would the adoption of a non-SA citizen child, including one born of a previous liaison between the foreign spouse and another person, prior to their marriage to a SA citizen or permanent resident.

54. Secondly, the respondents averred that providing that a spousal visa would not expire or terminate unless the Director-General had investigated the family unit's circumstances and had determined that it would be in the best interests of any dependent children of the relationship for it to terminate, was unworkable and impractical and would place an impossible burden on an already overstretched and under-resourced Department. Once again, the complaint is a cogent one. Such a proposal would require the Department to engage in functions which are more properly carried out by the Department of Social Welfare, at great expense and effort, and given the Department's constraints would hardly be capable of being implemented.

55. In the third place, the respondents averred that the proposed reading-in to section 18 of a right to work, irrespective of a foreigner parent's means and the needs or

circumstances of their child (i.e whether he/she needed to work to support them), simply because they made a 'contribution' (even a nominal one) towards their child's maintenance or 'care' (what constitutes a contribution to a child's care?), or merely 'intended' to do so, would open the door to obvious abuse. Here too I believe the respondents raised valid concerns.

56. As far as the proposed reading-in to regulation 17 was concerned the respondents contended that what was sought went beyond what was permissible in that it essentially postulated the creation of a new form of 'parental' visa, which had to be issued i.e which was peremptory in the case of a relative who was a foreign parent who formerly held a spousal visa, and did not afford the department any discretion in regard to the issue thereof, contrary to the terms of section 18 of the Act, being the empowering section in respect of which permissive powers are afforded and given effect to by way of regulation 17. Put simply, whereas s 18(1) provides for the permissive, discretionary issue of a relative's visa, the proposed reading-in to regulation 17 would make the issue thereof mandatory, and it was contended that this would render the regulation *ultra vires* the empowering section in the Act. On this score too, the objection has merit in it.

57. Finally, in relation to the proposed add-in to section 27(g), directing that the Director-General should render a decision on an application by an ex foreign spouse for permanent residence within no more than 30 days, the respondents contended that this was unreasonable given the extensive enquiries and background checks and verification which needed to be performed and the Department's constraints, and was incapable of being complied with and would put the Department in an impossible situation.

(ii) <u>Ad the relief currently proposed</u>

58. Pursuant to the respondents' objections, by the time the matter was argued the applicants proposed certain amended relief[117] in which they adopted a fundamentally different approach i.e. one whereby both their proposed extension of a spousal visa as well as the grant of a relative's visa (to a foreign ex-spouse) was made dependent on whether the holders thereof had parental responsibilities and rights, as defined in the

[117] No formal amendment was made to the relief which was sought in the notice of motion, and the applicants merely handed up a revised proposed draft order.

CA.[118] Thus, the applicants no longer proposed that a spousal visa would not expire for the period for which it was issued even if the spousal relationship no longer existed, unless the Director-General had determined that this would be in the best interests of the dependent children of the relationship, but that it would not do so if the holder thereof was the parent of an SA (citizen or permanent resident) child in respect of whom they had parental responsibilities and rights in terms of the CA.

59. Regarding relatives' visas the applicants adopted a similar formulation. They proposed that a foreigner who had a child who was a SA citizen or permanent resident, to whom they 'owed' parental responsibilities, would be allowed to work for the duration of their visa, unless there were 'exceptional circumstances' present.[119] This contrasts with their initial proposal that such a foreigner would only be allowed to work if they contributed or intended to contribute to their child's 'care and maintenance'. In line with their revised formulation in respect of the statutory provision which deals with the grant of relatives' visas (s 18) , insofar as regulation 17 is concerned (which gives effect to s 18 by setting out the requirements for the issue of a relative's visa), whereas the applicants initially proposed that such a visa must ('shall') be granted to a foreigner who is the parent and 'caregiver of a minor or dependent' child[120] they now similarly sought to provide that it was to be granted to those applicants who had parental responsibilities and rights in terms of the CA. However, whereas the applicants' revised proposed reading-in to s 18 restricted this condition to children who were SA citizens or permanent residents, no such restriction was seemingly included in the proposed amended reading-in to the regulation, at least not by way of a direct link thereto. As I read the proposed reading-in which is to be effected by way of sub-regulation 17(4), it provides for the mandatory issue of a relative's visa to any foreigner who is related to a child in respect of whom they have parental responsibilities and rights and would therefore include even a

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[118] In terms of s 18.

[119] However, whereas such circumstances were previously defined by and were to be read in to regulation 17 as including the foreigner parent's history of abuse, their criminal record and whether they constituted a threat to anyone in SA, the revised formulation made no mention of these and provided that exceptional circumstances would include the best interests of the child and instances where the foreigner was a so-called prohibited person or a person who had been declared undesirable, in terms of ss 29(1) and 30(1) respectively of the Act. This formulation of the regulation would exclude both Tembo and Guntensperger from obtaining a relative's visa.

[120] Who is a SA citizen or permanent resident.

child born of a union with a non-SA citizen or permanent resident i.e one born outside of the former spousal relationship with the SA spouse. In this regard in terms of the proposed new sub-regulation 17(4), read together with s 18(1), although in order to qualify as a relative the foreigner must be a member of the immediate family of a SA citizen or permanent resident who is a child, in order to be granted a relative's visa they do not have to have parental responsibilities in regard to that child- if they have any parental responsibilities and rights, even to another child, they will qualify.

60. In the third place, whereas the initial suite of proposed readings-in did not make provision for an application for a change of status to be made from within SA, this was now provided for by way of a proposed reading-in to s 10(6)(b), which would provide that foreigners who were in possession of a visitor's visa in terms of the applicants' proposed amended s 11(6)(d) i.e. those who were the parents of an SA child or permanent resident in respect of whom they had parental rights and responsibilities in terms of the CA, would be allowed to make application for a change of status from within the country.[121] In the alternative the applicants proposed that regulation 9(9)(a)(iii) should be read to include, in the *Nandutu* added subsection (iii), a (foreign) parent of a child who is a SA citizen or permanent resident, as one of the categories of persons who (together with spouses or children of a SA citizen or permanent resident) would be allowed to apply for a change of status from within the country, by way of an exceptional circumstance as referred to in s 10(6)(b) of the Act.

61. The respondents contend that the applicants' revised proposals are still unacceptable as they still allow for foreigners to have a right to live and work in the country simply because they claim to have parental obligations towards children, (irrespective of whether the children were born to them out of their union with a SA spouse) and irrespective of whether they are in fact discharging such obligations (either those pertaining to their financial obligation to maintain the children or their other parental obligations of care and support), and irrespective of their actual need to work i.e. without regard for their means or those of their children (either of which may not require them to work), and irrespective of the circumstances of the children and their best interests. The

[121] In like vein, the proposed reading-in to s 43(a) was coupled to the proposed amended s 11(6)(d), thereby providing that a foreigner's status would not expire upon their violation or failure to abide by the terms and conditions of their status.

respondents further contend that the revised proposals are contrary to the accepted principle in most countries that non-citizens ordinarily do not enjoy a right to work in a foreign country. Furthermore, the respondents contend that the proposals are offensive to the legislative scheme and intent, insofar as they continue to provide that even if the spousal relationship which was a requirement for the issue of a spousal visa and which formed the basis for the issue thereof, no longer exists, the visa will continue to be operative. The respondents contend that apart from opening the system to obvious abuse the effect of the revised proposals will be to make an unjustifiable distinction and to unfairly discriminate between those foreigners who are the holders of spousal visas, who have no children, and those who do. Finally, in relation to the revised proposed reading-in to regulation 17 the respondents contend that it would still be *ultra vires* the empowering section of the Act insofar as it provides for the mandatory as opposed to the discretionary issue of a relative's visa (save in exceptional circumstances), and would extend the issue of relatives' visas to foreigners who are not parents of the children concerned, and/or to children who are not SA citizens or permanent residents, beyond the circumstances of those who are before the Court.

62. The respondents contend that if the court were to uphold the applicants' challenge all that is required is a declaration to the effect that regulations 11(4) and 9(9) are inconsistent with the Constitution and invalid, and not the Act or any of the sections in issue.

63. As previously pointed out, regulation 9(9) sets out the circumstances which may be regarded as exceptional for the purposes of s 10(6)(b) i.e. the circumstances in which foreigners who are the holders of a visitor's visa may apply for a change of status, from within SA. In this regard, the respondents proposed that it be declared that the regulation is inconsistent with the Constitution to the extent that it does not provide, by way of an exceptional circumstance, that the holder of a visitor's visa who is the parent and 'primary' caregiver of a SA citizen child or permanent resident may apply for a change of status from within the country, provided that the onus shall be on them to demonstrate that it is in the best interests of the child that they be allowed to do so. As far as regulation 11(4) is concerned the respondents contended that the declaration of constitutional invalidity in respect thereof should provide that a 'prescribed activity', as

contemplated in s 11(1)(b)(iv) of the Act i.e. an activity which would allow a foreign parent who is the holder of a visitor's visa to work, should include that they were previously the holder of a spousal visa and are the parent and caregiver of a child who is a SA citizen or permanent resident and, as in the case of the proposed amendment to regulation 9, are able to demonstrate that they are required to work in South Africa in order to fulfil their parental obligations to such child.

(iii) Ad the formulation of an order

64. It will be evident from what has been set out above that the parties have put forward different alternatives which can be adopted, by way of a reading-in to various sections of the Act and its regulations, to render it constitutionally compliant. The applicants' proposals are clearly couched in terms that are far wider and more extensive than those proposed by the respondents, who only envisage that declarators of constitutional inconsistency and readings-in be made to certain regulations, as opposed to their empowering sections in the Act.

65. In my view, the applicants' proposed remedies insofar as sections 11 and 18 of the Act and regulation 17 are concerned, are wider than is necessary and in certain instances go beyond the legislative intent embodied in these provisions and are inconsistent with it.

66. The applicants' proposal that a spousal visa shall remain valid and shall not expire notwithstanding the termination of the spousal relationship which constitutes the very basis on which the visa was issued in the first place, and to this end will not be a visitor's visa,[122] is both constitutionally and conceptually unsound[123] and would subvert the legislative intent and open the door to abuse. Furthermore, insofar as it simply would provide that the visa would remain valid for the remainder of the period for which it was issued it will hardly serve to assist the applicants and similarly placed foreigners, other than to afford them a temporary respite. On the expiry of the visa due to the effluxion of time they would still face the very same legal issues and difficulties which they have sought to deal with by way of this application: they would still be compelled to leave the country and would be unable to discharge their parental responsibilities and rights.

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[122] *Vide* the applicants' proposed reading-in of a provision to this effect, as s 11(6)(d)(ii).

[123] A spousal visa, which is provided for in s 11(6), is *per se* a subspecies of a visitor's visa, which is provided for in terms of s 11.

67. In addition, in their current iteration the remedies proposed will not only allow a foreign parent of an SA citizen or permanent resident child who has parental responsibilities and rights in respect of such child and who is the ex-holder of a spousal visa, to continue to live and work in South Africa even if they are in fact not discharging such responsibilities or exercising such rights (which is the effect of the proposed s 11(6)(d) reading-in), but will allow a foreigner who is related to such a child and who has such rights in respect of any child, including a child born outside of their former spousal relationship with a SA citizen or permanent resident, to live and work in the country (the effect of the proposed reading-in to s 18(2) and regulation 17), unless there are exceptional circumstances present. As formulated the proposed reading-in to regulation 17 makes the issue of a relative's visa mandatory and removes the discretionary powers which lie in the empowering section and renders the regulation *ultra vires* the Act.

68. In the circumstances the remedies proposed would perversely allow deadbeat foreign parents who are not contributing to their children's maintenance or care to continue living and working in the country, either by way of an extended spousal visa or by way of a relative's visa. Rather than promoting the due discharge of parental responsibilities by foreign parents it will therefore encourage the exact opposite.

69. In any event, what is proposed not only goes beyond what is required to address the mischief complained of but will effectively result in the creation of new forms of parental and/or relatives' visas, by judicial intervention. This is not something which falls within the purview of this Court's powers and if adopted would result in the Court exercising legislative as opposed to judicial powers, beyond what is necessary to assist the applicants.

70. Equally however, as far as the remedies which are proposed by the respondents are concerned there are also shortcomings, and their proposals also appear to be conceptually and legally unsound in certain respects. In the first place, in the absence of any formal challenge to the constitutionality of either regulation 9 or regulation 11, I do not understand on what basis I am at liberty to hold that either of these are inconsistent with the Constitution and to declare that they are therefore invalid. In my view it is not the regulations which are defective, and which have resulted in a limitation of the constitutional rights of dignity and children's and parental rights, but the scheme of the

legislative provisions from which they derive their force. Secondly, the proposal that only foreigners who are both parents and 'primary caregivers', should be covered by the readings-in is untenable and unnecessary. In terms of s 18(2)(a) of the CA a parent is the holder of parental responsibilities and rights which include the obligation and right to care for a child, and there is accordingly no need to include a requirement that the foreign parent must also be a caregiver. In addition, restricting the proposed remedy to the 'primary' caregiver will most often, although not invariably, exclude fathers from its ambit and may unfairly disenfranchise parents who are primary in regard to the discharge of parental responsibilities in monetary terms i.e. in relation to maintenance of the children, but are secondary in regard to their daily care. Finally, providing simply that the remedy will be available to foreign parents, without coupling it to the necessary requirement that they be parents who are discharging their parental obligations, will render it defective and insufficient on the very same basis as the applicants were criticized for their proposals.

71. In order to arrive at a properly formulated remedy the first step is to circumscribe the issues which need to be addressed. As I see it, these are that 1) on termination of their spousal relationship a spousal visa which was issued to a foreigner on the basis thereof is no longer valid and 2) the foreigner is no longer allowed to continue residing or working the country, thereby 3) rendering them unable to discharge their parental responsibilities and rights and 4) compelling them to leave the country to regularize their status.

72. In my view, in the interests of honouring the separation of powers between the judicial and the legislative domains the proper approach which I should adopt is one that is predicated upon the principle of 'less is more' i.e. a curative approach that is aimed at adopting the minimum reading-in which is necessary in order to achieve the desired aim of rendering the Act constitutionally compliant, on an interim basis, pending a period of time (24 months would appear to be appropriate) which will allow the legislature to deal with the difficulties that have been raised and to adopt a legislative solution that is considered to be appropriate. Secondly, any proposed reading-in should be consonant with the overall legislative scheme and structure of the Act and the objectives which it seeks to achieve. Thus, any tinkering with the statutory provisions should as far as possible be limited.

73. In my view the solution is not to provide artificially, by way of a reading-in to s 11, that a spousal visa will continue in the absence of any spousal relationship, but to accept and recognize that it has to come to an end on termination of the relationship, and to provide by other means for a foreign spouse who is the parent of a SA child citizen or permanent resident in respect of whom he/she has parental responsibilities and rights as defined in the CA which they are actually discharging, to remain in the country in order to 1) apply for a fresh status i.e. a visitor's or relative's visa (this will depend *inter alia* on whether the foreigner wishes and/or is in a position to apply for permanent residence in terms of s 27(g) or wishes to leave the country at some stage in the future), which will thereby 2) allow them to reside and work in the country, in order to discharge their parental responsibilities and exercise their rights. To this end I propose making an Order in which 1) a reading-in is made to regulation 9(9) to allow for a foreigner who meets these requirements to make application for a change of status from within the country, as an exceptional circumstance as provided for in s 10(6)(b), and 2) a reading-in is made to regulation 11(4) to provide for the addition of the circumstances I have outlined to constitute a prescribed activity as provided for in s 11(1)(b)(iv) in relation to the holder of a visitor's visa, and 3) a reading-in is made to s 18(2) to provide for an exception to the general bar against the holder of a relative's visa being allowed to work, in the case of a foreigner parent of the kind specified. These readings-in will allow a foreign ex-spouse who applies, on expiry of their spousal visa, for a visitor's or relative's visa, to continue to live and work in the country to discharge their parental responsibilities. In my view this is all that is required and there is no need to effect any reading-in to s 43. Although it provides[124] that on expiry of their status foreigners shall depart, s 32(1) also provides that the Director-General may authorize them to remain in the Republic pending their application for a status. The applicants will accordingly be protected if the Order which is made includes a direction that they are granted leave to submit an application for a status to the Director-General, and that pursuant thereto he/she shall consider granting them authorization to remain, pending the outcome of their applications. Finally, given the remedy I propose I do not believe that there is any cause or need to interfere with s 27(g) by providing that any application for permanent residence which is made in terms

[124] In s 43(2).

thereof must be processed within 30 days. To impose such a time limitation would be unworkable and would be impossible of compliance, given the Department's current circumstances. That then in respect of the relief which is sought by the applicants on the basis of the termination of their spousal visas.

(iv) Ad the relief sought by T[....]5 and G[....]

74. As far as T[....]5 and G[....] are concerned, the relief which they seek is aimed at setting aside the declarations which were made that they are undesirable persons and are consequently illegal foreigners, who are required to depart, failing which they may be deported.

75. As was previously indicated T[....]5 has effectively been in the country illegally since or about 2012-2013. He has never been in possession of a spousal visa. In 2012 he bribed an immigration official to obtain a fraudulent work visa which is no longer valid. In 2013 he was arrested and convicted in respect of this and compelled to return to Zimbabwe. A few months later he returned to SA illegally. In 2019 he was arrested again and declared an undesirable person, after which he was again forced to return to Zimbabwe. He did not appeal the declaration of undesirability and chose instead to again return to SA illegally. As the respondents point out he did not attempt to regularize his stay in terms of the Zimbabwe Exemption Project, a special dispensation which was created in order to assist Zimbabweans who entered SA illegally, to legalize themselves. In my view, given his manifestly unlawful conduct and his blatant disregard for the law, the Court should not come to his aid on the basis that he has a child in South Africa who he needs to support. Although the Court's sympathies lie with his child, assisting him would encourage and effectively grant a licence to foreigners to enter the country illegally, and to live and work here illegally until the moment when they have a child who is a SA citizen or permanent resident, which they need to support, which they could then use to legalize their stay. No country that functions in terms of the rule of law can endorse such a stance.

76. G[....]'s situation is distinguishable. He entered the country legally and was granted a spousal visa in 2009 which was extended in 2012 for 3 years and again in 2015 for 2 years. Unfortunately, he failed to notice this until it was pointed out to him by a day after it had expired, whereupon he immediately took steps to regularize his position

by seeking authority to remain in SA, pending an application for renewal of his status. After obtaining the requisite police clearance certificate which took a couple of weeks, he made representations in this regard to the immigration inspectorate on 10 July 2017, in which he pointed out that requiring him to leave the country in order to apply for a renewal of his visa would result in a separation from his wife and daughter and would place a huge financial burden on his family, and would effectively leave his daughter without the necessary financial support. Despite this, his application for a waiver and authorization to remain was denied on 23 January 2018. The reason which was given was simply that he had not shown 'good cause'. An application for the review of this decision was turned down on 17 July 2018 on the basis that he had not submitted any evidence which indicated that prior to the expiry of his visa he was intending to legalize his stay, as he only noticed that the visa had expired after he was informed thereof by a bank clerk. The reason given is a *non sequitur* as the fact that he may have forgotten that his visa was only valid for 2 years does not necessarily mean that he was intending not to legalize his stay in the country by renewing/extending it. In addition, his review was also rejected on the grounds that there were no 'reasons beyond his control' which had prevented him from applying for the renewal of his visa, which was wrongly described as a relative's visa, prior to the expiry thereof. In the circumstances this decision was also impeachable. (The reference to there being no reasons beyond his control which prevented him from renewing his visa was clearly a restatement of the requirement in regulation 30(1)(a) that, in requesting authorization to stay pending an application for a status, a foreigner is required to demonstrate in writing to the satisfaction of the Director-General that he/she was unable to apply therefor for reasons beyond his/her control).

77. Pursuant to this decision, on 27 August 2018 he was declared to be an undesirable person in terms of s 30(1)(h) and ordered to depart by 10 September 2018, in terms of regulation 30(4), purportedly on the basis that he had undertaken to leave the Republic voluntarily, which he had not. In the circumstances this decision was also assailable. Despite this, an application to the Minister for the review thereof was similarly rejected on 18 August 2020, on the basis that he had failed to apply to renew his visa within 60 days from the date of its expiry and there were no reasons beyond his control which prevented him for applying for the renewal thereof, prior to its expiry.

78. It is therefore apparent that, in none of the instances where the various decisions referred to were made, was any regard had to G[....]'s circumstances and the best interests of his child, contrary to the injunction in s 28 of the constitution, which is also embodied in the CA, which as previously pointed out the relevant officials were enjoined by law to have considered. It is apparent that the basis for each of their decisions was simply that he had failed to show that there were any reasons beyond his control which prevented him from renewing his visa, and no consideration at all was given to what would be in the best interests of his child, despite what was set out in his representations in this regard. In my view, the decisions that were arrived at were consequently arbitrary and irrational and were made without any regard for a highly relevant and material constitutional consideration, contrary to the provisions of s 6 of the Promotion of Administrative Justice Act 3 of 2000.

79. As was pointed out by G[....] in his supporting affidavit[125] given the circumstances it was 'no answer' to repeat the refrain that he failed to provide reasons for his failure to renew his visa timeously due to circumstances that were beyond his control. A foreign spouse who is a parent of a SA citizen child which he/she supports and cares for may fail to apply to renew their visa in time, because of forgetfulness or simple negligence, but the Constitution requires that more be considered before they may be required to leave the country. G[....]'s right to dignity and his child's rights to parental care and to administrative action being taken which was in his/her best interests surely required a consideration of the circumstances which he set out in his affidavit. This did not occur.

80. In the circumstances, the decision by the Cape Town inspectorate on 27 August 2018 to declare G[....] an undesirable person in terms of s 30(1)(h) of the Act and to order that he depart must be set aside. There is in my view no need or cause to make an Order declaring the provisions of regulation 30(1) to be inconsistent with the Constitution and invalid, and no need for a reading-in to the regulation to be made that the best interests of a child are to be considered where these are raised by a foreigner in an application for authorization to stay, pending an application for renewal of status. Such interests must always be considered in any such application, as a matter of law, given

[125] Para 82.

the provisions of the Constitution and the CA. The fact that they were not renders the decisions which were taken liable to be reviewed and set aside.

Conclusion

81. In the result, I make the following Order:

1. It is declared that the Immigration Act, 13 of 2002 ('the Act') alternatively sections 10(6), 11(1)(b) and 18(2) thereof, as read together with regulations 9(5) and 9(9) of the Immigration Regulations ('the Regulations'), 2014 as published under GN R413 in GG 37679 of 22 May 2014 (as amended), is/are inconsistent with the Constitution of the Republic of South Africa, 1996 and invalid to the extent that it /they:

    1.1 Require a foreigner who was (a) the holder of a spousal visa in terms of s 11(6) of the Act which is no longer valid by virtue of the termination of the spousal relationship on which it was based, who (b) has parental responsibilities and rights in terms of the Children's Act 38 of 2005 in respect of a SA citizen or permanent resident child of the aforesaid spousal relationship, which responsibilities and rights they were discharging at the time of the termination of the said spousal visa, to cease working in and to leave South Africa; and

    1.2 require such a foreigner to make application for a status, from outside South Africa; and

    1.3 do not allow such a foreigner, who may be eligible for a visitor's visa in terms of s 11 or a relative's visa in terms of s 18 of the Act to conduct work in South Africa, in order to discharge their aforesaid parental responsibilities and rights in terms of the Children's Act in respect of a SA citizen or permanent resident child of the aforesaid spousal relationship.

2. The declaration of invalidity in paragraph 1 is suspended for a period of 24 months from the date of this Order to enable Parliament to remedy the inconsistencies that have resulted in the declaration.

3. Should Parliament fail to remedy the inconsistencies that have resulted in the aforesaid declaration within the period referred to in the preceding paragraph

the readings-in which are to be effected in terms of paragraph 4 of this Order shall become final, save and unless an affected and/or interested party makes application, before the expiry of the aforesaid period, for a further suspension of the aforesaid declaration and/or for such further or alternative relief as may be appropriate.

4. During the period of suspension, the following is to be read into the regulations and provisions of the Act:

4.1 Regulation 9(9) of the Immigration Regulations is to be read to include, as sub-regulation 9(9)(iv): '(iv) is the foreign parent of a SA citizen or permanent resident child of a spousal relationship in respect of which a spousal visa was issued in terms of s 11(6) which is no longer valid by virtue of the termination of the aforesaid spousal relationship, and in respect of which child the foreign parent has parental responsibilities and rights in terms of the Children's Act 38 of 2005, which they are discharging';

4.2 Regulation 11(4) of the Immigration Regulations is to be read to include, as sub-regulation 11(4)(d): '(d)' work which a foreigner who was the holder of a spousal visa in terms of s 11(6) of the Act (which visa is no longer valid by virtue of the termination of the spousal relationship on which it was based), is able to demonstrate he/she is required to perform in order to discharge parental responsibilities and rights in terms of the Children's Act 38 of 2005 in respect of a SA citizen or permanent resident child of the aforesaid spousal relationship, and which responsibilities and rights they were discharging at the time of the termination of the said spousal visa,'

4.3 Section 18(2) of the Act is to be read as follows: 'Save in the case of a foreigner who (i) was formerly the holder of a spousal visa in terms of s 11(6) which is no longer valid because the spousal relationship on which it was based no longer exists, who (ii) is able to demonstrate that such work is required by the foreigner in order to discharge parental responsibilities and rights in terms of the Children's Act 38 of 2005 in respect of a SA

citizen or permanent resident child of the aforesaid spousal relationship, the holder of a relative's visa may not conduct work.'

5. The decisions by the Cape Town immigration inspectorate to deny G[....]'s application for a waiver under section 30(2) of the Act and to declare him an undesirable person in terms of section 30(1)(h) of the Act and to order him to depart in terms of regulation 30(4) of the regulations, are reviewed and set aside.

6. G[....]'s application for a waiver under section 30(2) of the Act is remitted to the 4th and/or 3rd respondent for reconsideration.

7. T[....]5's application for the review and setting aside of the declaration that he is an undesirable person in terms of section 30(1)(h) of the Act, is dismissed.

8. Save for T[....]5 the remaining affected applicants are granted leave to make application for a visitor's, relative's or spousal visa or other temporary status and/or for a permanent residence permit in terms of section 27(g) of the Act, as the case may be, within 60 days from the date of this Order, if they have not already submitted such applications.

9. On receipt of the applications referred to in the preceding paragraph the second respondent shall proceed to consider granting the applicants authorization to remain in the Republic in terms of section 32(1) of the Act, pending the outcome of such applications.

10. Save for T[....]5, in respect of whom there shall be no Order, the respondents shall be liable jointly and severally (the one paying the other to be absolved), for the applicants' costs of suit, including the costs of two counsel.

M SHER

Judge of the High Court

Appearances

Applicants' counsel: A Katz SC, M Bishop & E Cohen

Applicants’ attorneys: Eisenberg & Associates (Cape Town)

Respondents’ counsel: I Jamie SC, M Adhikari, M Mokhoaetsi

Respondents’ attorneys; Webber Wentzel (Cape Town)