CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 8/01

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| ANETTE SUSAN BOOYSEN | First Applicant |
| YOULIAN VASSILEV STOIANOV | Second Applicant |
| CLAUDIA PHOEBE VALERIE CLOETE | Third Applicant |
| AROUNA ODUNLAYE | Fourth Applicant |
| SHAHIDA MOUDEN | Fifth Applicant |
| ABDEL MAJID MOUDEN | Sixth Applicant |
| SHAMILAH KHAN | Seventh Applicant |
| MOHAMMAD TAHIR JAVED | Eighth Applicant |

versus

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

Heard on : 22 May 2001

Decided on : 4 June 2001

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JUDGMENT

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SACHS J:

[1] The applicants are the spouses in four marriages contracted in terms of the laws of

South Africa. Each couple comprises a South African and a foreign national[1] spouse who is not in possession of an immigration permit. They ask this court to confirm the declarations of constitutional invalidity[2] ordered by van Heerden J on 8 February 2001 sitting in the Cape of Good Hope High Court (the High Court)[3] of two sections of the Aliens Control Act 96 of 1991 (the Act). Both sections deal with applications for work permits by, amongst others, foreign nationals who are spouses of South African citizens or permanent residents (South Africans). Van Heerden J also declared certain provisions of regulations promulgated under the provisions of the Act to be constitutionally invalid and made certain consequential orders. These orders, relating as they do to the

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1 The term "foreign national" is used to describe those persons who are not South African citizens, and are defined as "aliens" by Section 1 of the Aliens Control Act. See *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) at 16I-J; 2000(1) BCLR 39 (CC) at 52I-J at footnote 11.

2 Under the provisions of section 172(2)(a) of the Constitution of the Republic of South Africa, 1996. Section 172(2)(a) of the Constitution provides that-
"The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

3 *Makinana and Others v The Minister of Home Affairs and Another; Keelty and Another v The Minister of Home Affairs and Another* (Cape of Good Hope) Case No 339/2000, 8 February 2001, unreported.

constitutional invalidity of regulations, and not to Acts of Parliament or to a provincial Act, do not fall within the purview of section 172(2)(a) and accordingly do not require confirmation by this Court for their coming into force. There has been no appeal against any of these orders and their validity is accordingly not an issue in the present case.

[2] The first declaration of invalidity which is submitted for confirmation is of section 26(2)(a) of the Act, which concerns the obligation of the foreign national spouse seeking to work in South Africa, to apply for a work permit while outside the country and then not to enter the country until the permit has been issued. Section 26(2)(a) of the Act provides that-

> "Subject to paragraph (b) and subsection (5), application for a work permit, study permit or a workseeker's permit referred to in subsection (1), may only be made while the applicant is outside the Republic and such applicant shall not be allowed to enter the Republic until a valid permit has been issued to him or her."

Regulation 16(1) of the Aliens Control Regulations[4] provides further that-

> "An application for a work permit, study permit or workseekers permit referred to in section 26 of the Act must be made in the country or territory of which the applicant validly holds a passport, or in which he or she normally lives and to which he or she

[4] Made in terms of section 56 of the Act by the Minister of Home Affairs, and published under Government Gazette 17254 GN R999, 28 June 1996.

> returns regularly after any period of temporary absence."

[3] In the High Court proceedings the applicants contended that the effect of section 26(2)(a) of the Act was seriously to disrupt their family life and to impede the possibilities of their living together and giving each other marital support. The Minister of Home Affairs (the Minister) and the Director General, Department of Home Affairs (the DG) at first opposed the applications. After delivery of the judgment of this Court in *Dawood, Shalabi and Thomas v Minister of Home Affairs and Others*[5], however, they caused affidavits to be submitted acknowledging that the effect of the provision was unjustifiably to limit the applicants' right to dignity as protected by section 10 of the Constitution, which states that-

> "[e]veryone has inherent dignity and the right to have their dignity respected and protected."

[4] Van Heerden J found that the legislation significantly impairs the ability of the spouses to honour their obligations to one another, and constitutes an unjustifiable limitation of the right to human dignity of both South Africans and their foreign spouses.

[5] She suspended the declaration of invalidity for 12 months to allow the inconsistencies that had resulted in the declaration of invalidity to be corrected by Parliament and further directed that during the period of suspension the DG was to accept

any application for a work permit in terms of the Act made within South Africa by any foreign non-resident spouse of a South African.

[6] The second declaration of constitutional invalidity is of section 26(3)(b) of the Act, which provides that work permits are only to be issued to spouses of South Africans if they do not or are not likely to pursue an occupation in which a sufficient number of persons are available in South Africa to meet the requirements of the inhabitants of South Africa. The paragraph in question provides that-

> "The Director-General shall only issue a work or workseeker's permit with due regard to the provisions of section 25(4)(a)(i) and (iv) of this Act."

Section 25(4) provides that-

> "The regional committee concerned may authorize the issue to the applicant of an immigration permit if the applicant—
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> (a) (i) is of a good character; and
> (ii) will be a desirable inhabitant of the Republic; and
> (iii) is not likely to harm the welfare of the Republic; and
> (iv) does not and is not likely to pursue an occupation in which, in the opinion of the regional committee, a sufficient number of persons are available in the Republic to meet the requirements of the

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[5] 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC).

inhabitants of the Republic . . ."

[7] The applicants contended that the effect of subparagraph (iv) was to prevent the foreign spouses from working if they did not have scarce occupational skills. In many cases the foreign spouse was the sole or main provider for the family and this highly restrictive provision prevented them from fulfilling their duty to support, thereby violating the right to human dignity of both spouses. Here too, an affidavit was submitted on behalf of the Minister withdrawing opposition to the application in the light of the decision in *Dawood's* case.

[8] In the High Court van Heerden J held that this provision resulted in an unjustifiable limitation on the constitutionally entrenched right to human dignity of South African permanent residents who are married to foreign spouses, as well as of such foreign spouses.

[9] She suspended the declaration of invalidity for 12 months to enable Parliament to correct the inconsistency which had resulted from the declaration of invalidity, and further ordered that during the period of suspension the DG was not to decline to issue work permits to foreign non-resident spouses of South Africans, unless good cause for refusal to issue such permits is established. She also ordered that the mere fact that the foreign spouse of a South African pursues or is likely to pursue an occupation in which, in the DG or the Regional Committee's opinion, a sufficient number of persons are available

in the Republic to meet the requirements of the inhabitants of the Republic, is not in itself to constitute such good cause for refusing to issue the permits. In addition she ordered that during the period of suspension applications for the issue or extension of work permits by foreign spouses of South Africans were to be finalised within thirty working days of submission.

[10] Van Heerden J has dealt comprehensively with the relevant facts. The correctness of the factual basis to which she applied the relevant statutory and constitutional provisions of the Act was conceded before us. In substance, van Heerden J analysed and applied to those facts the relevant principles laid down in *Dawood's* case[6] and the other judgments of this Court cited in her judgment. It is unnecessary to review afresh these principles or their application to the undisputed facts of this case. I am in substantial agreement with the reasons advanced by her for coming to the conclusion that sections 26(2)(a) and 26(3)(b) of the Act unjustifiably limit the constitutionally entrenched right to human dignity of South Africans and their foreign spouses.

[11] Counsel who appeared for the Minister at the hearing in this Court indicated that he supported confirmation of the orders made, subject only to latitude being given where it is impossible for the applications for work permits to be finalised within thirty days, as ordered by the High Court. Counsel for the applicants agreed with this qualification. I

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6 Above n 5 especially at 960A-B and 963B-D.

share the view that uncertainty and possible unfairness should be avoided and will in confirming paragraph 2.5 of the High Court Order do so in an amended form. I have also amended the High Court Order so as to make it quite clear that any refusal before 8 February 2001 of applications for work permits made under section 26(1)(b) of the Act will not be rendered unlawful.

[12] The applicants sought to recover costs, including the costs of two counsel, from the respondents for the hearing in this Court. It was necessary for the applicants to seek confirmation of the declarations of invalidity, and it is helpful for this Court to receive argument in all but the most straightforward of cases. In the event, counsel on both sides have assisted the Court in refining the orders to be made. If the Minister had indicated immediately after the High Court Order had been granted that he would not oppose confirmation, the applicants might well not have been entitled to costs of two counsel in this Court. As it happened, the Minister only withdrew his opposition at a late stage. By then the applicants had already employed two counsel, as they had done in the High Court. For this they could not be faulted. Under these circumstances it would be fair and just to order the respondents to pay the costs of the applicants, including the costs of two counsel.

*Order*

The order made by van Heerden J in the Cape High Court on 8 February 2001 is

confirmed in the following amended form:

1.1 Section 26(2)(a) of the Aliens Control Act 96 of 1991, as amended (the Act) is declared to be inconsistent with the Constitution of the Republic of South Africa (the Constitution) and invalid.

1.2 The order made in para 1.1 above is suspended for a period of 12 (twelve) months from the date of this order to give Parliament an opportunity to correct the inconsistency that has resulted in the declaration of invalidity.

1.3 Pending the enactment of such legislation or the expiry of the period referred to in para 1.2 above, whichever occurs sooner, the second respondent is directed to accept, notwithstanding the provisions of section 26(2)(a) of the Act and of Regulation 16(1) of the Aliens Control Regulations, any application for a work permit in terms of section 26(1)(b) of the Act, made within South Africa, by any foreign non-resident spouse of a person who is permanently and lawfully resident in the Republic of South Africa.

2.1 Section 26(3)(b) of the Act is declared to be inconsistent with the Constitution and invalid.

2.2 The declaration of invalidity made in para 2.1 above is suspended for a period of 12 (twelve) months from the date of this order to enable Parliament to pass legislation to correct the inconsistency which has resulted in the declaration of invalidity.

2.3 Pending the enactment of such legislation or the expiry of the period referred to in

para 2.2 above, whichever occurs sooner, the second respondent, when exercising the discretion conferred upon him or her by section 26(3)(a) of the Act, may not refuse to issue work permits as contemplated by section 26(1)(b) of the Act to foreign non-resident spouses of South African permanent residents, unless good cause for refusal to issue such permits is established.

2.4 Pending the enactment of legislation by Parliament or the expiry of the period referred to in para 2.2 above, whichever occurs sooner, the second respondent shall not, when exercising the discretion conferred upon him or her by section 26(6) of the Act, refuse to extend the validity of work permits as contemplated by section 26(1)(b) of the Act to foreign non-resident spouses of South African permanent residents, unless good cause for refusal to extend such permits is established.

2.5 The fact that the foreign spouse referred to in paras 2.3 or 2.4 above pursues or is likely to pursue an occupation in which, in the opinion of the second respondent or of the relevant Regional Committee of the Immigrants Selection Board, a sufficient number of persons are available in the Republic to meet the requirements of the inhabitants of the Republic, shall not be taken into account in determining the existence of good cause for the purposes referred to in paras 2.3 and 2.4 above.

2.6 Pending the enactment of legislation by Parliament or the expiry of the period referred to in para 2.2 above, whichever occurs sooner, the second respondent

shall, when exercising the discretion conferred upon him or her by section 26(3) and 26(6) of the Act, finalise any application made by the foreign non-resident spouse of a South African permanent resident for the issue or extension of a work permit, within 30 (thirty) working days of the submission of such application, unless there is good cause for a longer period to be taken.

3. The orders made under paras 1.1 and 2.1 shall not render unlawful the refusal prior to 8 February 2001 of applications made under section 26(1)(b) of the Act.

The first respondent is to pay the applicants' costs of these confirmation proceedings, including the costs attendant upon the employment of two counsel.

Chaskalson P, Ackermann J, Goldstone J, Kriegler J, Madala J, Mokgoro J, Ngcobo J, Madlanga AJ and Somyalo AJ concur in the judgment of Sachs J.

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| For the applicants: | A Katz and E de Villiers-Jansen instructed by Eisenberg & Associates, Cape Town. |
| For the respondents : | MA Albertus SC instructed by the State Attorney, Cape Town. |