

SACHS J ABRIDGED JUDGMENT

Booyesen and Others v Minister of Home Affairs and Another

- [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 spouse who is not in possession of an immigration permit. They ask this court to confirm the declarations of constitutional invalidity ordered by van Heerden J on 8 February 2001 sitting in the Cape of Good Hope High Court (the High Court) 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 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...
- [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...
- [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...
- [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 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] ...I 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.