IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case no. in CC:
Case no. in WCHC: 11440/17

In the matter between:-

ROBINHA SARA NANDUTU	First Applicant
JAMES FERRIOR TOMLINSON	Second Applicant
ILIAS DEMERLIS	Third Applicant
CHRISTAKIS FOKAS TTOFALLI	Fourth Applicant

and

THE MINISTER OF HOME AFFAIRS	First Respondent
THE DIRECTOR-GENERAL, DEPARTMENT OF HOME AFFAIRS	Second Respondent
VFS VISA PROCESSING (SA) (PTY) LTD T/A VFS GLOBAL	Third Respondent

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FOUNDING AFFIDAVIT

I, the undersigned,

GARY SIMON EISENBERG

do hereby make oath and say

1. I am an adult male attorney practicing at Eisenberg and Associates, situated at 2 Riebeek St, Cape Town City Centre, Cape Town, 8001. I am the Applicants' attorney of record in this application. I am authorised to depose to this affidavit and do so per Rule 19(3) of the Constitutional Court Rules, 2003.

2. The facts contained in this affidavit are, unless the contrary appears from the context or is so stated, within my own knowledge and are true and correct. The facts of which I do not have personal knowledge are to the best of my knowledge and belief both true and correct.

3. The Applicants seek leave to appeal directly to this Court against the whole of the judgment and order of the Western Cape Provincial Division of the High Court (per Thulare AJ) ("the Court below") handed down on 18 April 2018. The judgment is attached to this affidavit as **GE1**, and Thulare AJ's order is attached as **GE2**. The applicants intend also to seek leave from the Court below to appeal to the Supreme Court of Appeal. If such leave is granted and this application is refused, they shall pursue the appeal in the Supreme Court of Appeal. Likewise, should this application be granted, they shall not pursue any appeal to the Supreme Court of Appeal.

4. It is submitted that the interests of justice dictate that in the particular circumstances of this case a direct appeal is warranted. In making this submission

it is appreciated that the usual course is to first appeal to the SCA, and only thereafter to this Court.

5. This affidavit deals with the following:

5.1. An introduction to this matter;

5.2. The parties to this matter;

5.3. The relevant statutory framework;

5.4. The factual background to this matter;

5.5. The reasoning of the court below;

5.6. Why leave to appeal directly to this court should be granted; and

5.7. Conclusion.

INTRODUCTION

6. Should the holder of a visitor visa who becomes eligible for a spousal visa while in South Africa always be required to leave the Republic to change their status to a spousal visa?

7. This Court has already answered this question negatively in *Dawood*.[1] The right to dignity, and how it protects the entering and maintenance of familial relationships, is unjustifiably limited by requiring foreign spouses who are in the Republic to always leave the Republic to apply for a spousal visa.

8. Despite this court answering the above question negatively, in the court below, Thulare AJ, in his judgment of 18 April 2018, answered the question affirmatively. He found that visitor visa holders who wish to apply for spousal visas must always do so from outside the Republic. He also found that this does not violate the applicants' right to dignity. He subsequently dismissed the applicants' application to have regulation 9(9)(a) of the Immigration Regulations in GNR.413 *GG 37679* of 22 May 2014 ("**the regulation**") declared unconstitutional.

9. This application seeks to protect the right to dignity of those who become eligible for spousal visas while in the Republic on a visitor's visa. The application aims to ensure that the applicants' right to enter and maintain familial relations is not violated by requiring spouses to leave their families and apply for spousal visas from abroad. The applicants submit that the regulation constitutes an unjustifiable limitation to their right to dignity. To remedy this, the words "*(iii) is the spouse or child of a citizen or permanent resident"* should be read into the regulation.

[1] *Dawood and Another v Minister of Home Affairs and Others ; Shalabi and Another v Minister of Home Affairs and Others ; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) paras 30-1 ("***Dawood***"). See also *Booysen and Others v Minister of Home Affairs and Another* (CCT 8/01) [2001] ZACC 20 ("***Booysen***").

10. This application also seeks to declare unconstitutional a regulation and appeal a judgment that respectively contradict precedent established by this Court. As Moseneke J (as he then was) explained in *Daniels*:

> *"the doctrine of precedent is an incident of the rule of law. Its primary purpose is to advance justice by ensuring certainty of the law, equality and equal treatment and fairness before it. To that end, the doctrine imposes a general obligation on a court to follow legal rulings in previous judicial decisions."*[2]
>
> (footnotes omitted)

11. Not only does the court below run roughshod over an issue decided by this Court, it also departs from a decision of the Western Cape High Court in *Stewart*.[3] It creates conflicting High Court judgments on the issues raised in this matter. This application therefore is not only about dignity, but also about the rule of law and treating like cases alike.

THE PARTIES

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[2] *Daniels v Campbell and Others* (CCT 40/ 03) [2004] ZACC 14 para 94. This was in a minority judgment, although the majority did not disagree on this point of the nature and role of stare decisis.

[3] *Stewart and Others v Minister of Home Affairs and Another* (12520/2015) [2016] ZAWCHC 20 (29 January 2016) (available at http://www1.saflii.org/cgi-bin/disp.pl?file=za/cases/ZAWCHC/2016/20.html&query=stewart).

12. The first applicant is Robinah Sarah Nandutu, an adult, female Ugandan citizen. She resides together with the second applicant, who is her husband, at 4A Erica Road, Durbanville Hills, Durbanville. The second applicant is a British citizen and permanent resident of South Africa.

13. The third applicant is Illias Demerlis, a Greek citizen, who resides with the fourth applicant, who is his life partner. The fourth applicant is Christakis Fokas Ttofalli, a South African citizen. The third and fourth applicants reside together at 8 Atrina Way, Sunset Beach, Milnerton.

14. The first respondent is the Minister of Home Affairs, who is cited in her official capacity as the Member of the National Executive responsible for the administration of the Immigration Act 13 of 2002 ("**the IA**"). The Minister is empowered under s7(1)(e) of the IA to make regulations relating to the requirements for the issuing of visas.

15. The second respondent is the Director-General of the Department of Home Affairs, who is responsible for the implementation of the IA, including the issues of visas and permits under the IA.

16. The third respondent is VFS Visa Processing (South Africa) (Pty) Ltd t/a VSF Global, a company duly incorporated according to the company laws of South Africa. The third respondent is cited as a respondent because the first and/or second respondents require applicants to submit their applications for visas and

permits at their offices. The third respondent did not oppose the application in the High Court and no relief is sought against it in this application.

RELEVANT STATUTORY FRAMEWORK'

Spousal and Relative's Visas

17. Before explicating the facts of this matter, the framework of the IA and the regulations are set out.

18. Foreigners (who do not have permanent resident permits) may only enter and/or sojourn in South Africa if they have a visa issued by the second respondent. Section 10 of the IA deals with visas and the issuing of visas to foreigners. Section 10(2) lists an array of visas available to foreigners, including visitor's visas and relative's visas. Visitor's visas are dealt with specifically in s11, while relative's visas are dealt with in s18 of the IA.

19. A foreigner who is the spouse of a South African citizen or permanent resident may apply for any of the visas listed in s10(2) of the IA, provided they meet the requirements for that visa. In practice, a such a spouse is issued a visitor's visa under s11(6) of the IA or a relative's visa per s18 of the IA. The former is a type of visitor's visa, and is colloquially referred to as a "spousal visa".

20. Section 11(6), the so-called spousal visa, reads:

"(6) Notwithstanding the provisions of this section, a visitor's visa may be issued to a foreigner who is the spouse of a citizen or permanent resident and who does not qualify for any of the visas contemplated in sections 13 to 22: Provided that-

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

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

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

21. Section 11(6) ensures that foreign spouses, on application, can do any of the activities referred to in other visa categories (like work and study).

22. A relative's visa per s18 may be issued for a maximum period of 24 months by the Director-General to a foreigner who is a member of the immediate family of a citizen or a permanent resident, provided that such citizen or permanent resident provides the prescribed financial assurance (currently set at R8500 per month). The holder of a relative's visa may not conduct work.

Change of Status

23. Once a foreigner is admitted into the Republic, her visa and its conditions are deemed to be of force and effect. Their visa and its conditions determine the foreigner's "status" in the Republic. "Status" in the IA means the status of the person as determined by the relevant visa or permanent residence permit granted to a person in terms of this Act.

24. Section 10(6) provides that a foreigner may apply to the second respondent to change her status (i.e. her visa) or the conditions attached thereto <u>while in the Republic</u>.

25. The general rule in s10(6), that status may be changed within the Republic, then has two exceptions. Holders of visitor's visas or medical treatment visas may not change their status within the Republic, except in prescribed exceptional circumstances. Regulation 9(9) spells out the 'exceptional circumstances' contemplated in s10(6)(b) of the IA. For visitor visa holders, there are two such exceptional circumstances:

25.1. the applicant is in need of emergency lifesaving medical treatment for longer than three months;

25.2. the applicant is an accompanying spouse or child of a holder of the business or work visa, who wishes to apply for a study or work visa.

26. Therefore, holders of visitor visas who marry South African permanent residents or citizens while in the Republic do not fall into the exceptional circumstances contemplated in the regulation. In turn, if they wish to change their status from a visitor's visa to a spousal visa, then they must do so from outside the Republic. This would entail leaving their families, returning to their countries of origin, and remaining there (away from their families) until the respondents grant them a spousal visa.

FACTUAL BACKGROUND

The First and Second Applicants

27. The first applicant is a Ugandan national who entered South Africa on 20 February 2015 on a visitor's visa issued in terms of section 11(1) of the IA. The visitor's visa had been issued to her at Kampala on 19 February 2015. The conditions of the visa were:

> *"Enter on or before: 2015.05.18.*
> *EACH VISIT NOT TO EXCEED 30 DAYS*
> *FOR HOLIDAY PURPOSES ONLY*
> *MUST HOLD A RETURN ONWARD AIR TICKET."*

28. The first applicant was three months pregnant when she left Uganda. She left Uganda for South Africa to join the second applicant. The second applicant is the

father of the first applicant's child. The second applicant is a British citizen and a holder of a permanent residence permit in South Africa.

29. On 21 April 2015, two months after her entry, the first applicant married the second applicant. Their son, Joshua, was born on 14 August 2015 in South Africa. The first two applicants then consulted with an attorney regarding a visa that would enable the first applicant to remain in South Africa to live with her child and husband as a family. They applied at the offices of the third respondent for a spousal visa. The application was rejected and the reasons for the rejection were provided as follows:

> "*No change of status or conditions attached to the temporary visa while in the Republic in terms of section 10(6) of the Immigration Act, 2002."*

30. An appeal to both the Director-General and the Minister in terms of the IA were also unsuccessful. In both cases, the first applicant's application was rejected because s10(6) does not allow a visitor visa holder to change her status within the Republic. All three letters of rejection are annexed hereto and marked **GE3**, **GE4**, and **GE5** respectively.

31. Joshua's birth is not registered per the Births and Deaths Registration Act 51 of 1992 as the first applicant is not in possession of a valid temporary residence visa. Joshua thus cannot apply for a passport or an identity number.

The Third and Fourth Applicants

32. Third applicant is a Greek citizen who entered South Africa on a section 11(1) visitor's visa. The third applicant is in a life partnership with the fourth applicant. They wish to make Cape Town their home. To that end, the third applicant applied for a section 11(6) visa to enable him to continue to cohabit with fourth respondent. His application was rejected. The reasons were given as follows:

> *"No change of status or conditions attached to the temporary residence visa while in the Republic in terms of section 10(6) of the Immigration Act of 2002*
>
> *No documentation to prove the financial support to each other and the extent to which the related responsibilities are shared by the applicant and his or her spouse in terms of section 3(2)(d)."*

33. An appeal to both the Director-General and the Minister were also unsuccessful. The Minister rejected the application because of s10(6) and how the third applicant was attempting to change his status within the Republic. All three letters communicating the three decisions are attached hereto as **GE6**, **GE7**, and **GE8** respectively.

THE COURT BELOW

34. Aggrieved by the respondents' decision and the regulation, the applicants approached the High Court for relief. Their principal submission was that requiring

the applicants to return to their countries of origin to apply for spousal visas unjustifiably limits their right to dignity.

35. This submission entailed four steps. First, the scope of the right to dignity extends to entering and sustaining familial relations. Second, the regulations limit entering and sustaining familial relations. Third, this limitation was unjustified. Fourth, the appropriate remedy for this unconstitutional regulation is reading in. Each of these steps in the applicant's submission was made before the learned Thulare AJ.

36. Regarding the first step, the following is settled about the nature and scope of the right to dignity:

36.1. Human dignity has no nationality. All those in South Africa are entitled to the right to dignity.[4]

36.2. The right to dignity includes the ability to form and maintain familial relationships, particularly marriage.[5]

36.3. Any law that interferes with the right to enter and sustain familial relationships thus limits the right to dignity.[6]

[4] *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (4) SA 326 (SCA) para 25.

[5] *Dawood* paras 30-1 ("***Dawood***"). See also *Booysen.*

[6] Ibid.

36.4. If any law of general application limits the right to dignity, that limitation must be reasonable and justifiable. Otherwise that law is unconstitutional.[7]

37. As explained above, the regulation limits the right to dignity. It interferes with a spouse's right to cohabit with their spouse and sustain familial relations. It requires a spouse to leave the Republic and their family for an unspecified amount of time. The spouse is mandated to remain in their country of origin, away from their spouse and family, until the respondents accept their spousal visa application.

38. Thulare AJ did not make an express finding that the regulation limits the right to dignity. But he accepted that a visitor visa holder must generally leave the Republic to change their status.[8] This implies that there is a limitation on the visitor visa holder's right to dignity if they are married to a South African permanent resident.

39. The question then becomes whether this limitation of the right to dignity passes the requirements of s36 of the Constitution. The first of these requirements is that the right must be limited by a law of general application. The regulation is a law of general application.

[7] Section 36 of the Constitution.

[8] Unless they are granted a waiver under s31. This is dealt with in the next part of this affidavit. High Court Judgment para 41.

40. Second, the court must consider whether the limitation is reasonable and justifiable. This includes considering, firstly, the nature of the right in question.[9] There is no doubt that the right to dignity is fundamental to South Africa's constitutional dispensation. It is the first and foremost value upon which the Republic is founded.[10] In the context of marital or familial relations, it cannot be gainsaid that the right to dignity protects the most important of relationships people enter.[11]

41. The purpose of the limitation must then be considered, and whether the limitation is linked to achieving that purpose. This must then be weighed against the extent of the limitation. The availability of less restrictive means must also be considered.[12]

42. In casu, the applicants are seeking a visa to remain with their spouses who are lawfully in the country. One applicant has a child in the country. There is simply no overriding reason for why they should not be able to apply for a visa while within the Republic. It is unclear what legitimate, constitutional purpose is achieved by requiring the applicants to leave their families to apply for spousal visas. This is especially so given how accompanying spouses of work or business visa holders

[9] The Constitution, s36(1)(a).

[10] The Constitution, s1(a).

[11] See *Dawood* supra para 30.

[12] The Constitution, ss36(1)(b)-(e).

are given the ability to apply for spousal visas within the Republic.[13] If other spouses can be given the right to change a status while in the Republic, so too should the applicants.

43. Thulare AJ suggested four possible legitimate reasons for requiring the applicants to apply from abroad. These four reasons were also submitted by the first two respondents in the court below. The first was that allowing the applicants to change their status while in the Republic circumvents the additional safety checks required when applying for a s11(6) visa.[14] However, the applicants have not argued that they be exempt from the other requirements for applying for a spousal visa. They only want to apply for that visa without leaving the Republic. The High Court thus erred in dismissing the application for this reason.

44. Second, those in the position of the applicants could apply for a s11(6) visa before they left for the Republic from their countries of origin. That they chose not to was their choice, and so they cannot complain now that they are required to return to their countries of origin.[15] But the first applicant was not married to her spouse when she left her country of origin. Her child was also not born yet. A s11(6) visa was thus not available to her. The same is true of the third applicant: his relationship with his life partner as it exists now did not exist when he left his

[13] Regulation 9(9)(a)(ii).

[14] High Court Judgments paras 20, 25, 27 and 31.

[15] High Court Judgment, para 18.

country. In any event, it is unclear how choosing to enter South Africa on a visitor's visa, and not a spousal visa, justifies separating the visa holder from their family for an unspecified amount of time.

45. Third, the purpose of the regulation is to mitigate administrative inconvenience. This may be a legitimate purpose, although this is highly doubtful. But whatever administrative inconvenience the respondents experience by accepting visa applications from visitor visa holders from within the Republic is outweighed by the severity and extent of the limitation on the right to dignity. The applicants' familial relations should not be at risk just to make bureaucracy run smoothly.

46. On the respondent's account, they would accept the visitor visa holder's applications from abroad. The respondents already accept visa applications from inside the country when other visa-holding foreigners apply for a change of status under s10(6) of the IA. It is also unclear how accepting these applications from within the country is more inconvenient than accepting and processing the applications from foreign missions. It appears then, if the purpose is administrative efficiency, that there is no rational link between this chosen means and achieving that purpose.

47. In any event, there are no doubt less restrictive means for ameliorating administrative issues than placing the applicant's familial relations at risk.

48. Fourth, Thulare AJ held that the extent of the limitation is mitigated by s31(1)(c) of the IA. This section allows any applicant to apply to have any prescribed requirement in the IA (including that the applicants cannot apply for within the Republic) waived by the Minister. A requirement is prescribed when, according to the definition of "prescribed" in s1 of the IA, it is prescribed by regulation. So the Minister's power to waive requirements are limited to requirements in the regulations—not requirements in the IA.

49. The first issue with this argument is that the applicants should not be allowed to apply for visas or permits only when the Minister vouchsafes an exemption. They are, in terms of the IA and their right to dignity, entitled to do so without more. Their applications, per *Dawood*, should be the default, and not the exception. Alternatively, the exceptionality of their circumstances should be recognised by the regulations, and they should not have to rely on the Minister to guarantee their right to dignity. This is because waivers are supposed to give effect to something out of ordinary. But here the applicants' remainder in the Republic and cohabitation with their spouses should be the default, ordinary course of events.

50. Second, what exactly are those exceptional circumstances under which the Minister would grant the waiver? The Minister has a broad, almost unfettered discretion in waiving requirements in the Act. This broad discretion, without proper guiding factors, introduces an element of arbitrariness to its exercise that is inconsistent with the constitutional protection of the right to marry and establish a

family.[16] This is not to say that s31(1)(c) is unconstitutional. But it is to say that applicants' ability to sustain their familial relations (and subsequently their right to dignity) should not hinge on that provision. To do so aggravates the extent to which their right to dignity is limited. Instead, applicants should be allowed to apply for a spousal visa within the Republic as any other foreigner can.

51. Therefore, the Regulation unjustifiably limits the applicants' right to dignity, and is unconstitutional. The court below erred in reaching the opposite conclusion.

52. To remedy this unconstitutionality, the applicants submit that the court read the following words into the Regulation: "*(iii) is the spouse or child of a citizen or permanent resident".*

53. Reading these words into the Regulation would ensure with precision that reg 9(9)(a) is consistent with the Constitution. These words will also, at the same time, interfere as little as possible with the legislative scheme of the IA and the Refugees Act. The reading in will also not result in an unsupportable budgetary intrusion. As explained above, the respondents already accept visa applications from within the country, and there is nothing to suggest that doing so is cheaper than processing applications from abroad. For these reasons, reading in is a warranted remedy.[17]

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[16] *Dawood* para 58.

[17] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* (CCT10/99) [1999] ZACC 17 para 68.

DIRECT APPEAL

54. In *Union of Refugee Women*, this Court summarized the law on appealing directly to the Constitutional Court as follows:

> *"Leave to appeal directly to this Court will be granted if it is in the interests of justice to do so. Each case is considered on its own merits. The factors relevant to a decision whether to grant an application for direct appeal have been listed as including whether there are only constitutional issues involved, the importance of the constitutional issues, the saving in time and costs, the urgency, if any, in having a final determination of the matters in issue and the prospects of success. These must be balanced against the disadvantages to the management of the Court's roll and to the ultimate decision of the case if the Supreme Court of Appeal ("SCA") is bypassed."*[18]
>
> (footnotes omitted) (emphasis added)

55. Applying these factors to the facts at hand demonstrates that that leave to appeal directly to the Constitutional Court is justified:

[18] *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* (CCT 39/06) [2006] ZACC 23 para 21.

55.1. This matter only concerns the constitutional issue of whether the Regulations unjustifiably limit the applicants' right to dignity;

55.2. This is a crucial issue, as the Court recognized in *Dawood* and *Booysen*. It concerns the applicant's right to enter and sustain familial relations;

55.3. Unnecessary time and cost wastage will be avoided if the court heard this matter. The legal representatives, including counsel, are working at reduced rates, and some pro bono. The applicants cannot afford to continue funding this litigation for protracted periods. Should applicants first have to argue a leave to appeal application before the Court below, and if such leave is granted, then pursue an appeal in the Supreme Court of Appeal, before probably thereafter in any event having to pursue or defend an appeal in this Court, it would result in a considerable amount of extra costs for them. Unfortunately, it is money which neither they nor their lawyers have readily available;

55.4. The matter is urgent: the applicants' visitors visas will eventually expire, and they could face deportation from their families. In the meantime, they cannot travel, open bank accounts, acquire driver licences, or work. They live in

constant angst. This has been the situation for over three years for all the applicants.

55.5. In the case of the first two applicants, they cannot register the birth of their child and secure citizenship for their child. This has implications for the child's best interests, especially as he approaches a school-going age;

55.6. There are strong prospects of success, as discussed above;

55.7. This case is relatively straightforward, and essentially entails applying *Dawood* to the regulation. The Court will not suffer significantly if the Supreme Court of Appeal is bypassed.

55.8. Thulare AJ, in paragraph 24 of his judgment, disagrees with Donen AJ's finding in *Stewart*. Donen AJ held that to move from a s11(1) visitor's visa to a s11(6) spousal visa is not a change of status. So the applicants need not apply for a change of status from outside the Republic. Thulare AJ held to the contrary. The judgment in the court below thus contradicts another High Court ruling, creating uncertainty and exacerbating the need for finality in this matter;

55.9. Finally, Thulare AJ ordered that the applicants have leave to apply to the Minister for the waivers that would be issued in this case. I understand that the Minister, quite appropriately, intends to appeal against those findings.

56. Therefore, the interests of justice require a direct appeal to this Court.

CONCLUSION

57. Is the regulation unconstitutional because it requires foreign spouses who are in the Republic on visitor's visas always to apply for spousal visas from outside the Republic?

58. This is the issue raised by this application. The court below erred in dismissing the application and concluding that the regulation is constitutional. The regulation constitutes an unjustifiable limitation on the applicants' right to dignity.

59. Given the constitutional essence of this matter, and the facts of the applicants, the interests of justice dictate that leave to appeal directly to this Court is granted.

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GARY SIMON EISENBERG

Signed and sworn to before me at _____ on this the ____day of MAY 2018, the deponent having acknowledged that he/she knows and understands the contents of this affidavit, that he/she has no objection to taking the prescribed oath, and that he/she regards same as binding on his/her conscience. I certify furthermore that the deponent in my presence uttered the following words: *"The contents of this affidavit are true and correct, so help me God"*.

_____

COMMISSIONER OF OATHS