IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Constitutional Court Case no: 114/18
Case no: 11440/17

In the matter between:

ROBINAH SARAH 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

---

FIRST AND SECOND RESPONDENTS' ANSWERING AFFIDAVIT

I, the undersigned,

RONNEY MARHULE

make oath and say that:

1. I am the Acting Chief Director: Permits of the Department of Home Affairs (**"the Department"**), based at corner 270 Maggs and Petroleum Streets, Waltloo, Pretoria.

RM GO

2. I am duly authorised to depose to this affidavit and to oppose the applicants' application.

3. The facts set out in this affidavit are within my personal knowledge or derived from documentation held by the Department, unless stated otherwise or the contrary appears from the context, and are true and correct. Where I rely on information given to me by others, I verily believe such information to be true and correct. Where I make legal submissions, I do so on the advice of the respondents' legal representatives, which I believe is correct.

A. THE APPLICATION

4. In this application, the applicants seek leave to appeal directly to this Court against the Western Cape High Court judgment of Thulare AJ. The grounds given for the application for direct appeal are set out in paragraphs 54 to 55.9 of the founding affidavit of Gary Simon Eisenberg. The application is opposed based on the grounds that follow.

5. The first and second respondents (collectively referred to as **"the Department"**) have applied for leave to appeal to the High Court; alternatively to the Supreme Court of Appeal (**"SCA"**), against the second to fifth orders issued by the High Court. It would be undesirable to have different courts pronounce on the same issues disjunctively. That approach has potential for contradiction and legal chaos. Rather, the normal route should ensue.

6. The applicants have not made out any case for urgency in this Court hearing the matter at this stage.

RM

GS

6.1. It is alleged at paragraph 55.4 that *"the applicants' visitors visas will eventually expire"* and they could face deportation. However, the position set out in paragraph 55.4 occurred in 2015 when the applicants' visitors visas expired. This was the whole basis for the High Court application.

6.2. It is alleged at paragraph 55.5 that the first and second applicants have been unable to register the birth of their minor child, resulting in implications for the child's best interests. However, this is a result of the fact that the first applicant allowed her visitor's visa to expire in April 2015. It was pointed out in the High Court that the first applicant, who was legally represented before her visa expired, ought to have applied to the Director-General in terms of section 32 of the Immigration Act, for the regularisation of her stay in South Africa beyond the time period stipulated in her visitor's visa.

7. The Department set out the policy objectives and rationale for the impugned legislation in paragraphs 9 to 26 of the answering affidavit in the High Court. they are not repeated here in order not to prolix this affidavit. However, the Department continues to rely thereon. The objectives and rationale justify the limitation of the right relied upon by the applicants. Accordingly, the applicants do not have good prospects of success in the matter.

8. The matter brought by the applicants to this Court does not only involve a constitutional matter. On the applicants' own version (see paragraph 55.8), they also seek an appeal against Thulare AJ's finding regarding the case of *Stewart and Others v Minister of Home Affairs and Another* (12520/2015) [2016] ZAWCHC 20 (29 January 2016). In that case, which was decided by Donen AJ, it was held that a foreign spouse

of a permanent resident or citizen is not required to apply for a change of status from outside the Republic as required in section 10(6) of the Immigration Act. At paragraph [42] of that case Acting Judge Donen held that, as an existing holder of a visitor's visa (under s.11(1)), the second applicant could not have been making an application for a change of status attached to a visitor's visa. Thulare AJ disagreed with Donen AJ. There are therefore two conflicting judgments from the same division of the High Court. This is matter of interpretation of the Immigration Act. It is desirable to have a judgment by the SCA on this issue, before it reaches this Court.

9. The applicants rely extensively on the Dawood judgment by this Court. (see paragraphs 55.2 and 55.7) However, the facts of this case are distinguishable from *Dawood* and from the *Booysen* judgment in some significant respects:

9.1. In *Dawood and in Booysen*, the Department and the Minister of Home Affairs did not oppose the matter, and the courts therefore did not have the benefit of considering the policy objectives of the impugned legislation. By contrast, in this matter, the High Court has had the benefit of considering the Department's case, and specifically the rational objective of the impugned legislation, as set out in the High Court answering affidavit.

9.2. The issue in *Dawood* was that the right to family life was dependent upon the exercise of a discretion conferred upon officials to grant or extend temporary permits, with no guidance as to the factors relevant to the refusal of the grant or extension of such permits. No such issue arises in this case.

RM
GT

9.3. The provision in question in the case of *Dawood,* section 25(9)(b) of the Aliens Control Act 96 of 1991 has since been repealed. The impugned legislation in this case has different requirements.

10. In any event, the fact that this case might have a bearing on the *Dawood* and *Booysen* judgments is not a reason for direct appeal to this Court.

11. For all the above reasons, it is not in the interests of justice for this Court to grant the applicants leave to appeal directly to this Court.

B. THE FOUNDING AFFIDAVIT

12. I now turn to considering the allegations in the founding affidavit of the applicants which warrant a response. Allegations which are not expressly addressed are denied, unless that would be inconsistent with what is contained herein.

Ad paragraph 1

13. I have no knowledge of the facts alleged herein, but do not place them in dispute. I find it strange that the applicants' attorney of record deposed to the founding affidavit, without a confirmatory affidavit from his clients. I am, however, advised that the Rules of this Court permit for an application in terms of Rule 19(3) to be signed by an applicant's legal representatives.

Ad paragraph 2

14. It is denied that the facts alleged in the founding affidavit are within the deponent's own knowledge, or that they are true and correct.

RM CJ

Ad paragraph 3

15. I point out that the first and second respondents have applied for leave to appeal against orders 2 to 5 of the Thulare AJ's judgment and order. That application seeks leave to appeal in the Western Cape High Court, alternatively the SCA. It is therefore preferable for the matter to follow the normal course; otherwise different courts will be pronouncing on the same matter, with the potential for contradiction and legal chaos. The application for a direct appeal to this Court is therefore opposed, and is not warranted.

Ad paragraph 4

16. It is denied that a direct appeal to this Court is warranted, or that the interests of justice demand it. I refer, in this regard, to what is stated above.

Ad paragraphs 5 – 5.7

17. These paragraphs are noted.

Ad paragraphs 6 – 7 (INTRODUCTION)

18. A holder of a section 11(1) visitor's visa holds that visa because he or she meets the criteria for it. An applicant for a section 11(6) visa must likewise meet the requirements for that visa. In terms of section 10(6)(b) of the Immigration Act 13 of 2002 ("the Immigration Act"), an application for a change of status attached to a visitor's or medical treatment visa shall not be made by the visa holder while in the Republic, except in exceptional circumstances prescribed in Regulation 9(9)(a). Therefore, if an

RM CS

applicant does not meet those criteria, they must make their applications outside the Republic, in their home countries.

Ad paragraph 8

19. This paragraph is admitted.

Ad paragraph 9

20. Without admitting the merits of the applicants' application, this paragraph is noted.

Ad paragraph 10

21. It is denied that the Immigration Regulations (**"the Regulations"**) or the first order in Thulare AJ's judgment contradict precedent.

Ad paragraph 11

22. The allegations contained in this paragraph are denied. It is denied that Thulare AJ's Judgment 'runs roughshod' over an issue decided by this Court. This Court has not been seized with the facts with which the High Court was seized in this matter.

23. Thulare AJ correctly disagreed with the *Stewart* judgment, as that judgment created legal chaos and uncertainty in the application of the Immigration Act, particularly change in status to section 11(6) visas.

Ad paragraphs 12 - 13 (THE PARTIES)

RM CG

24. I have no personal knowledge of the facts in these paragraphs. It is, however, admitted that they are the basis on which the judgment of the court below was decided.

Ad paragraphs 14 - 15

25. These paragraphs are admitted.

Ad paragraph 16

26. In the High Court the applicant withdrew its only prayer against the third respondent, which was to *"direct the third respondent to post a copy of the Order on the VFS Global website"*. (See High Court pleadings, pp 258 – 259).

Ad paragraph 17 (RELEVANT STATUTORY FRAMEWORK)

27. This paragraph is noted.

Ad paragraphs 18 - 19

28. These paragraphs are admitted.

Ad paragraph 20

29. To the extent that this paragraph correctly quotes section 11(6) of the Immigration Act, it is admitted.

Ad paragraph 21

30. This paragraph is admitted.

Ad paragraph 22

31. This paragraph is admitted.

Ad paragraph 23 (Change of status)

32. This paragraph is admitted.

Ad paragraph 24

33. Section 10(6) of the Immigration Act provides for a foreigner, other than the holder of a visitor's or medical treatment visa, to apply to the Director-General in the prescribed manner to change his or her status or terms and conditions attached to his or her visa, or both such status and terms and conditions, as the case may be, while in the Republic.

34. Save as aforesaid, this paragraph is denied.

Ad paragraphs 25 – 25.2

35. These paragraphs are admitted.

Ad paragraph 26

36. This paragraph is admitted.

Ad paragraph 27 (FACTUAL BACKGROUND)

37. This paragraph is admitted.

Ad paragraph 28

RM

CJ

38. The first applicant led no evidence to substantiate the first three sentences. The fourth sentence is admitted.

Ad paragraph 29

39. In the High Court, the first and second respondents pointed out (pp197, para 64) that the copy of the alleged marriage certificate of the first and second applicants' marriage, which was attached to the papers, appears, on the face of it to have been tampered with in the space where the second applicant's date and year of birth appear. If one compared two versions of the marriage certificate, namely "RN2" and "JT2" (pp 37 & 78), the second applicant's date and year of birth are not the same. It was therefore alleged that one or both of the documents is/are fraudulent.

40. In her replying affidavit the first applicant admitted (p 280, para 55) to have tampered with her marriage certificate.

41. In addition, the first applicant stated in her replying affidavit (pp 270 – 271, paras 31.3 – 31.4) that she and the second respond were married on 13 December 2017 (i.e after the High Court application was launched), and attached a copy of their current marriage certificate as "RN9" (p 288).

42. In light of the above, the first three sentences are denied.

43. The fourth and fifth sentences are admitted.

Ad paragraph 30

44. This paragraph is admitted.

Ad paragraph 31

45. In terms of section 32 of the Act the Director-General may authorize an illegal foreigner to remain in the Republic pending his or her application for a status. The first applicant should therefore have made an application to the Director-General in terms of this provision to remain in the Republic pending her application for a change in status. In that way, her child's birth could have been regularised.

Ad paragraph 32 (The Third and Fourth Applicants)

46. It is admitted that the third applicant is a Greek citizen, as stated in his passport, and that he was issued with a section 11(1) visa. It is admitted that the third applicant made an application to change from a section 11(1) visa to a section 11(6) visa from inside the Republic, and that the application was rejected. The initial decision-maker rejected the application for the reasons set out in this paragraph, but the final decision from the Minister rejected the application due to non-compliance with section 10(6) of the Immigration Act.

47. I have no knowledge of the second sentence.

Ad paragraph 33

48. This paragraph is admitted.

Ad paragraph 34 (THE COURT BELOW)

49. This paragraph is admitted.

RM GT

Ad paragraph 35

50. It is denied that the applicants' case in the High Court was that the Regulations limit their right to enter familial relations. The applicants' case in the High Court was based on the *"duty of parties in a marriage or life partnership to cohabit and provide each other with support"*. (See p 13, para 11) Save as aforesaid, this paragraph is admitted.

Ad paragraphs 36 – 36.4

51. The case law set out in these paragraphs is admitted. It is denied that the Immigration Act and Regulations limit the right to dignity; alternatively, it is a reasonable and justifiable limitation thereof.

Ad paragraph 37

52. It is denied that the Immigration Act and Regulations limit the right to dignity; alternatively, it is a reasonable and justifiable limitation thereof. In paragraphs 9 to 27 of the answering affidavit before the High Court, the Department set out the rationale and objectives for Regulation 9(9), read with section 10(6) of the Immigration Act. I ask that its contents be incorporated by reference.

Ad paragraph 38

53. This paragraph is denied. In paragraph 60 of the Judgment, Thulare AJ stated that he was not persuaded that section 10(6) read with Regulation 9(9) is an infringement to the right to dignity.

Ad paragraph 39

RM GG

54. On the basis of the rationale and objectives set out in the High Court answering affidavit of the Department, I aver that Regulation 9(9), read with section 10(6) of the Immigration Act, is a justifiable limitation on the right to dignity, in terms of section 36 of the Constitution.

Ad paragraph 40

55. The importance of the right to dignity is admitted. It is, however, denied that it is infringed by Regulation 9(9) and section 10(6) of the Immigration Act.

Ad paragraph 41

56. This paragraph is noted. It is averred that the Regulation 9(9) is a justifiable limitation on the right to dignity, in accordance with section 36 of the Constitution.

Ad paragraph 42

57. *Ad first sentence*: The first and third applicants entered the Republic holding section 11(1) visas, fully aware that they did not have rights to permanent residence. Every holder of a section 11(1) visa is, and should be aware, that, after expiry of the period of duration of the visa, they are required to leave the Republic.

58. *Ad second sentence*: On the first applicant's version, she entered the Republic already pregnant.

59. *Ad third & fourth sentences*: These sentences are denied. The Department has set out the policy reasons and justification for the statutory scheme, in its High Court answering affidavit.

60. *Ad fifth & sixth sentence*:

60.1. The exception in Regulation 9(9)(a)(ii) caters for individuals accompanying foreign spouses or parents that are in South Africa on a fixed and temporary basis. In terms of Regulation 18 a general or critical skills work visa is valid for a maximum of 5 years, while an intra-company transfer is valid for a maximum of 4 unrenewable years. In terms of Regulation 20 a business (or corporate) visa is valid for a maximum period of 3 years. The period of stay of the accompanying spouse or child of the holder of a business or work visa is also linked to the period of business or work visa. The necessary checks and investigations that must be conducted in respect of an accompanying spouse or child of a foreign business or work visa holder are conducted before the individual travels to South Africa by the embassy. They enter South Africa having disclosed their true reasons for entering the country, namely to join a spouse or parent, and their entry into South Africa is determined on that basis. That visa is more onerous than a visitor's visa, and allows the Department to conduct all the necessary checks before the individual enters the Republic.

60.2. In order to obtain a business or corporate visa, the Department of Trade and Industry must assess the application, in addition to the Department. The application goes through a rigorous process of assessment, taking into account various considerations mentioned in Regulation 20, including whether the business model is feasible, in the national interests, and will result in the improvement to our economy. The same goes during an application to renew such a visa.

RM GS

60.3. Likewise, a work visa is subject to rigorous assessment by the Department of Labour, as outlined in Regulation 18.

60.4. The exception in Regulation 9(9)(a)((ii) is intended for instances where, for example, a child of a foreign business permit-holder reaches school-going age and needs to start attending school; or where a child needs to go to university within the duration of the validity of the business or work visa. The child must meet the requirements of a study visa in terms of Regulation 12. Another example is where an accompanying spouse of a business permit-holder finds a job in South Africa. The application to change the conditions of a visa by the accompanying spouse must meet the requirements of a work visa, and will be subject to the various checks conducted by the Department of Labour, including whether the job applied for is critical and whether the job can rather be performed by a South African citizen.

60.5. It is clear from above that, both the holder of the business or work visa, and their spouse or child's study or work visas are tightly monitored through inter-departmental measures between the Department, the Department of Trade and Industry, the Department of Labour and the departments of education. By contrast, individuals who enter the Republic on a visitor's visa are under no such strict regulation. This is indicated by the facts of this case. Both the first and third applicants have managed to remain in the Republic despite the expiry of their visas, without detection.

61. The relief sought by the applicants will amount to similar abuse referred to above, but on an even more drastic level. Individuals will be able to travel to South Africa on a

RM GG

visitor's visa and be immediately entitled to stay permanently at the expiry of three months on the basis of an alleged spousal relationship.

Ad paragraph 43

62. The first three sentences are admitted.

63. *Ad fourth sentence*: The fourth sentence is denied. The applicants want to be exempt from the requirement to apply from outside the Republic, which is the rule applicable for all other applications for section 11(6) visas.

64. *Ad fifth sentence*: This sentence is admitted.

65. *Ad sixth sentence*: This sentence is denied. The High Court clearly states in the Judgment that the applicants want to be exempt from the requirements applicable in a section 11(6) visa application.

Ad paragraph 44

66. It is denied that the first and third applicants were in a position to apply for section 11(6) visas before entering South Africa. It is admitted that the first and third applicants were required to return to their home countries after expiry of their section 11(1) visas.

Ad paragraph 45

67. This paragraph is denied. Administrative convenience is not the only justification given by the Department. Amongst the reasons given by the Department for the statutory scheme in Regulation 9(9), read with section 10(6), are: the policy reason of

externalising borders; economic savings; security reasons; eliminating fraud and abuse of spousal and family visas; bureaucratic and administrative efficiency. It is averred that the rationale and objectives supplied by the Department meet the requirements for justified limitation in terms of section 36 of the Constitution.

Ad paragraph 46

68. *Ad first sentence*: An application for change of status from a section 11(1) to section 11(6) visa must be made from outside the Republic. Save as aforesaid, the contents of this sentence are denied.

69. *Ad second sentence*: This sentence is admitted.

70. *Ad third sentence*: The Department has explained the rationale and objectives of the applicable legislation, which include the following: the policy reason of externalising borders; economic savings; security reasons; eliminating fraud and abuse of spousal and family visas; bureaucratic and administrative efficiency. It is averred that the supplied by the Department meet the requirements for justified limitation in terms of section 36 of the Constitution.

71. *Ad fourth sentence*: This sentence is denied. The Department has shown a rational link between the chosen means and the purpose of the legislation and policy.

Ad paragraph 47

72. This paragraph is denied. The Department has explained in its High Court answering affidavit that it has previously allowed individuals on visitor's visas to change from inside the Republic, and that this led to wide-spread fraud and abuse of the system. The

RM AG

Department has therefore tried less restrictive means and they had the effect of threatening the security of the Republic's borders, contrary to the objectives set out in that affidavit.

Ad paragraph 48

73. *Ad first sentence*: This sentence is denied. The Acting Judge relied on section 31(2)(c) of the Immigration Act.

74. The remainder of this paragraph is admitted.

Ad paragraph 49

75. *Ad first sentence*: I point out that the Department has noted an appeal against the Court's order to the effect that all applications to change status from a section 11(1) visa to a section 11(6) visa from within the Republic which are rejected must also be considered by the Minister in terms of section 31(2)(c) of the Immigration Act.

76. *Ad second, third and sixth sentences*: These sentences are denied. The limitation by the Regulations and section 10(6) is justifiable.

77. *Ad fourth sentence*: It is denied that the first and third applicants' circumstances are exceptional.

Ad paragraph 50

78. I point out that the Department has noted an appeal against the Court's order to the effect that all applications to change status from a section 11(1) visa to a section 11(6)

IOM GO

visa from within the Republic which are rejected must also be considered by the Minister in terms of section 31(2)(c) of the Immigration Act.

79. *Ad last sentence*: This sentence is denied, and is without basis.

Ad paragraph 51

80. This paragraph is denied, for the reasons already stated.

Ad paragraphs 52 - 53

81. These paragraphs are denied. The remedy of 'reading in' in the circumstances of this case infringes on the separation of powers principle and interferes with the policy objectives of the Act and the Regulations, as well as the provisions of the Act and the Regulations. The 'reading in' sought by the applicants requires a policy decision to be made, and the Court should refrain from making choices that are reserved for the legislature. The Court is not in a position to define with sufficient precision how the Regulation is to be amended, if the Court were to grant the order sought. The remedy will, furthermore, result in an unsupportable budgetary intrusion.

82. The instances relied on in this paragraph as examples of when the Department accepts visa applications from inside the Republic are tightly regulated, and experience much lower levels of fraud of abuse, compared to visitor visas. The fact that the Department already accepts visa applications from inside the Republic is in circumscribed, tightly regulated instances, and is not comparable to the position of the applicants.

Ad paragraph 54 (DIRECT APPEAL)

RM GT

83. The case authority set out in this paragraph supports the view of the Department, that the applicants should not be granted leave to appeal directly to this Court. It is not only constitutional matters that are involved. There are issues raised by the Department in its leave to appeal to the High Court; alternatively the SCA, which ought to first be adjudicated by those courts before this Court pronounces on the matter. There is no case made out by the applicants for urgency in having this Court determine the matter before the SCA. Lastly, the Department has applied for leave to appeal to the High Court, alternatively the SCA. It is undesirable to have different courts pronouncing on the same issues disjunctively.

Ad paragraph 55.1

84. This paragraph is denied. This matter also concerns the Court orders granted by the High Court, which are being appealed in the High Court, alternatively to the SCA. On the applicants' own version, they also seek to appeal the High Court's finding in relation to the *Stewart* decision. That issue is not directly a constitutional point, but is a matter of interpretation of the Immigration Act.

Ad paragraph 55.2

85. It is admitted that the case involves crucial issues. However, that does not justify direct leave to appeal to this Court instead of the normal route.

Ad paragraph 55.3

86. I have no knowledge of the factual allegations in this paragraph. However, the interests of justice involve more than the applicants' financial arrangements. I have already set

RM GG

out above the issues militating against direct leave to appeal to this Court, and ask that they be weighed against the contents of this paragraph.

Ad paragraph 55.4

87. This paragraph is denied. The visitor's visas of the first and third applicants expired in 2015. There is therefore no urgency in the matter; alternatively there is self-created urgency.

Ad paragraph 55.5

88. This paragraph is denied. it is because the first applicant failed to regularise her stay that the minor child is unregistered. The failure to register the child also resumed in 2015. There is therefore no urgency; alternatively, there is self-created urgency.

Ad paragraph 55.6

89. This paragraph is denied.

Ad paragraph 55.7

90. It is denied that this case entails simply applying *Dawood* to the Regulations. The *Dawood* decision of this Court is distinguishable from the facts of this case.

90.1. In *Dawood*, the Department and the Minister of Home Affairs did not oppose the matter, and this Court therefore did not have the benefit of considering the policy objectives of the impugned legislation. By contrast, in this matter, the courts have the benefit of considering the Department's case, and specifically

RM GS

the rational objective of the impugned legislation, as set out in the High Court answering affidavit.

90.2. The issue in *Dawood* was that the right to family life was dependent upon the exercise of a discretion conferred upon officials to grant or extend temporary permits, with no guidance as to the factors relevant to the refusal of the grant or extension of such permits. No such issue arises in this case.

90.3. The provision in question in the case of *Dawood,* section 25(9)(b) of the Aliens Control Act 96 of 1991 has since been repealed. The impugned legislation in this case has different requirements.

Ad paragraph 55.8

91. It is averred that Thulare AJ was correct in his findings regarding the Stewart decision. The learned Donen AJ's decision on the matter was wrong, and was cause of much confusion and abuse.

Ad paragraph 55.9

92. This paragraph is admitted.

Ad paragraph 56

93. This paragraph is denied.

Ad paragraphs 57 - 59 (CONCLUSION)

94. These paragraphs are denied, for the reasons already stated.

RM CG

95. In the circumstances, the applicants' application should be dismissed with costs.

RONNEY MARHULE

I certify that:

1. The deponent acknowledged to me that:
   1.1 he knows and understands the contents of this declaration;
   1.2 he has no objection to taking the prescribed oath;
   1.3 he considers the prescribed oath to be binding on his conscience.
2. the deponent thereafter uttered the words, "I swear that the contents of this declaration are true, so help me God";
3. the deponent signed this declaration in my presence at the address set out hereunder on this 23 day of **MAY 2018**.

COMMISSIONER OF OATHS

Designation and Area
Full Names
Address

CLERK JOHANNES STONE
MARTIN CLARK
28 CHURCH SQUARE
PRETORIA
0002

DIRECTOR OF PUBLIC PROSECUTIONS
PRIVATE BAG X300
23 MAY 2018
APPEAL SECTION
PRETORIA 0001
NORTH GAUTENG: PRETORIA