IN THE CONSTITITIONAL COURT OF SOUTH AFRICA

CASE NO.: CCT 114/18

In the matter between:

ROBINHA 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

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APPLICANTS' WRITTEN SUBMISSIONS

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INTRODUCTION

1. This application for leave to appeal and appeal raises as its primary issue whether it is constitutionally permissible to compel all foreign spouses and children of citizens holding visitor's visas to leave the South Africa in order to lodge applications to change their visa statuses under the Immigration Act 13 of 2002 (**Immigration Act**).

2. Compelling all foreign spouses and children to leave South Africa infringes upon both the right to dignity and on the rights of children protected by section 28 of the Constitution.

3. The right to dignity is infringed whenever a legislative or regulatory scheme prevents a married couple from enjoying the ordinary incidents of marriage, including their rights and obligations of cohabitation. This Court has already decided so in the *Dawood* case,[1] and declared a legislative regime unconstitutional on account of the impact that it could have on married couples when one of the spouses may be required to leave South Africa pending an application for an immigration permit (permanent residence).

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[1] *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC).

4. The present regime created by the Immigration Act and its Regulations[2] intrudes significantly further into the spousal relationships between foreign spouses, and citizens or permanent residents than the regime considered in *Dawood*. Unlike in *Dawood*, now when the spouse of a citizen or permanent resident holding a visitor's visa wishes to apply for a spousal visa[3] or relative visa,[4] that spouse must leave South Africa and lodge their application outside of the country (and ordinarily in their country of origin). Unlike in *Dawood,* they cannot apply for a temporary permit or visa pending their visa application.

5. The impact of the foreign spouse being forced to leave South Africa on the married couple could be tremendous. Once back in his or her country of origin, the foreign spouse has, *inter alia*, to submit a passport as part of the application for a visa, preventing return to South Africa until the application has been decided. This process may take months just to receive an initial decision, and years to exhaust the applicant's internal reviews or appeals. In that time the harm to and violation of the rights in the marriage of that spouse and his or her South African or permanent resident spouse will be

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2 The Immigration Regulations, 2014 (**the Regulations**) Government Gazette 37679 published on dated 22 May 2014.

3 Being the customary name of the visa granted under section 11(6) of the Immigration Act – albeit that such visas are still visitor's visas.

4 Granted under section 18 of the Immigration Act.

severe.

6. However, it is not only the spouses who remain in South Africa that have their dignity infringed by this regime, but also any children to the couple. Children have a right to family care which is severely curtailed when one of their parents is required to leave the other parent behind in order to return to his or her country of origin to submit an application. Regardless of which parent that child remains with, the child loses his or her right to be cared for by the family as a whole and loses the right to be cared for by the other parent. The child's bests interests are also not advanced when accompanying a parent abroad – travel may be disruptive to its routine and schooling.

7. These infringements cannot be, and are not, saved by the section 36 of the Constitution. The intrusions into the right to dignity are too severe, denying the remain spouse's rights and duties of cohabitation for months, and the harms to the rights of a child considerable. The respondents' stated goals in requiring foreign spouses to return to their countries of origin are not served by such a regulatory regime. The advantages of externalising the borders have already been lost by the time a foreign spouse holds a visitor's

visa and is present in South Africa, and the dangers of fraudulent marriages or marriages of convenience need not combated by spouses returning to their countries of origin.

8. In the remainder of these submissions we address:

8.1. Why leave to appeal directly to this Court should be granted;

8.2. The factual background to this application;

8.3. The legislative framework in which this Court should determine whether Regulation 9(9) is constitutionally compliance;

8.4. The rights limitations caused by the requirement that foreign spouses holding visitor's visas leave the Republic and why those limitations are not saved by section 36 of the Constitution; and

8.5. The appropriate relief in the event that Regulation 9(9) falls to be declared invalid, especially in light of the rule of law and respect for judicial decisions, as well as appropriate consequential relief for the applicants.

THE APPLICATION FOR LEAVE TO APPEAL

9. We respectfully submit that it is in the interests of justice to grant leave to appeal directly to this Court:[5]

   9.1. This Court's constitutional jurisdiction is directly engaged. The application for leave to appeal concerns the constitutional validity of a Regulation, and the appeal raises issues exclusively of a constitutional nature.

   9.2. Granting leave to appeal will save significant time and expense. The applicants have spent years in a state of uncertainty as to their visa statuses, and the matter warrants expeditious finalisation.

   9.3. The appeal has strong prospects of success. The merits of the appeal turn on findings that this Court has already made in the *Dawood* matter.

   9.4. The appeal would have a wide impact on other married couples in South Africa where one of the partners holds a visitor's visa and seeks to change their visa status.

   9.5. The appeal may resolve the status of conflicting judgments.

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[5] *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 (4) SA 395 (CC) para 21.

The Court *a quo* declined to follow a precedent of the same High Court that held that a person holding a visa issued under section 11(1) of the Immigration Act does not seek to change his or her visa status when applying for a spousal visa under section 11(6) of the Immigration Act.

9.6. The matter does not raise issues customarily requiring the consideration of the Supreme Court of Appeal, such as the development of the common law, but rather turns on the constitutional validity of a regulation or the proper interpretation of a statute in light of the Constitution.

THE RELEVANT FACTS

First applicant's application for a visa

10. The first applicant, Ms Nandutu, is a Ugandan citizen.[6] Holding a visitor's visa in terms of section 11(1) of the Immigration Act, she entered South Africa on 20 February 2015 to join the second applicant, Mr Tomlinson, a British citizen and permanent resident of South Africa.[7] Just over a month later, she married Mr Tomlinson

[6] R: 1/11/1.
[7] R: 1/11/3; 1/19/29.

and now lives with him in Durbanville.[8]

11. Following the advice of an attorney and before the expiry of her visitor's visa, she paid the prescribed fee and submitted an application for relative's visa in terms of section 18 of the Immigration Act on 22 April 2015.[9]

12. On 14 August 2015, Ms Nandutu and Mr Tomlinson had a son (Joshua). His birth has not yet been registered since Ms Nandutu is not in possession of a valid visa and Home Affairs will not register his birth until she has a valid visa or permit.[10] In this state of limbo, Joshua cannot apply for a passport or get his British citizenship, to which he is entitled.[11]

13. After not receiving a decision on her application for more than four months, Ms Nandutu instructed her attorneys to follow-up on the application.[12] She was then able to uplift the "Notice of Decision Adversely Affecting Person" on 7 October 2015, which had apparently been taken on 12 June 2015.[13] Her application was rejected for the reason that: "No change of status or conditions

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8 R: 1/19/29; 1/11/3; 1/71/5. The marriage was not registered by the marriage officer and so Ms Nandutu and Mr Tomlinson were 'remarried' on 13 December 2017. R: 3/259-260/31.

9 R: 11/20/30-31; 1/21/34; 3/181/28.

10 R: 11/20/30-32; 1/72/8. The conduct of Home Affairs in this regard is probably unlawful.

11 R: 1/72/7.

12 R: 1/20-21/34.

13 R: 1/21/35; 1/22/39; 2/183/34.

attached to the temporary visa while in the Republic in terms of section 10(6) of the Immigration Act, 2002."[14]

14. Within the ten working day period allowed, Ms Nandutu submitted an appeal against the rejection to the Director-General of Home Affairs (**Director-General**).[15]

15. The appeal was rejected ten months' later by the Director-General on 10 August 2016.[16] The Director-General's reason for his decision was "based on no change of status or condition attached to the temporary visa while in the Republic in terms of section 10(6) of the Immigration Act 2002".[17] It is unclear from the Director-General's reasons whether he determined Ms Nandutu's application to be a visitor's visa application, or a work visa application.[18]

16. Ms Nandutu then submitted an administrative review application in terms of section 8(6) of the Immigration Act to the Minister of Home Affairs, dated 25 August 2016.[19] The Minister rejected the review on 18 October 2016, although Ms Nandutu only uplifted the decision on

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14 R: 1/21/37. The respondents are bound by that reason. *National Lotteries Board v South African Education And Environment Project* 2012 (4) SA 504 (SCA) paras 26-27*; Zuma v Democratic Alliance* 2018 (1) SA 200 (SCA) para 24.
15 R: 1/22/41. The appeal is RN5 1/41-47. Section 8(4) of the Immigration Act.
16 R: 1/22/42; 2/183/37.
17 R: 1/23/43.
18 R: 1/23/43-44.
19 R: 1/23/45; 2/183/38.

31 October 2016.[20]

17. Ms Nandutu brought a judicial review of the Minister's decision on 16 February 2017. However, she discovered that her initial application had been for a relative's visa and not a spousal visa so she withdrew her review application.[21]

The third applicant's application for a visa

18. The third applicant, Mr Demerlis, is a Greek citizen.[22] He has been in an exclusive life partnership and living with the fourth applicant, Mr Ttofalli, since February 2013.[23]

19. During the currency of a visitor's visa, Mr Demerlis lodged an application, with the required fee, for a spousal visitor's visa in terms of section 11(6) of the Immigration Act on or about 9 April 2015.[24]

20. On 14 May 2015, Mr Demerlis uplifted a "Notice of Decision Adversely Affecting Right of Person" dated 4 May 2015 and which rejected his spousal visitor's visa.[25] The decisionmaker gave as the reason for the rejection of the application: "*No change of status or*

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20 R: 1/23/46; 2/184/39.
21 R: 1/24/49-50.
22 R: 1/77/1.
23 R: 1/77/4; 2/162/4.
24 R: 1/78/9-10; 2/200/124-125.
25 R: 1/79/11.

conditions attached to the temporary residence visa while in the republic" and "*No documentation to prove the financial support to each other and the extent to which the related responsibilities are shared by the applicant or his spouse*".[26]

21. On 28 May 2015, Mr Demerlis paid the service fee and lodged an appeal against this decision to the Director General.[27] The appeal noted that Mr Demerlis was seeking to extend his visa for a period of three years to continue living with Mr Ttofalli.[28] The appeal also pointed out the documentary proof that Mr Demerlis had included in his original application.[29]

22. On 30 September 2015, Mr Demerlis uplifted the decision by the Director-General (dated 4 September 2015), which rejected his appeal.[30] The stated reason for this rejection was "No contract of employment to support the category 11(6) which the applicant applied for".[31]

23. Mr Demerlis then lodged a review dated 13 October 2015 to the

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26 R: 1/79/12.
27 R: 1/79/14; 3/202/131.
28 R: 1/80/15.
29 R: 1/80/16.
30 R: 1/80-18/19-20; 3/203/133.
31 R: 1/81/20.

Minister against the appeal decision.[32]

24. The Minister only decided Mr Demerlis' review eighteen months later on 18 May 2017, which Mr Demerlis uplifted on 25 May 2017.[33] The Minister rejected Mr Demerlis' review, giving his basis for the rejection that "any person holding a visitor's visa or medical treatment visa may not change the status of his/her visa whilst in the Republic."[34]

The relief sought and proceedings before the High Court

25. On 28 June 2017, the applicants issued founding papers.[35] In their notice of motion, as amended, the applicants sought:[36]

    25.1. To declare regulation 9(9)(a) unconstitutional to the extent that it does not extend exceptional circumstances to include when the applicant is the spouse or child of a citizen or permanent resident.[37] To remedy this invalidity, the applicants sought to read into Regulation 9(9)(a) as sub-regulation 9(a)(iii) the words: "is a spouse or child of a South African

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32 R: 1/81/23; 1/82/27.
33 R: 1/82/29; 3/204/135.
34 R: 1/83/32.
35 R: 1/1 court stamp.
36 The applicants also sought relief in their notice of motion which they did not proceed with after filing their replying affidavit, and which is accordingly not summarised here.
37 R: 1/2/2-2.2.

citizen or permanent resident".[38]

25.2. To review and set aside the rejection of Ms Nandutu's relative's visa application, and to review and set aside Mr Demerlis' visitor's visa application.[39] Consequentially, the applicants seek an order that Ms Nandutu and Mr Demerlis be issued with a resident's visa and visitor's visa respectively.[40]

26. After a number of interim orders were granted, the matter was brought before Acting Judge Thulare. He dismissed the application with no order as to costs.

27. Acting Judge Thulare also granted leave for the first and third applicants to submit applications in terms of section 31(2)(c) of the Immigration Act to the Minister, for good cause, to consider waiving the requirements under Regulation 9(9) within thirty days, and directed the Department not to refuse applications by holders of section 11(1) visas for section 11(6) visas only on the basis that the applicants were in the country, unless the Minister had dismissed the section 31(2)(c) application or there was other good cause for

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38 R: 1/3/3.
39 R: 1/3/4&6.
40 R: 1/3/5; 1/4/7.

such refusal.[41] The applicants were granted leave to submit applications for section 11(6) visas within 30 days or a longer period as determined or prescribed by the Minister.

28. Acting Judge Thulare directed the Director-General to assist Joshua in having his birth registered, or to appear before the Children's Court to give reasons for the failure, directed that the Children's Court could make an order it deemed just and in the best interests of the child.

LEGISLATIVE FRAMEWORK

29. Foreigners who do not hold a permanent residence permit[42] may only enter and sojourn in the Republic if they are in possession of a visa issued by the Director-General for a prescribed period.[43] The types of visas that may be issued by the Director-General are provided for in section 10(2) of the Immigration Act, and include visitor's visas[44] and relative's visas.[45]

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41 It is unclear on what basis this order could be granted. Section 31(2)(c) of the Immigration Act provides for the waiver of a "prescribed requirement or form". Regulation 9(9) does not include a requirement or a form. The requirement to depart from South Africa arises from section 10(6) of the Immigration Act and not from the Regulations, and accordingly could not be waived by the Minister in terms of section 31(2)(c).

42 In terms of section 25 of Immigration Act.

43 Section 10(1) of the Immigration Act.

44 Section 10(2)(b) read with section 11 of the Immigration Act.

45 Section 10(2)(h) read with section 18 of the Immigration Act.

30. Persons seeking visas to come to the Republic to join their spouses are as a matter of practice granted visas under section 11(6) (customarily called a spousal visa) or section 18 (relative's visa) of the Immigration Act. Section 11(6) of the Immigration Act states:

> "(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 [including workings and studying]; 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."

31. Relatives' visas may be granted for up to the prescribed period (presently 24 months), and do not allow the holder to work.[46]

32. When a foreigner enters South Africa on a visa or permanent residence permit granted in terms of the Immigration Act, they

[46] Section 18(1) of the Immigration Act read with [*]. Section 18(2) of the Immigration Act.

acquire the status determined by that visa or permit.[47]

33. Section 10(6)(a) of the Immigration Act permits a foreigner, other than the holder of a visitor's visa or medical treatment visa, to apply to the Director-General to change his or her status and/or the terms and conditions attached to his or her visa.

34. Section 10(6)(b) of the Immigration Act provides that an application for change of status attached to a visitor's or medical treatment visa shall not be made by the visa holder while he or she is in South Africa, except in prescribed exceptional circumstances.

35. Immigration Regulation 9(9) lists the prescribed exceptional circumstances. It lists two exceptional circumstances in respect of the holders of visitor's visas:

    35.1. The applicant is in need of emergency life-saving medical treatment for longer than three months; or

    35.2. 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.

[47] Definition of "status" in section 1 of the Immigration Act.

36. The consequence of Regulation 9(9) read with section 10(6) of the Immigration Act is that holders of visitor's visas married to permanent residents or citizens must leave South Africa to change their visa status. This would mean returning to their country of origin and remaining there (possibly without their family) until they have a new visa.

37. In the case of *Stewart v Minister of Home Affairs*[48] the High Court, Western Cape Division, held that a person that seeks to apply for a spousal visa under section 11(6) of the Immigration Act whilst holding a visitor's visa issued under section 11 of the Immigration Act does not seek to change his or her status under the Act and is accordingly not required to leave the Republic.[49] The High Court's reasoning cannot be faulted:

37.1. Although visas issued under section 11(6) of the Immigration Act are by practice referred to as "spousal visas", they remain visitor's visas under section 11.

37.2. Section 11 is titled "visitor's visa", and an applicant for a visa under section 11(1) is granted a "visitor's visa". So too is the applicant for a visa under section 11(6), which allows for the

[48] (12520/2015) [2016] ZAWCHC 20 (29 January 2016).
[49] *Stewart v Minister of Home Affairs* (12520/2015) [2016] ZAWCHC 20 (29 January 2016) para 41.

Director-General to issue a "visitor's visa". There is accordingly no application for a change in status when a holder of a visitor's visa issued under section 11(1) applies for a visitor's visa under section 11(6).

37.3. There would be a change to the conditions of the visa held by that applicant, but section 10(6)(b) of the Immigration Act only prohibits applications while in South Africa the holders of a visitor's visa "for a change of status". Section 10(6)(b) does not prohibit applications by the holders of a visitor's visa for a change of the terms and conditions of their visa.

37.4. For the reasons detailed below, such an interpretation would promote the spirit, purport and objects of the Bill of Rights, and should be endorsed by this Court.[50]

THE CONSTITUTIONAL INVALIDITY OF REGULATION 9(9)

The rights limited by Regulation 9(9)

38. Section 10 of the Constitution provides:

[50] Section 39(2) of the Constitution. As applied in *Phumelela Gaming and Leisure Limited v Grundlingh and Others* 2007 (6) 350 (CC) at paras 26 – 27; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* NO 2001 (1) SA 545 (CC) at paras 22-23; *Fraser v Absa Bank Ltd (NDPP as Amicus Curiae)* 2007 (3) SA 484 (CC) at para 47; and *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* (1) SA 337 (CC) at paras 46, 84 and 107

> "Everyone has inherent dignity and the right to have their dignity respected and protected."

39. Section 10(6)(b) of the Immigration Act read with Regulation 9(9) limit the right to dignity.

40. Section 10(6)(b) provides that persons holding a visitor's visa must leave South Africa to apply for a change of status to their visa, except in exceptional circumstances.

41. Regulation 9(9) provides the exceptional circumstances – namely when the holder of the visitor's visa is in need of emergency life-saving medical treatment for longer than three months or "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".

42. However, the exceptional circumstances in Regulation 9(9) do not extend to the spouse or children of a South African citizen or permanent resident. Spouses and children of South African citizens or permanent residents and who hold a visitor's visa are required by section 10(6)(b) to leave the Republic to lodge their applications for

a change in status.[51]

43. This Court has already held in the *Dawood* case that provisions or powers which require all spouses to leave in order to apply for a visa limit the right to dignity:[52]

43.1. After discussing the Constitutional Court's previous jurisprudence on the relationship between the right to dignity and the right to a family life[53] as well as the international instruments protecting the right to a family life,[54] it was held:

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[51] This would including having to leave to lodge an application for a spousal visa under section 11(6) of the Immigration Act if this Court does not endorse the holding of *Stewart v Minister of Home Affairs* summarised above.

[52] This holding was confirmed in *Booysen v Minister of Home Affairs* 2001 (4) SA 485 (CC) but the Constitutional Court did not provide further reasons, endorsing the reasoning of the court *a quo*.

[53] Specifically *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 1996 (4) SA 744 (CC) para 100.

[54] These included:

- Article 16 of the Universal Declaration of Human Rights ("(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution… (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.");

- Article 23 of the International Covenant on Civil and Political Rights ("(1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. (2) The right of men and women of marriageable age to marry and to found a family shall be recognised… (4) States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution…"; and

- Article 18 of The African Charter on Human and Peoples' Rights ("1. The family shall be the natural unit and basis of society. It shall be protected by the State… 2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community…").

To these might be added Article 10(1) of the International Covenants on Economic, Social and Cultural Rights ("[t]he widest possible protection and assistance should be afforded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children", Article 16 of the Convention on the Elimination of all Forms of Discrimination Against Women,

"The decision to enter into a marriage relationship and to sustain such a relationship is a matter of defining significance for many if not most people and to prohibit the establishment of such a relationship impairs the ability of the individual to achieve personal fulfilment in an aspect of life that is of central significance. In my view, such legislation would clearly constitute an infringement of the right to dignity. It is not only legislation that prohibits the right to form a marriage relationship that will constitute an infringement of the right to dignity, but any legislation that significantly impairs the ability of spouses to honour their obligations to one another would also limit that right. A central aspect of marriage is cohabitation, the right (and duty) to live together, and legislation that significantly impairs the ability of spouses to honour that obligation would also constitute a limitation of the right to dignity."[55] Our underlining.

43.2. Against this holding, this Court had to consider whether section 25(9) of the Aliens Control Act, 96 of 1991, limited the right to dignity. It held that section 25(9) read with section 23 of the Aliens Control Act provided for a general rule that applicants for immigration permits must leave South Africa to submit their applications, but that section 25(9)(b) made an exception for *inter alia* spouses and dependent children of people lawfully and permanently resident in South Africa, by allowing them to apply for a temporary residence permit pending their immigration permit application within South

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and regional instruments including Article 17(1) of the American Convention on Human Rights and Article 8(1) of the European Convention for Protection of Human Rights and Freedoms.

55 *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 37.

Africa. However, since temporary residence permits were not automatically granted but subject to the discretion of immigration officials there was a possibility that such applications could be refused.[56]

43.3. This Court accordingly held that:

"The effect of such a refusal is that a South African married to a foreigner is forced to choose between going abroad with his or her partner while the application is considered, or remaining in South Africa alone. Many South African spouses will not even face this dilemma on account of their poverty or other circumstances and will have to remain in South Africa without their spouses. The right (and duty) to cohabit, a key aspect of the marriage relationship, is restricted in this way. Accordingly, the right to dignity of spouses is limited by the statutory provisions that empower immigration officers and the DG to refuse to grant or extend a temporary permit. Having regard to the general prohibition against remaining in South Africa pending the outcome of an application for an immigration permit, the power to refuse the temporary permit is a power, in effect, to limit the right of cohabitation of spouses." Our underlining.

43.4. Accordingly, to require spouses to leave South Africa pending the determination of an immigration permit limited the right to dignity, and this Court had to assess whether that limitation passed constitutional muster.

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[56] *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) paras 38-39

44. *Dawood*'s reasoning applies with even greater force to the general rule in section 10(6) of the Immigration Act read with Regulation 9(9): All spouses of citizens and permanent resident that hold visitor's visas must leave if they wish to apply for a change in status. There is no ordinary regulatory discretion to allow them to remain. Their spouses then have to make a choice (if they have the financial means and employment flexibility to make the choice) – leave South Africa to remain with their spouse or stay and lose their right and duty to cohabit with their spouse.

45. Accordingly, section 10(6) of the Immigration Act read with Regulation 9(9) "significantly impairs the ability of spouses to honour that obligation [to cohabit]" and constitutes a limitation of the right to dignity.

46. The right to dignity is not the only constitutional right infringed by section 10(6) of the Immigration Act read with Regulation 9(9). Section 28(1)(b) provides that "Every child has the right… to family care or parental care, or to appropriate alternative care when removed from the family environment." And section 28(2) provides that "A child's best interests are of paramount importance in every matter concerning the child."

47. As explained in *Jooste v Botha*[57] "What section 28(1)(b) envisages, therefore, is a child in care of somebody who has custody over him or her. To that situation every child is entitled. That situation the State is constitutionally obliged to establish, safeguard and foster. The State may not interfere with the integrity of the family."[58]

48. As the Supreme Court of Appeal commented in *Minister of Police v Mboweni*:[59]

> "The language of the section [28(1)(b)] suggests a progression from an ideal of being raised and cared for in a family, bearing in mind that concepts of family differ among different communities in this country and that the notion of what constitutes a family is subject to evolution over time, to parental care by one or both of a child's parents, to appropriate alternative care, which may mean foster care or care in an appropriate home or institution. The latter is probably seen as the least desirable situation, but may be necessary in the best interests of the child, which are paramount in terms of s 28(2) of the Constitution."[60]

49. Section 10(6) of the Immigration Act read with Regulation 9(9) limit the rights of children who have a parent that is required to leave South Africa in order to apply for a change in status. The circumstances in which this will occur are myriad and so the impact

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57 2000 (2) SA 199 (T).

58 Ibid p 208F

59 2014 (6) SA 256 (SCA). This appears similar to the position adopted in the concurring judgment of Justice Skweyiya in *C v Department of Health and Social Development, Gauteng* 2012 (2) SA 208 (CC) para 24.

60 Ibid para 10.

on the child will vary. In the worst cases, the primary-caregiving parent will be required to leave and due to financial wherewithal, schooling or health related reasons, or, as in this case, the child lacks a travel document, the child will have to remain in South Africa. In less severe cases, the child might be able to travel with the parent, or the primary caregiver is in South Africa. But common to both cases is that the child's family is split.

50. The requirement that foreign spouses of citizens and permanent residents holding visitor visas must leave South Africa to submit their applications for a change of status infringes the right to dignity and the rights of children to family care. Those infringements cannot be saved by section 36 of the Constitution, to which issue we now turn.

The nature of the rights limited

Dignity

51. The importance of dignity within South Africa's constitutional order has been repeatedly emphasised by this Court.[61] Dignity is a

[61] For recent examples, see *Daniels v Scribante* 2017 (4) SA 341 (CC) paras 1-3; *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 (2) SA 168 (CC) para 52.

fundamental value;[62] one of the democratic values affirmed by our Bill of Rights;[63] of central significance in the limitations analysis;[64] and an interpretative aid when interpreting the Bill of Rights.[65]

52. For these reasons, this Court held in *Dawood* that:

> "The value of dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings."[66]

53. The dignity inherent in marrying and then living in accordance with the precepts of that marriage, including the right and obligation of cohabitation, has also been recognised by this Court.

53.1. In the First Certification judgment, this Court explained that the right to dignity would protect against the historical violations of the apartheid state including "the kinds of violations of family life produced by the pass laws or the institutionalised migrant labour system, just as it would not permit the prohibitions on free choice of marriage partners imposed by laws such as the Prohibition on Mixed Marriages

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62 Section 1(a) of the Constitution.
63 Section 7(1) of the Constitution.
64 Section 36(1) of the Constitution.
65 Section 39(1) of the Constitution.
66 *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 35.

Act 55 of 1949."[67] To this may be added Justice O'Regan's footnote in *Dawood* that:

"The right to cohabit was another aspect of marriage and family life severely attenuated under apartheid legislation. The practice of migrant labour was legislatively imposed by a myriad of regulations - the central of which was s 10(1)(d) of the Blacks (Urban Areas) Consolidation Act 25 of 1945, as amended, which provided that certain black workers were permitted to enter urban areas, largely reserved for whites, for the purposes of performing their obligations in terms of employment contracts. Their families were not permitted to join them upon pain of criminal sanction."[68]

53.2. In *Dawood* the Court noted the importance of marriage in its many manifestations, including in civil and common law, customary law and Islamic law and stated that:

"Marriage and the family are social institutions of vital importance. Entering into and sustaining a marriage is a matter of intense private significance to the parties to that marriage for they make a promise to one another to establish and maintain an intimate relationship for the rest of their lives which they acknowledge obliges them to support one another, to live together and to be faithful to one another. Such relationships are of profound significance to the individuals concerned. But such relationships have more than personal significance, at least in part because human beings are social beings whose humanity is expressed through their relationships with others. Entering into marriage therefore is

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67 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 1996 (4) SA 744 (CC) para 100.

68 *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) fn 61..

to enter into a relationship that has public significance as well."[69]

54. The rights of a child are of significant constitutional importance. This Court held in *Du Toit*[70] that: "is clear from section 28(1)(b) that the Constitution recognises that family life is important to the well-being of all children".[71] In *S v M*[72] this Court explained that "section 28 requires the law to make best efforts to avoid, where possible, any breakdown of family life or parental care that may threaten to put children at increased risk. Similarly, in situations where rupture of the family becomes inevitable, the State is obliged to minimise the consequent negative effect on children as far as it can."[73] These sentiments were echoed in the concurring judgment of Justice Skweyiya in *C v Department of Health and Social Development, Gauteng*[74] and to which he added: "Children's rights, and the rights relating to family life, bear tremendous importance in a caring constitutional democracy."[75]

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69 *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 30.
70 *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC).
71 Ibid para 18.
72 *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC).
73 Ibid para 20.
74 2012 (2) SA 208 (CC).
75 Ibid para 30.

The importance of the purpose of the limitation

55. The respondents advance the following rationales for the requirement that all spouses of citizens and permanent residents must leave when they hold visitor's visas and wish to change their statuses:

55.1. As a general proposition, South Africa, as a sovereign state, has an interest in determining who is allowed entry into the country and under what conditions.[76]

55.2. The State has adopted a "risk-based approach" of "externalising the borders" or "off-shore border manager", which aims as ensuring that undesirable persons are prevented from travelling to South Africa from their source countries.[77] This is most effectively done, the respondents submit, by screening for visa issuance at a mission or embassy abroad, since it is more cost effective and expeditious.[78]

55.3. The State should prevent persons from fraudulently overstaying in South Africa.

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[76] 2/173/9. This does not, of course, exclude the State's obligation to respect the constitutional rights of those within its territory. *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC) paras 25-26.

[77] 2/173/10.

[78] Ibid. See also 2/174-175/13.

56. These appear to be legitimate governmental purposes.

57. However, the respondents add to these valid purposes that: “people must apply for the appropriate visas at their home countries. They must make up their minds in their home countries regarding the reason for travel to South Africa. If a foreign person desires to work or conduct business in South Africa, an appropriate visa application must be made in their home country. The same goes for a foreign person intending to marry an individual who is already in South Africa and has a permanent residence or citizenship.”[79]

58. This purpose is questionable. There is no reason why those who travel to South Africa should be precluded from staying in South Africa for a different reason. A person travelling under a visitor’s visa for a long-term academic sabbatical[80] or as a volunteer in a local charity might fall in love and marry. Or a partner in a long-distance relationship may visit their partner in South Africa under a visitor’s visa, accept a surprise proposal and get married.

59. This stated purpose is also misleading since the respondents use it in their answering affidavit to create the impression that foreigners,

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79 2/174/11.
80 Section 11(1)(b)(i).

including Ms Nandutu, who come to South Africa with a plan to marry a South African citizen or a permanent resident are acting fraudulently.[81] This is unwarranted – the Immigration Act expressly provides that visitor's visas "may be issued for any purpose other than those provided for in sections 13 to 24".[82] Visitor visas are a catch-all visa, intended to allow those who wish to come to South Africa for non-listed reasons. There is no provision for a fiancé visa and the applicants cannot be criticised for applying for visitor's visas. The intemperate attacks on the applicants for holding visitor's visas whilst unmarried to their respective partners or before their relationships had reached the required level of permanency to qualify for spousal visas are to be regretted.[83]

The relation between the limitation and its purpose

60. There is no reasonable or rational relationship between the purposes identified by the respondents and the means that they have identified – requiring spouses of citizens and permanent residents to return to their countries of origin when they wish to apply to change their statuses under the Immigration Act.

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81 2/177-178/20.

82 Namely: study visas (section 13), treaty visas (section 14), business visas (section 15), crew visas (section 16), medical treatment visas (section 17), relative's visas (section 18), work visas (section 19), retired person visas (section 20), corporate visas (section 21), exchange visas (section 22), and asylum transit visas (section 23).

83 See 2/179/21 for the attack on Mr Demerlis.

61. South Africa's interest in determining who is allowed entry into the country and the conditions of such entry is unaffected by whether an applicant returns to their country of origin to make application; the State may apply the same substantive provisions to determine whether to grant a visa and may impose the same substantive conditions. This, indeed, is the decision made in the Immigration Act and Regulations. Despite that the Immigration Act and the Regulations permit some persons to apply for visas within the Republic and others only in their country of origin, applications lodged abroad do not have to satisfy different substantive requirements to those lodged domestically.

62. Nor is the State's policy of externalising the borders served by requiring spouses holding visitor visas to return to their countries of origin to change their status.

63. If such a spouse is a non-desirable person, then he or she has already made it to South Africa and the policy has failed to achieve its purpose. Furthermore, if such a non-desirable person is prepared to return to their country of origin to lodge an application to change their status, then there is scant reason to believe that they would not do so upon receipt of an adverse decision on their application (and

any flight risk at that stage could be handled by Home Affairs at the time of collection of the decision).

64. The practical benefits of screening visa applications in countries of origin are also not served by having an applicant apply in the country of origin. Nothing prevents the State from couriering or emailing visa applications submitted domestically to the applicant's country of origin. In any event, with the data available to the State, such screening could take place in South Africa.

65. The respondents allege that requiring foreign spouses to return to their countries of origin was motivated by "wide-spread and alarming levels of abuse" discovered by the Department in the form of fraudulent marriages and marriages of convenience.[84] The evidence that the respondents provide in support of their allegations is sparse. DHA2, which the respondents allege shows the widespread abuse, is an illegible table containing conclusions, with no description of how it was populated, whom populated it, or why its contents may be treated as reliable. It falls well short of supporting evidence that could support any of the conclusions advanced in the answering affidavit and no weight should be given

[84] 2/175-177/15-18.

to it or the conclusions drawn from it.

66. Nevertheless, the respondents' conclusions of widespread fraud are accepted at face value, it undermines, rather than supports, the need for foreign spouses to return to their countries of origin:

66.1. Firstly, the report was compiled at a time when persons could change status while in South Africa.[85] Of the 895 applications, only 19 were confirmed to be genuine, 128 untraceable or uncooperative, and 23 deceased.[86] These numbers seem improbable on the face of it. But if true, they show that the Department of Home Affairs detected 725 cases of fraud, being 81% of the sample, and did so even though those applications were submitted in South Africa and not in the country of origin. Unless the Department fears that the remaining 19% may also be fraudulent, it seems that Home Affairs is more than capable of detecting fraud without requiring applicants to return to their countries of origin.

66.2. Secondly, the respondents allege that "[t]he Department has discovered that the abuse mentioned above regarding fraudulent applications and marriages of convenience, occurs

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85 2/175/15.
86 2/176/16.

mostly in instances where one of the parties is a permanent resident or a citizen of South Africa. Where both parties are foreigners, the incidence of fraud or abuse is virtually non-existent."[87] However, if the marriage to the South African or the permanent residence is fraudulent or one of convenience, this would be uncovered by investigations into the marriage – which are far more likely to have to occurred at least partially (if not entirely) within South Africa rather than in the country of origin.

67. It is emphasised that if the 725 alleged instances of fraud were in fact fraudulent and intended to deceive Home Affairs into issuing a permanent residence permit, then there is no reason to expect that those applicants would not come to South Africa on visitor visas issued under section 11(1) of the Immigration Act and overstay their visas once here.

The nature and extent of the limitation

68. The respondents seek to underplay the extent of the limitation caused by the requirement to leave. They allege that: "the

[87] 2/179/24.1. This is the basis upon which the respondents allege that it is rational to allow foreign spouses of persons holding a business or work visa to apply with a change of status while in South Africa but to deny that right to the spouses of citizens and permanent residents.

requirement to leave the Republic in order to apply for a new visa amounts to an absence of approximately two days. Applicants are not required to await the outcome of an application. They would not be prevented from entering South Africa on a visitor's visa pending the outcome of the applications for a relative's visa in terms of section 18 or a visitor's visa in terms of section 11(6)(b)."[88]

69. Even on its own terms, the allegation that an applicant would only have to be absent for two days is hyperbolic. However, the allegation is incorrect:

69.1. Regulation 9(1)(a) provides that applications for visas in terms of, *inter alia*, sections 11 and 18 must be "accompanied by… a valid passport". As Ms Nandutu explained in her replying affidavit, "an applicant is required to hand in his/her passport when applying for a visa".[89] Without a passport, an applicant cannot return to South Africa on a port of entry visitor's visa and must await the outcome of his or her spousal or relative's visa outside South Africa.

69.2. What is known is that the initial decision on Ms Nandutu's

88 2/178/22.
89 3/263/38.1.

application took more than four months,[90] and the initial decision on Mr Demerlis' application took about a month.[91] There is no reason to believe that these lengthy time periods are outliers - the initial application in the *Stewart* decision appears to have taken roughly a month. Moreover, it took significantly longer for the responsible state officials to make decisions in respect of Ms Nandutu and Mr Demerlis' internal reviews and appeals, which took in Ms Nandutu's case roughly a year and in Mr Demerlis' case just shy of two years.

69.3. Even assuming that an applicant could return to the Republic after lodging his or her application, the applicant would have to travel back to their country of origin to collect any decision on the application.[92] Given the possibility of an erroneous decision, an applicant could be left travelling backwards and forwards between South Africa and their country of origin for months, if not years.[93]

70. In *Dawood*, this Court accepted that the worst-case scenario under that framework was that a spouse might have his or her application for a temporary residence permit rejected, and would thus be

90 R: 1/20-21/34.
91 R: 1/79/11; 2/200/124-125.
92 R: 3/264/38.2.
93 R: 3/264/38.2.

required to wait-out the full time period for a decision on his or her immigration permit. Without specifying what length of time this might be, the Court stated:

> "The exact nature and effect of the deprivation of rights will depend on the circumstances of each case in which the grant or extension of a temporary residence permit is refused. The result of such a refusal will be that the foreign spouse will be required to leave South Africa pending the decision of the Regional Board on his or her application for an immigration permit. Even if the South African spouse is able to accompany his or her spouse to the foreign State, the limitation of the rights of the South African spouse is significant. It is aggravated by the fact that applicants do not know when their applications for immigration permits will be considered by the relevant regional committee. The limitation is even more substantial where the refusal of the permit results in the spouses being separated. Enforced separation places strain on any relationship. That strain may be particularly grave where spouses are indigent and not in a position to afford international travel, or where there are children born of the marriage. Indeed, it may well be that the enforced separation of the couple could destroy the marriage relationship altogether. Although these provisions do not deprive spouses entirely of the rights to marry and form a family, they nevertheless constitute a significant limitation of the right."[94]

71. These findings would apply with equal measure to an applicant for a spousal or relative's visa awaiting a decision in their country of origin.

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[94] *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 51.

72. A useful analogy in this context is this Court's decision in *Dladla v City of Johannesburg*.[95] There this Court had to consider the constitutionality of rules in temporary emergency accommodation that compelled spouses to sleep in separate, gender segregated, dormitories overnight. In that matter, like in this matter, the period of spousal-separation would be temporary. Nevertheless, the Court described the effect of the overnight-separation rule in the following way:

> "The right to dignity includes the right to family life. This right in turn consists of the right to marry and the right to raise a family. The family separation rule creates a vast chasm — between parents and children, between partners and between siblings — where there should be only intimacy and love. As the High Court notes, the family separation rule erodes the basic associative privileges that inhere in and form the basis of the family. Therefore, in so many ways, the lockout and family separation rules limit the dignity of the applicants."[96]

73. The rights of a child would also be significantly impinged upon by a parent being required to return to their country of origin to await a visa.

74. When this results in the family being split, the child's rights to family

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95 2018 (2) SA 327 (CC).

96 Ibid para 49. In the High Court, Judge Wepener held that: "The splitting-up of families at the shelter cuts to the very heart of the right to dignity and the right to family life." See *Dladla v City of Johannesburg* 2014 (6) SA 516 (GJ) para 36.

life and to family care are infringed. He may be with one parent or the other but not both. However, an unwanted split in the family unit infringes a child's principle right to family care (as opposed to parental care or appropriate alternative care). If the child cannot travel with or remain with the primary caregiver, this also impacts negatively on his or her right to receive care. However, even in cases where the child can travel to the foreign spouse's country of origin with both of his or her parents, this may be disruptive to the child's routine or schooling, with months or even years of uncertainty.

A less restrictive means

75. There is a less restrictive means to achieving the purposes identified by the Department – Regulation 9(9) may be amended to include as sub-regulation 9(a)(iii) the words: "is a spouse or child of a South African citizen or permanent resident". Applications submitted in South Africa that are more expeditiously, cost effectively and effectively determined in the embassy or consulate in the country of origin may be couriered there by the Department.

The appropriate remedy in respect of Regulation 9(9)(a)(iii)

76. If this Court holds that Regulation 9(9)(a) is unconstitutional, it must declare it to be inconsistent with the Constitution and invalid[97] to the extent that it fails to extend the rights accorded by means of the exceptional circumstances contemplated in section 10(6)(b) of the Immigration Act to the foreign spouse or child of a citizen or permanent resident.

77. Since the constitutional invalidity is caused by an omission, the just and equitable remedy[98] would be to read into Regulation 9(9)(a) as sub-regulation (iii) the words "is the spouse or child of a South African citizen or permanent resident".[99]

78. In determining whether to read-in, a Court must be guided by two considerations – "the need to afford appropriate relief to successful litigants, on the one hand, and the need to respect the separation of powers, and, in particular, the role of the Legislature as the institution constitutionally entrusted with the task of enacting

97 Section 172(1)(a) of the Constitution.
98 Section 172(1)(b) of the Constitution.
99 *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* 2016 (6) SA 596 (CC) para 206.

legislation, on the other."[100]

79. Such a reading in would vindicate the rights of those affected by the constitutional invalidity, including the applicants themselves, whilst having no discernible impact on the remainder of the Regulations or on the Immigration Act, and accordingly having a minimal impact on the separation of powers.

80. Moreover, there is little reason to expect that the reading-in would cause significant disruptions or any prejudice to the respondents. Pending applications may be decided in accordance with the Regulation as notionally amended and the Department already has domestic centres for the receipt of new applications from foreign spouses and children. The Minister may always promulgate new regulations or amendments to the Regulations as long as they are constitutionally compliant.[101]

81. A final consideration weighs heavily in favour of a remedy of reading-in, rather than affording the Minister a period of time in which to correct Regulation 9(9). This is the respondents' lamentable treatment of this Court's precedent in *Dawood*. Whilst

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[100] *National Coalition for Gay and lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 62.

[101] Ibid and *Mlungwana v S* (CCT32/18) [2018] ZACC 45 (19 November 2018) paras 102-110.

the respondents are not in breach of the Court's order in *Dawood*, the regulatory framework imposed by section 10(6) of the Immigration Act read with Regulation 9(9) is patently inconsistent with the holdings by this Court in *Dawood*.

82. While the courts should be mindful that they do not trespass on the terrain of the legislature or the executive, the other branches may not disregard this Court's interpretations of the Constitution when reformulating policy and legislative. Yet far from giving effect to this Court's reasoning in *Dawood*, the Regulations effectively impose greater limits on the rights to dignity of South African and permanent resident spouses. For the State through legislation or regulation to enact a regime which does violence to judicial precedent has serious implications for the rule of law. While there may be scope for deference to the policy choices of the executive, blatant disregard for this Court's reasoning in *Dawood* imperils the nature of the State based on the rule of law. It is to be deprecated.

THE CONSEQUENTIAL CONSTITUTIONAL RELIEF

83. The applicants would be left without valid visas if this Court were to grant only relief in respect of Regulation 9(9)(a).

84. The decision to deny Ms Nandutu a relative's visa was based solely on the ground that she had applied for the visa while in the Republic.

85. Mr Demerlis' position is somewhat different. The original decision was based on dual grounds, namely that the application had been made while South Africa and that no documentation had been provided to prove financial support. On appeal to the Director-General, the Director-General made his finding only on the basis that no contract of employment had been included in the application – which is not a requirement for a visa in terms of section 11(6) of the Immigration Act. However, this reason was overturned on appeal to the Minister, who rejected the appeal solely on the basis that Mr Demerlis applied for a visitor's visa in terms of section 11(6) while in South Africa. As such, the sole remaining reason in support of the rejection of Mr Demerlis' application is that he applied within South Africa.

86. Accordingly, both the decision to reject Ms Nandutu's application and the decision to reject Mr Demerlis' application must be reviewed and set aside.

87. This is an appropriate instance in which the decisions should not be remitted but this Court should rather substitute the decisions with decisions to granted visas to Ms Nandutu and Mr Demerlis:[102]

87.1. The basis upon which both applications were finally rejected on appeal was on a legal conclusion – that applicants could not apply within South Africa. This legal conclusion is unsound and this Court is in as good a position as the respondents to determine whether, in light of its judgment, applicants in the position of Ms Nandutu and Mr Demerlis may apply within South Africa. It may be that the expertise of Home Affairs is ordinarily an appropriate reason to remit, but when the officials have cited no reasons in support of their decision that turn on an application of that expertise, there is no basis for a remittal on grounds of expertise.

87.2. The decisions on Ms Nandutu and Mr Demerlis' applications if remitted are a foregone conclusion. The Department is not required to apply a value judgment or make a polycentric decision in relation to the applications. The decision makers had to determine whether the applications satisfied the Immigration Act and its Regulations – they determined that

[102] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* 2015 (5) SA 245 (CC) paras 47-52.

the only requirement not met was that the applications be made from outside South Africa. That determination is not one requiring the exercise of a discretion or application of judgment.

87.3. Both Ms Nandutu and Mr Demerlis have suffered extensive delays at the hands of the respondents. The delays have caused both them and their families ongoing suffering and prejudice, both by being exposed to possible findings of being undesirable persons under the Immigration Act and by being at risk when leaving South Africa. This prejudice should be ended as soon as possible by a substitution order granting them the relevant visas.

88. If the Court endorses the interpretation of the Immigration Act set in *Stewart*, being that a holder of visitor's visa that applies for a spousal visa does not seek to change his or her status and may accordingly make the application in South Africa, then Mr Demerlis would be entitled to relief even if the Court declines to declare Regulation 9(9) unconstitutional. This is because Mr Demerlis' application was made while holding a visitor's visa and was made for a visitor's visa under section 11(6) of the Immigration Act.

89. There would appear to be no basis for disturbing High Court's order that the Director-General be instructed to assist Ms Nandutu and Mr Tomlinson's child having his birth registered.

PRAYER AND RELIEF SOUGHT

90. The applicants submit that they are entitled to an order:

90.1. Granting leave to appeal directly to this Court;

90.2. Upholding the appeal and replacing the judgment of the High Court, except order 5, with an order reading:

"(a) Regulation 9(9)(a) of the Immigration Regulations 2014, dated 22 May 2014, *Regulation Gazette* 10199, is declared invalid to the extent that the rights accorded by means of the exceptional circumstances contemplated in section 10(6)(b) of the Immigration Act, 2000 (Act 13 of 2000) ("Immigration Act") are not extended to the foreign spouse or child of a citizen or permanent resident;

(b) The following words are to be read into Regulation 9(9)(a) as sub-regulation 9(9)(a)(iii):

"(iii) is the spouse or child of a South African citizen or permanent resident"

(c) The decision of the second respondent to reject the first applicant's application for a relative's visa issued under section 18 of the Immigration Act is reviewed,

set aside and substituted with a decision granting the application;

(d) The second respondent is directed to issue to the first applicant a relative's visa under section 18 of the Immigration Act and to make same available at the Cape Town office of VFS Global within one month of the Order of this Court;

(e) The decision of the second respondent to reject the third applicant's application for a visitor's visa issued under section 11(6) of the Immigration Act is reviewed, set aside and substituted with a decision granting the application;

(f) The second respondent is directed to issue to the third applicant a relative's visa under section 18 of the Immigration Act and to make same available at the Cape Town office of VFS Global within one month of the Order of this Court;

(g) The first and second respondents are to pay the costs of this application, the one paying the other to be absolved."

90.3. Ordering the first and second respondents to pay the costs of this application and appeal, the one paying the other to be absolved, which costs are to include those attendant upon the employment of two counsel.

ANTON KATZ SC

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LERATO MOLETE

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12 December 2018