IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC Case No.: CT 114 / 2018

In the matter between:

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

and

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

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FIRST AND SECOND RESPONDENTS' WRITTEN SUBMISSIONS

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I. INTRODUCTION

1. The first and third applicants entered South Africa on a visitor's visa, being a visa issued in terms of section 11(1) of the Immigration Act 13 of 2002 (**"the Immigration Act"**).

2. Whilst inside of South Africa the first and third applicants, respectively, became a 'spouse' as defined in terms of section 1 of the Immigration Act. In the circumstances of the first applicant, she entered into marriage, as defined in terms of section 1 of the Immigration Act, with the second applicant (a British citizen, with permanent residence status in South Africa). The third applicant, however, entered into a cohabitation agreement with the fourth applicant (a South African citizen).

3. Thereafter, the first and third applicants applied to change their status whilst inside South Africa. In terms of the legislative scheme of the Immigration Act, this is not allowed and their applications were correctly refused.

4. Aggrieved by this, the applicants now attack the constitutionality of Regulation 9(9) of the Immigration Act and allege that their rights to

dignity, equality and (in the circumstances of the first and second applicants) it is alleged that the rights of a child are also infringed.

5. The main thrust of the Constitutional challenge is premised on the incorrect assertion that the only alternative available to the first and third applicants is to be separated from their spouses. The assertion is incorrect because of the wording of section 31(2)(c) of the Immigration Act, read with the definition of 'prescribed' in terms of section 1 of the Immigration Act.

6. The definition of 'prescribed' in terms of section 1, 'means prescribed by regulation'. Section 31(2)(c) of the Immigration Act, allows the Minister, upon application, to set terms and conditions, for good cause, to waive any *prescribed* requirement. Section 31(2)(c) of the Immigration Act would therefore apply to an application for a waiver of Regulation 9(9).

7. The applicants are aware of section 31(2)(c) of the Immigration Act, but have chosen to ignore its provisions, thus depriving the Minister of Home Affairs to – (1) apply his mind to such an application and properly consider same, especially whether good cause has been shown; and (2) to exercise his legislative discretion to set any terms and conditions that may be appropriate.

8. We submit that the central issues for determination in this matter are:

   8.1. First, whether the applicants should be granted leave to appeal;

   8.2. Second, whether Regulation 9(9)(a) of the Immigration Regulations, 2014, GN R413 of 2014 published in GG 37679 of 22 May 2014 (**"the Immigration Regulations"**) is invalid to the extent that 'exceptional circumstances' as referred to therein, do not include a foreign spouse of a citizen or permanent resident;

   8.3. Third, if Regulation 9(9)(a) is unconstitutional, whether it would be just and equitable and or appropriate for this Court to insert a sub-regulation (9)(a)(iii) to read:

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

9. For reasons to be articulated more fully herein below, it is submitted that the applicants' relief (on all bases) must fail. The reasons therefore, we submit, are:

9.1. First, it would be appropriate in the circumstances of this matter to have obtained a decision of the Supreme Court of Appeal and therefore leave to appeal should be refused;

9.2. Second, the applicants have refused to avail themselves of the provisions of section 31(2)(c) of the Immigration Act; and

9.3. Third, the substantive relief sought (i.e. the *addition* of a sub-regulation 9(9)(a)(iii)) does not amount to 'reading-in', but amounts to a substantive amendment, which amounts to a fundamental breach of the principle of separation of powers.

10. The remainder of these submissions is structured as follows:

10.1. In Part II, we address the facts.

10.2. In Part III, we address the applicants' application for leave to appeal.

10.3. In Part IV, we address the general rule that applications for visitor's visas are to be made outside of South Africa.

10.4. In Part V, we address the Stewart decision.

10.5. In Part VI, we address the applicants' attack on the constitutionality of regulation 9(9).

10.6. In Part VII, we address the relief being sought – reading-in: the appropriateness of the remedy.

II. THE FACTS

(i) The first and second applicants

11. The first applicant is a Ugandan national[1].

12. On 20 February 2015, the first applicant entered South Africa on a visitor's visa issued in terms of section 11(1) of the Immigration Act[2]. The visitor's visa was issued at Kampala on 19 February 2015 and it is a single entry. The condition is that she enters on or before 18 May 2015 and "each visit not to exceed 30 days for holiday purposes only must hold a return onward air ticket" (Record, page 56). At the time of entry, she was three months pregnant and was joining the father of her expected child, being the second applicant.

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1 Founding Affidavit, Vol 1, pg 8 para 1

2 Founding Affidavit, Vol 1, pg 19, para 29

13. The second applicant is a British citizen and a holder of a South African permanent residence permit[3].

14. On 21 April 2015, two months after admission into South Africa, the first applicant married the second applicant inside South Africa[4].

15. The first and second applicants consulted with attorneys to assist in applying for a visa, which would enable them to reside in South Africa as a family[5].

16. On 22 April 2015, the first applicant completed an application for a change of condition on an existing visa or a change of status[6].

17. The first applicant sought to change from a visitor's visa (section 11(1)) to a relative's visa in terms of section 18 of the Immigration Act[7].

18. In terms of section 10(6)(b) of the Immigration Act read with regulation 9, a change of status from within South Africa is not permitted. It was on this basis that the application was rejected[8].

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3 Founding Affidavit, Vol 1, pg 11, para 3
4 Founding Affidavit, Vol 1, pg 19, para 29
5 Founding Affidavit Vol 1 page 20, para 30
6 Answering Affidavit, Vol2, page 181, para 28
7 Answering Affidavit, Vol 2, page 182, para 30
8 Answering Affidavit, Vol 2, page 183, para 34

Similarly, the first applicant's internal appeals in terms of section 8 of the Immigration Act were unsuccessful for the same reason[9].

19. On 14 August 2015, whilst residing inside South Africa, the first and second applicants' son was born[10].

20. In October 2016, the first applicant's internal appeal recourse in terms of section 8 of the Immigration Act was exhausted[11].

21. Aggrieved by the rejection, the first and second applicants initiated review proceedings in the Western Cape High Court under case number 2889/17 to review and set aside the rejection. The relief sought was premised on the unreported decision of Stewart v Minister of Home Affairs (case number 12520/2015)[12].

22. After initiating the aforementioned review application, it was withdrawn on the basis that there was in fact a change of status being sought, which is prohibited in terms of section 10(6) read with Regulation 9 of the Immigration Act[13].

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9 Answering Affidavit, Vol 2, page 183 – 183, para 35 - 39
10 Founding Affidavit, Vol 1, page 20, para 32
11 Founding Affidavit, Vol 1, page 23, para 46
12 Founding Affidavit, Vol 1, page 24, para 49
13 Founding Affidavit, Vol 1, page 24, para 49 - 50

(ii) The third and fourth applicants

23. The third applicant is a Greek national[14]; he alleges that he is in life partnership with the fourth applicant, who is a South African citizen[15].

24. The third applicant entered South Africa on a visitor's visa (issued in terms of section 11(1) of the Immigration Act). The first visitor's visa was issued to the third applicant on 11 February 2014[16].

25. In August 2014, at the South African Embassy in Greece, the third applicant applied for a section 11(6) visa. The application was rejected[17]. Although the third applicant has not attached the rejection, it appears to be premised on Regulation 3(2) of the Immigration Act.

26. Thereafter, in November 2014, the third applicant travelled to South Africa on a section 11(1) visitor's visa, which he periodically revived by leaving South Africa and re-entering on a section 11(1) visitor's visa[18].

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14 Founding Affidavit, Vol 1, page 77, para 1
15 Founding Affidavit, Vol 1, page 77, para 4
16 Replying Affidavit, Vol 3, page 282, para 8.2.
17 Replying Affidavit, Vol 4, page 282 – 283, para 8.2. – 8.3.
18 Replying Affidavit, Vol 3, page 283 - 284, para 8.5 – 8.6.

27. In March 2015, whilst inside South Africa, the third applicant made an application for a visa in terms of section 11(6) visa[19]. The application was rejected.

28. The reasons for the rejection was two-fold:

    - No change of status or conditions attached to the temporary residence visa while in the republic in terms of section 10(6) of the Immigration Act of 2002

    - No documentation to prove the financial support to each other and the extent to which the related responsibilities are shared by the applicant and his or her spouse in terms of regulation 3(2)(d).

29. The first reason for the rejection follows as a matter of law. This aspect will be dealt with more fully hereinbelow.

30. With regard to the second reason, it should be noted that:

    30.1. Regulation 3(2)(d) requires documentary proof of financial support to each other. In support of the third applicant's

[19] Founding Affidavit, Vol 1, page 78, para 8 and 9

application he only submitted the credit card statement of the fourth applicant. No other documentation was provided[20].

31. In May 2017, the third applicant exercised and exhausted his rights of an internal appeal in terms of section 8 of the Immigration Act. The third applicant was in this regard unsuccessful[21].

32. On 28 June 2017, the applicants launched review proceedings in the Western Cape High Court.

33. On 18 April 2018, Thulare AJ handed down the judgment of the court *a quo*.

34. On 8 May 2018, the applicants made application in terms of Rule 19 to appeal directly to this Court.

III. LEAVE TO APPEAL

35. The applicants have appealed to this Court directly from the Western Cape High Court.

36. The applicants' application is in terms of section 167(6)(b) of the Constitution, read with Rule 19 of the rules of this Court.

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[20] Answering Affidavit, Vol 3, page 202, para 130; and page 83, para 31 and 32

[21] Founding Affidavit, Vol 1, page 79, para 11 - 14

37. Rule 19 indicates, that:

> "The procedure set out in this rule shall be followed in an application for leave to appeal to the Court where a decision on a constitutional matter, other than an order of constitutional invalidity under section 172 (2) (a) of the Constitution, has been given by any court including the Supreme Court of Appeal, and irrespective of whether the President has refused leave or special leave to appeal."
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> (own emphasis added)

38. The relief sought by the applicants in the court *a quo* and in this Court is in terms of section 172(2)(a) of the Constitution. In the circumstances, it is submitted that the applicants' reliance on Rule 19 of the Rules of this Court is misplaced. However, in the event that this may be incorrect, we nonetheless proceed to deal with this aspect on its merits.

39. In the matter of *Magajane v Chairperson, North West Gambling Board and Others* 2006 (5) SA 250 (CC), this Court stated:

> "[29] Applications to this Court for leave to appeal are governed by s 167(6) of the Constitution and Rule 19 of the Rules of this Court. Section 167(6) provides for direct appeals from another Court 'when it is in the interests of justice and with leave of the Constitutional Court'. In terms of Rule 19(6)(a) '(t)he Court shall decide whether or not to grant the appellant leave to appeal'. It is well settled that this Court will employ its discretion to grant leave to appeal when the applicant raises a constitutional issue and when granting

leave to appeal is in the interests of justice. This Court determines whether it is in the interests of justice to grant leave to appeal through a careful and balanced weighing up of all relevant factors. As noted in Radio Pretoria, '(t)he considerations could be varied and are often case-specific but informed by the broad requirement of whether by hearing the case the interests of justice will be advanced'."

40. What is also required in the circumstances is 'compelling reasons' to grant leave to appeal directly to this Court[22].

41. We submit that it is not in the interests of justice to grant leave to appeal. This is so, because:

41.1. First, the issues in dispute in this matter warrants a consideration by the Supreme Court of Appeal;

41.2. Second, by not first approaching the Supreme Court of Appeal, the respondents have been denied an opportunity to present and refine their arguments in that Court.

41.3. Third, the applicants have not satisfied the applicable legal test to be granted leave to appeal.

42. The above will, in turn, be elaborated more fully hereinbelow.

[22] See: *AParty and Another v Minister of Home Affairs and Another; Moloko and Others v Minister of Home Affairs and Another* 2009 (3) SA 649 (CC) (2009 (6) BCLR 611; [2009] ZACC 4) para 30.

(i) The issues herein warrant consideration by the Supreme Court of Appeal

43. The applicants rely on the unreported judgment of Donen AJ, in the matter of *Stewart and Others v Minister of Home Affairs and Another* 1250/2015 [2016] ZAWCHC 20 (29 January 2016)[23].

44. The court *a quo* explicitly differed from the *Stewart* decision[24]. Therefore, there are conflicting decisions in the Western Cape High Court division. In the circumstances, it is submitted that it would have been appropriated and desirable to have the Supreme Court of Appeal first decide this issue before the matter is heard by this Court.

45. In any event, we submit that the court *a quo* was correct in disagreeing with the *Stewart* decision. This aspect will be dealt with separately herein below.

[23] See applicants' heads of argument at paragraph 37
[24] See paragraph 24 of the judgment *a quo*

(ii) The parties will be denied the benefit of refining their arguments in the Supreme Court of Appeal

46. In the matter of *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC), this Court held:

> *"[8] It is, moreover, not ordinarily in the interests of justice for a Court to sit as a court of first and last instance, in which matters are decided without there being any possibility of appealing against the decision given. Experience shows that decisions are more likely to be correct if more than one court has been required to consider the issues raised. In such circumstances the losing party has an opportunity of challenging the reasoning on which the first judgment is based, and of reconsidering and refining arguments previously raised in the light of such judgment."*
>
> (own emphasis added)

47. It is submitted this Court's reasoning in *Bruce* is applicable herein, in that:

47.1. First, this Court, would with respect, benefit from having preceding judgment from the Supreme Court of Appeal; and

47.2. Second, the benefit of refining the arguments on appeal to the Supreme Court of Appeal and narrowing the issues for consideration by this Court would be lost if leave to appeal is granted.

(iii) The applicants have not satisfied the threshold test

48. The applicants rely[25] on the decision of *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 (4) SA 395 (CC). The applicants' reliance thereon is misplaced, in that that decision dealt with refugees; whereas in this matter refugees are not impacted, this matter relates to foreigners in terms of the Immigration Act.

49. The applicants make six contentions[26] why leave to appeal should be granted. These are addressed in turn herein below.

    49.1. First, the applicants contend that the constitutional validity of a regulation justifies direct access[27]. We submit that this contention is misplaced. This matter does not involve the exclusive jurisdiction of this Court. The Supreme Court of Appeal is thus disposed to deal with the issues in dispute herein.

[25] See applicants' heads of argument, page 7, footnote 5
[26] See applicants' heads of argument at page 7, para 9
[27] See page 7, para 9.1. of the applicants' heads of argument

49.2. Second, the applicants aver that direct access will save significant time and expense. We submit that there is no urgency herein. The applicants have delayed in bringing their review applications and in any event, there is no case made out for urgency. However, urgency and expediency, on its own does not warrant bypassing the Supreme Court of Appeal. The issue of time and expense are furthermore relevant to most other matters and does not, we submit, amount to 'compelling reasons' as is required.

49.3. Third, the applicants contend that there are strong prospects of success. We submit that this is not the case and this aspect will be dealt more fully elsewhere. However, again, this aspect alone is not decisive in determining whether leave to appeal should be granted[28].

49.4. Fourth, the applicants allege that the relief sought in this matter would have a wide impact. We submit that this contention is misplaced, this is so because a decision of the Supreme Court of Appeal could also grant the applicants the relief they seek.

[28] See: *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC) at para 25

49.5. Fifth, the applicants' allege that a decision of this Court would clarify the conflicting judgments in the Western Cape High Court (i.e. the judgments of Stewart and the decision of the court a quo). However, in contradictory terms, the applicants also allege this matter does not concern the development of the common law. We submit that the applicants contentions are misplaced, because – (1) Supreme Court of Appeal is best placed to provide a clarifying decision the conflicting judgments, which this Court would, with respect, benefit from having the insight of; (2) this matter does involve the development of the common law, namely the clarification of the conflicting judgments and therefore the Supreme Court of Appeal is in this regard best placed to determine this aspect; and (3) with regard to the applicants' constitutional challenge to the regulations, this too falls within the competent jurisdiction of the Supreme Court of Appeal; and again, with respect, this Court would benefit from having the Supreme Court of Appeal's insight into this aspect as well.

50. For all the above reasons, we submit that the applicants' application for leave to appeal should be dismissed.

IV. THE GENERAL RULE – APPLICATIONS FOR VISITOR'S VISAS ARE MADE OUTSIDE OF SOUTH AFRICA

51. The general rule is that applications for temporary visas, must be made outside of South Africa. The general rule is borne out by the scheme of the Immigration Act and its Regulations.

    51.1. Section 10(2) of the Immigration Act provides that an application for a visa must be made "*in the prescribed manner"*.

    51.2. Section 1 of the Immigration Act, defines "prescribed", as meaning – *"prescribed by regulation"*.

    51.3. Regulation 9(1) and (2) of the Immigration Regulations, provides that, as a general rule, an application for a visa may only be made abroad, that is, at a South African mission in another country (**"the general rule"**). There are exceptions to this general rule.

    51.4. The most significant exception to the general rule is created by s 10(6), read with the definitions of "*visa"* and "*status"* in s 1(1), of the Immigration Act and regulation 9(5) and (9) of the

Immigration Regulations. They allow foreigners who are already in South Africa under certain kinds of visas, to apply to change their status that is, their status as determined by their visas. They may for instance apply for a change in the terms and conditions of their visas or even for a visa of a different kind.

51.5. The applicants had all applied for visas while they were in South Africa. They are therefore subject to the general rule and their applications were thus correctly refused.

52. The general rule has been confirmed by the Supreme Court of Appeal[29] and this Court[30].

53. Aggrieved by the rejections, the applicants have challenged Regulation 9(9). The applicants' challenge is premised on section 172(a) of the Constitution, in that it is alleged that the right to dignity, equality and children's rights have been infringed.

[29] See Minister of Home Affairs v Ahmed 2017 (6) SA 554 (SCA) at para 10
[30] See: Ahmed and Others v Minister of Home Affairs and Another 2019 (1) SA 1 (CC) at para 39 and 40

54. The respondents have explained, in detail, the rationale and objective for the general rule[31]. The rationale, may be summarised, as follows:

54.1. It is an incidence of the sovereignty of South Africa, that it determines who enters her territory and migration patterns are controlled and laws are enacted to control such migration.

54.2. The key methodology and international best practice for managing immigration risks, is to build a complete history and effectively screen all visitors *before* they leave their country of origin. This risk-based approach is referred to as ‘externalising the borders’ or ‘off-shore border management’.

54.3. The cost of externalising the borders is far lower than that of dealing with threats and risks once individuals have established themselves inside South Africa.

54.4. A visitor’s visa in terms of section 11(1) is the least onerous visa to be granted in terms of the Immigration Act. The purpose of this visa is primarily to attract tourists to South

[31] See Answering affidavit, Vol2, page 173 - 177

Africa and it is for this reason that the process has been simplified. It is not intended to be used for other purposes such as work, business or to permanently reside with a relative, spouse or life partner.

54.5. In contrast, however, in order to obtain a business, working, residence or section 11(6) visa certain more onerous formal conditions must be met, including proof of financial resources, police clearance certificates, health and radiological information. All these checks are performed *before* the applicant enters South Africa. The correct visa application at the home country therefore allows the respondents to perform all the necessary security and background checks at the embassy *before a foreigner enters South Africa*.

54.6. The foreign mission at the country of origin is familiar with the government of the home country of the particular foreigner, including the law enforcement agencies. The process can be completed fairly quickly by a particular foreign mission. It is therefore better placed and suited to perform security checks, and to adjudicate long-term visa applications. The

Department does not have the capacity to conduct those checks inside the Republic.

54.7. Before the amendment to the Regulations, the respondents allowed foreigners to change the conditions of their visas from inside South Africa. The respondents discovered that there was wide-spread and alarming levels of fraud. An investigation over a two-year period revealed that:

54.7.1. out of 895 applications for permanent residence permits, only 19 were confirmed to be genuine applications.

54.7.2. 128 of the 895 applications were untraceable, and or refused to co-operate with the respondents' investigations; and 23 were deceased;

54.7.3. The remainder were fraudulent applications, obtained through the use of invalid addresses, fraudulent police clearance certificates, fraudulent life partnership agreements, fraudulent notarial contracts, fraudulent radiological report; and marriages and life-partnerships of convenience.

54.7.4. It is in the above context that the respondents have taken view that there are enough risks to warrant the approach of off shore border management.

55. It is submitted that there is a reasonable and rational governmental purpose that is being sought to be achieved by the implementation and the maintenance of the general rule. However, it is further submitted that in the even that the applicants' primary relief is granted, this would undermine the aforementioned purpose.

V. THE *STEWART* DECISION

56. The court *a quo* differed with the *Stewart* decision[32] to the extent that it held that a foreigner that is inside South Africa on a visitor's visa issued in terms of section 11(1) of the Immigration Act; and applies (from within South Africa) for a so-called spousal visa in terms of section 11(6) of the Immigration Act is not changing their status, which is prohibited from within South Africa by virtue of, *inter alia*, section 10(6)(b) of the Immigration Act.

57. It is submitted that the court *a quo* was correct in differing from *Stewart* in that the decision is clearly incorrect.

[32] See paragraph 24 of the judgment of the court a quo, read with paragraphs 41 and 42 of Stewart

58. The reasoning of *Stewart* may be summarised as follows – because a visitor's visa issued in terms of section 11(1) of the Immigration Act and a so-called spousal visa issued in terms of 11(6) falls under the umbrella of section 11, there is no change of status and therefore section 10(6)(b) of the Immigration does not apply[33].

59. With respect, the reasoning of the *Stewart* decision is superficial.

60. Section 1 of the Immigration Act defines 'status' as meaning – 'the status of the person *as determined by the relevant visa* or permanent residence permit granted to a person in terms of this Act'.

61. Upon closer scrutiny, it is apparent that there is a distinction between the status of a person as determined by visitor's visa issued in terms of section 11(1) of the Immigration Act and that of so-called spousal visa issued in terms of section 11(6) of the Immigration Act.

62. In this regard, we submit that the language of section 11, *read as a whole*, indicates that section 11(1) to (5) are to be read together, whereas section 11(6) stands on a different footing. It is evident

[33] See paragraph 41 of the Stewart decision

from a plain reading of section 11 of the Immigration Act that a visa issued in terms of section 11(1) is subject to the provisos stipulated in section 11(2) to (5). However, a visa issued in terms of section 11(6) is not subject to the provisos stipulated elsewhere in section 11. This, we submit, is an indication that there is difference between a visa issued in terms of section 11(1) and that of section 11(6) of the Immigration Act. The distinction is analysed more closely herein below.

(i) Section 11(1) to (5) and section 11(6) of the Immigration Act

63. A visa issued in terms of section 11(1) of the Immigration Act does not accord the holder thereof the right to study, conduct a business, work[34] or retire in South Africa[35].

64. A visa issued in terms of section 11(1) is also subject to the constrains of section 11(2), in that – (1) the visa cannot exceed three months; and (2) may be issued for a period of three years, but only on application to the Director-General and upon proof of sufficient available resources and engaged in one of the listed activities (see section 11(1)(b)(i) – (iv) of the Immigration Act).

[34] See section 11(2) of the Immigration Act
[35] See wording of section 11(1), which indicates 'for any purpose other than those provided for in section 13 to 24'

65. Section 11(6) of the Immigration Act begins with the words – *'Notwithstanding the provisions of this section…'* We submit that this is an indication that section 11(6) of the Immigration Act stands on a different footing from the provisions of section 11(1) to (5) and that there is distinction between the provisions.

66. On a plain reading of section 11(6) without regard to the provisions of section 11(1) to (5) it is evident that there is difference in the status of a person that obtains a section 11(6) visa, as opposed to a section 11(1) visa. The most telling difference in status is the contrast between section 11(1)(a) and section 11(6)(c) of the Immigration Act. In the case of the former provision, there is clear time limit set, in that a visitor's visor should not exceed three months, whereas in the latter provision it compels the holder of a section 11(6) visa to make application within three to apply for permanent residence.

67. It can therefore be seen that there is difference not only in the wording of the provisions of section 11(1) to (5) and section 11(6), but also the underlying purpose. A section 11(1) visa is meant to be temporary, in the plain meaning of the term. Whereas a visa issued

in terms of section 11(6) is meant to be lead to a permanency, in that it envisages an application for permanent residency.

68. It is for the above reasons that that court *a quo* was correct in differing with the *Stewart* decision.

VI. THE APPLICANTS' ATTACK ON THE CONSTITUTIONALITY OF REGULATION 9(9)

69. The applicants start from the incorrect premise that because of Regulation 9(9) there is no basis for the first and third applicants to remain in South Africa whilst applying for a change of status.

70. The applicants are incorrect because they overlooked and or misunderstood section 31(2)(c) of the Immigration Act. As explained hereinabove, this provision allows for the Minister to:

70.1. First, set terms and conditions for an exemption;

70.2. Second, determine whether good cause has been shown; and

70.3. Third, exercise their discretion to waive any prescribed requirement, that being any matter prescribed by regulation (see section 1 and definition of 'prescribed').

71. In seeking the relief, the applicants are effectively denuding section 31(2)(c) of the Immigration Act and the legislative discretion afforded to the Minister of Home Affairs.

72. Similarly, the applicants' reliance on Dawood v Minister of Home Affairs 2000 (3) SA 936 (CC) is misplaced.

73. Insofar as *Dawood* establishes that foreigners inside South Africa are the beneficiaries of the right to dignity and that the importance of dignity and its role in the context marital and familial relations, this is readily conceded. However, with regard to the *ratio* of *Dawood*, it applied to different factual matrix and is thus distinguishable.

74. In *Dawood*, this Court dealt with the now repealed Aliens Control Act 96 of 1991. In particular, what was considered was section 25(9) of the Aliens Control Act and the open-ended discretion which was given to immigration officials to extend temporary residence permits and the effect that this may have had on familial ties. In the now repealed Aliens Control Act, there was no guidance given for

the exercise of the discretion and there was no mechanism available in that Act to apply for an exemption, the only avenue was to request the immigration official to exercise their discretion favourably.

75. The situation in this matter and under the new Immigration Act is fundamentally different. Firstly, the discretion of immigration officials to extend visitor's visas does not arise at all. Secondly, there is a mechanism to allow for the first and third applicants to submit an application for a change of status from within South Africa, i.e. by making an application in terms of section 31(2)(c) of the Immigration Act. The refusal of such an application would then be the subject of a judicial review application.

76. For the same reasons as stated above, the applicants' arguments relating to the alleged infringement of section 28 of the Constitution is misplaced.

77. Unlike this matter, *Dawood* proceeded unopposed and therefore this Court did not have the benefit of opposing argument. In this matter, however, the respondents have given rational reasons as to why so-called off-shore border management has been adopted and is to be preferred. The reasoning is in furtherance of legitimate

governmental purposes, namely effective border control which is an incidence of state sovereignty; and managing and or reducing fraud and the associated costs therewith.

78. In any event in *Dawood*, this Court issued a *mandamus* that immigration officials and the DG, when exercising the discretion conferred upon them by section 26(3) and (6) in relation to applicants who are people referred to in section 25(4)(b) or (5) of the Act[36], to take into account the constitutional rights of such people and to issue or extend temporary permits to such people unless good cause exists to refuse to issue or extend such permits (para [67]).

[36] [44] One might have thought that s 25(4)(*a*) suggests the factors that could appropriately be considered in deciding to refuse to grant or extend a temporary permit. That provision states that a regional committee of the Immigrants Selection Board may issue an immigration permit if the applicant

> '(i) is of good character;
> (ii) will be desirable inhabitant of the Republic; and
> (iii) not likely to harm the welfare of the Republic; and
> (iv) does not and is not likely to pursue an occupation in which, in the opinion of the regional committee, a sufficient number of persons are available in the Republic to meet the requirements of the inhabitants of the Republic …'.

However, s 25(5) of the Act states that a regional committee, *notwithstanding the provisions of s 25(4)*, may issue an immigration permit to a spouse of a permanent and lawful resident of South Africa. Section 25(5) does not substitute any other criteria for those provided by s 25(4)(*a*). There is therefore no guidance to be found in either of these provisions as to the circumstances in which immigration officials or the DG may refuse to issue or extend a temporary residence permit.

79. In this application, the applicants pray for the Court to create a substantive right by legislating for the inclusion of a new sub-regulation 9(a)(iii).

80. For all the above reasons, it is submitted that there is no breach of rights, as alleged.

VII. READING-IN: THE APPROPRIATENESS OF THE REMEDY

81. It is submitted that the issue of remedy only follows upon a demonstrable breach of rights. As submitted hereinabove, there has been no breach of rights. However, due to the drastic nature of the relief being sought, a few comments are warranted.

82. The main difficulty with the applicants' approach is that what is being sought is not 'reading-in', but rather the addition of *an entirely new sub-regulation*. It is submitted that this does not amount to reading-in, but amounts to a substantive legislative amendment. This is problematic for a number of reasons. In this regard, this Court's warning in the matter of National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (2) SA 1 (CC) is apposite, which states:

"[74] The severance of words from a statutory provision and reading words into the provision are closely related remedial powers of the Court. In deciding whether words should be severed from a provision or whether words should be read into one, a Court pays careful attention first, to the need to ensure that the provision which results from severance or reading words into a statute is consistent with the Constitution and its fundamental values and, secondly, that the result achieved would interfere with the laws adopted by the Legislature as little as possible. …

[75] In deciding to read words into a statute, a Court should also bear in mind that it will not be appropriate to read words in, unless in so doing a Court can define with sufficient precision how the statute ought to be extended in order to comply with the Constitution. Moreover, when reading in (as when severing) a Court should endeavour to be as faithful as possible to the legislative scheme within the constraints of the Constitution. Even where the remedy of reading in is otherwise justified, it ought not to be granted where it would result in an unsupportable budgetary intrusion. In determining the scope of the budgetary intrusion, it will be necessary to consider the relative size of the group which the reading in would add to the group already enjoying the benefits. Where reading in would, by expanding the group of persons protected, sustain a policy of long standing or one that is constitutionally encouraged, it should be preferred to one removing the protection completely."

(own emphasis added)

83. It is submitted that the applicant's proposed wording to be read into Regulation 9(9) cannot be done with sufficient precision, as stated in *National Coalition*. As indicated by the court *a quo*, it is possible

and may be desirable to have the word ‘accompanying’ inserted into the proposed amendment[37].

84. However, leaving aside the difficulty with identifying, with precision, the correct wording of the amendment, there is the additional difficulty identified in *National Coalition* and that is - the unsupportable budgetary intrusion. The applicants submit[38]that there is no impediment to processing applications for a change of status inside South Africa, because the Department of Home Affairs should be required to courier documents to and from an applicant’s country of origin. This is an onerous burden, which is not borne out by the legislative scheme and will increase the administrative and economic burden already been placed on the respondents. The budgetary intrusion, we submit, is unsupportable.

85. In terms of section 7 of the Immigration Act, the Legislature has provided the Minister of Home Affairs with the discretion to make regulations, which should be done after consultation with the ‘board’. The ‘board’ is defined in terms of section 1 of the Immigration Act as established in terms of section 4 of the

[37] See paragraph 31 of the judgment of the court a quo.
[38] See applicants’ heads of argument, page 41 at paragraph 75

Immigration Act. Section 5 of the Immigration Act establishes the functions of the board.

86. When sections 4, 5 and 7 of the Immigration Act is scrutinised it is evident that:

86.1. First, there is an inter-disciplinary panel that comprises the immigration advisory board[39]; and

86.2. Second, after consulting the immigration advisory board, the Minister of Home Affairs is given the discretion to promulgate regulations.

87. It is submitted that it is apparent from the aforegoing that should this Court grant the relief, as prayed for, and effect the proposed amendment, this would, with respect, breach the principle of separation of powers, in that the Minister and the statutorily sanctioned advisory panel would be deprived of their legislative prerogative to deliberate, propose and determine the wording of regulations to be promulgated in terms of the Immigration Act.

[39] See section 4(2) of the Immigration Act

88. What is further evident from the nature of the advisory board and its interaction with the Minister of Home Affairs in proposing regulations, is that the reasoning for a particular regulation is polycentric in nature and involves careful consideration of the impact thereof.

89. It is submitted that in the event that the relief is granted, as prayed for, then that would also alter the nature of the intended purpose of the visitor's visa, in that it would change from a expeditious, less onerous path to entry into South Africa, into a more scrutinised cumbersome path to entry, this will not only negatively impact on the governmental purpose of externalising its borders, but would impact on the benefit derived from tourism, as a cumbersome procedure might deter tourism.

90. This Court has, furthermore, in similar circumstances upheld that a less restrictive means to negate any hardship to dignity (i.e. separation of spouses) is an application in terms of section 31(2)(c) of the Immigration Act[40].

[40] See: *Ahmed and Others v Minister of Home Affairs and Another* 2019 (1) SA 1 (CC)

91. It is for the aforegoing reasons that we submit that it is, with respect, manifestly inappropriate for the primarily relief to be granted and the amendment to be effected, as proposed by the applicants.

92. However, in the event that this Court disagrees with the above contention and finds that there has been an infringement of the applicants' rights, then it is submitted that in determining the analysis in terms of section 36 of the Constitution, the limitation is reasonable and justifiable in that it fulfils a rational governmental objective and there are less restrictive means than the proposed reading-in, in that section 31(2)(c) of the Immigration Act provides adequate and less restrictive means to mitigate any infringement of rights.

VIII. CONCLUSION

93. For all of these reasons, we ask for an Order that:

    93.1. The application for leave to appeal be dismissed on the basis that the application has no prospects of success and that it is not in the interests of justice for leave to appeal to be granted.

93.2. In the event that leave to appeal is granted, that the appeal is dismissed.

Costs

94. We respectfully submit that this application is an abuse, justifying an order for costs against the applicants, the one paying the others to be absolved.

95. In *Ahmed and Others v Minister of Home Affairs* 2019 (1) SA 1 CC at paragraph 30, this Court found as follows:

> "[39] The Supreme Court of Appeal did not consider the validity of the Directive. Rather, it looked to the Immigration Act and the Regulations to determine whether asylum seekers, in the position of the second to fourth applicants, were entitled to apply for a visa or permit. It concluded that asylum seekers are subject to the requirement that applications for visas or permits must be made from outside the borders of the country, and as the second to fourth applicants did not apply for exemption from this requirement, they were not entitled to make such an application once inside the country. It noted that applications for exemption from this requirement were possible under section 31(2)(c) of the Immigration Act."

96. Section 31(2) of the Immigration Act provides as follows:

> "31.
>
> (2) Upon application, the Minister may under terms and conditions determined by him or her-
>
> (a) allow a distinguished visitor and certain members of his or her immediate family and members in his or her employ or of his or her household to be admitted to and sojourn in the Republic, provided that such foreigners do not intend to reside in the Republic permanently;
>
> (b) grant a foreigner or a category of foreigners the rights of permanent residence for a specified or unspecified period when special circumstances exist which would justify such a decision: Provided that the Minister may-
>
> (i) exclude one or more identified foreigners from such categories; and
>
> (ii) for good cause, withdraw such rights from a foreigner or a category of foreigners;
>
> (c) <u>for good cause, waive any prescribed requirement or form; and</u>
>
> (d) for good cause, withdraw an exemption granted by him or her in terms of this section."

97. In this matter, the applicants doggedly refused to abide by the laws of this country and instead of applying for exemption as

contemplated in section 31(2)(c) whilst they pursue the privilege of applying to become South African citizens and/or residents, they approach the Court in circumstances where it was unnecessary to do so.

Nazeer Cassim SC

Adiel Nacerodien

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Chambers
Sandton and Cape Town
29 January 2019

RESPONDENTS' LIST OF AUTHORITIES

Legislation

1. The Constitution of the Republic of South Africa Act 108 of 1996
2. The Immigration Act 13 of 2002

Case law

3. Minister of Home Affairs and Another v Ahmed and Others 2017 (6) SA 554 (SCA)
4. Ahmed and Others v Minister of Home Affairs and Another 2017 (2) SA 417 (WCC)
5. National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (2) SA 1 (CC)
6. Dawood v Minister of Home Affairs 2000 (3) SA 936 (CC)
7. National Education Health and Allied Workers Union v University of Cape Town and Others 2003 (3) SA 1 (CC)
8. Magajane v Chairperson, North West Gambling Board and Others 2006 (5) SA 250 (CC)

9. AParty and Another v Minister of Home Affairs and Another; Moloko and Others v Minister of Home Affairs and Another 2009 (3) SA 649 (CC)
10. Stewart and Others v Minister of Home Affairs and Another 1250/2015 [2016] ZAWCHC 20 (29 January 2016).
11. Bruce and Another v Fleecytex Johannesburg CC and Others 1998 (2) SA 1143 (CC)
12. Union of Refugee Women v Director: Private Security Industry Regulatory Authority 2007 (4) SA 395 (CC)