**IN THE HIGH COURT OF SOUTH AFRICA**
**(WESTERN CAPE DIVISION, CAPE TOWN)**

Case number 11440/17

In the matter between

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| ROBINHA SARAH NANDUTU | FIRST APPLICANT |
| JAMES FERRIOR TOMLINSON | SECOND APPLICANT |
| ILIAS DEMERLIS | THIRD APPLICANT |
| CHRISTAKIS FOKAS TTOFALLI | FOURTH APPLICANT |

And

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| 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 |

DATE: 18 APRIL 2018

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JUDGMENT

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THULARE AJ

[1] This is an application in terms of section 172(1)(a) of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) (the Constitution) to declare as invalid and inconsistent with the Constitution, Regulation 9(9)(a) of the

Immigration Regulations (regulations) issued in terms of section 7 of the Immigration Act, 2002, (the Act) to the extent that the rights accorded by means of the exceptional circumstances contemplated in section 10(6)(b) of the Act are not extended to the foreign spouse or child of a citizen or permanent resident. The application is opposed by the first and second respondents.

[2] The remedy requested by the applicants is that this court exercise its powers in terms of section 172(1)(b) of the Constitution by reading in the words:
*"(iii) is the spouse or child of a citizen or permanent resident".*
This, it is submitted, is in order to render Regulation 9(9)(a) valid and consistent with the Constitution.

[3] The constitutional challenge is based on the duty of the parties in a marriage or life partnership to cohabit and to provide each other with support. The fact that the foreign spouse of a citizen or permanent resident who holds a visitor's visa is not exempted from the prohibition to apply for a change of status while in the Republic, it is argued, impairs the ability of the spouse to honour that obligation and is therefore an unjustifiable limitation of the right to dignity. It is further argued that the fact that the foreign accompanying spouse or child of the holder of a work or business visa is exempted, but not the holder of a visitor's visa, is an unjustifiable limitation on the right to equality.

[4] The first applicant is an Uganda national who entered South Africa on 20 February 2015 on a visitor's visa issued in terms of section 11(1) the Act. She was three months pregnant at the time and was joining the father of the expected

child, the second applicant who is a British citizen and a holder of a permanent residence permit in South Africa. On 21 April 2015, two months after her entry, she married the second applicant. The two then consulted an attorney to assist them to apply for a visa to enable her to remain in South Africa for them to live as a couple and as a family. Their son, Joshua, was born on 14 August 2015 in South Africa. Their application was not granted and the reasons were provided as follows:

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

An appeal to both the Director-General and the Minister were also unsuccessful. Joshua's birth is not registered as the first applicant is not in possession of a valid temporary residence visa. Joshua cannot apply for a passport or an Identity number.

[5] Third applicant is a Greek citizen who entered South Africa on a section 11(1) visitor's visa. He is in a life partnership with fourth respondent who is a South African citizen and they live together. He applied for a section 11(6) visa to enable him to continue to cohabit with fourth respondent. His application was rejected. The reasons were given as follows:

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

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

An appeal to both the Director-General and the Minister were unsuccessful.

[6] The issue is whether Regulation 9(9)(a) of the Immigration Regulations is inconsistent with section 9 (equality before the law and the equal protection and benefit of the law) and section 10 (inherent dignity and the right to have their dignity respected and protected) of the Constitution and therefore invalid; and if so what is the appropriate remedy.

[7] Molemela AJCC set out the correct approach to statutory interpretation as follows at para 12 to 14 in *Provincial Minister for Local Government etc, Western Cape v Oudtshoorn Municipal Council and Others* 2015 (6) SA 115 (CC):

*"[12] This court has previously stated that when interpreting a statute, judicial officers must consider the language used, as well as the purpose and context, and must endeavor to interpret the statute in a manner that renders the statute constitutionally compliant.*

*[13] In Bertie van Zyl this court stated that 'the purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of the law'. It pointed out that a contextual or purposive reading of a statute must remain faithful to the actual wording of the statute.*

*[14] In National Coalition it was held that the legislation must be interpreted in a way that promotes the spirit, purport and objects of the Bill of Rights but limited to what the text of the statute is reasonably capable of meaning. This position was echoed in Hyundai, where Langa DP stated that 'judicial officers must prefer interpretation of legislation that fall within constitutional bounds over those that do not, provided that such interpretation can be reasonably ascribed to the section'. He, however, warned against an unduly strained interpretation. These statements were quoted with approval by this court in Democratic Alliance."*

[8] The first applicant, a national of the Republic of Uganda and holding a passport issued by the government of her country of origin, applied for and was issued

with a visitor's visa by the Republic of South Africa (RSA) at Kampala on 19 February 2015. The visa was issued under the following conditions, which were endorsed on it:

*"Enter on or before: 2015.05.18.*

*EACH VISIT NOT TO EXCEED 30 DAYS*

*FOR HOLIDAY PURPOSES ONLY*

*MUST HOLD A RETURN ONWARD AIR TICKET."*

[9] It is a visa issued in terms of section 11(1)(a) of the Act (reference to sections are to the Act) which may not exceed three months and is renewable upon application to the Director-General (the DG) of the Department of Home Affairs (DHA), which renewal shall not exceed three months. The requirements for such application are that it be accompanied by a statement or documentation detailing the purpose and duration of the visit; a valid return air flight ticket or proof of reservation thereof and proof of sufficient financial means contemplated in subregulation (3) – [regulation 11(1)]. The applicant was not required to make an undertaking that she shall not establish herself in RSA once admitted within the borders.

[10] Section 10(6) of the Act reads as follows:

*"**Visas to temporarily sojourn in Republic***

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

*(b) An application for a change of status attached to a visitor's or medical treatment visa shall not be made by the visa holder while in the Republic, except in exceptional circumstances as prescribed."*

[11] The applicable provisions of section 1 of the Act read as follows:

"***Definitions and interpretation***

1. *(1) "**prescribed**" means prescribed by regulation.*

[12] Regulation 9(9)(a) reads as follows:

*"**Visas to temporarily sojourn in Republic***

*9. (9) The exceptional circumstances contemplated in section 10(6)(b) of the Act shall –*

*(a) in respect of a holder of a visitor's visa, be that the applicant –*

*(i) is in need of emergency lifesaving medical treatment for longer than three months;*

*(ii) 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; or*

[13] An unmarried woman in Kampala, Uganda, in the position of the first applicant, who is three months pregnant and on her way to join the father of her unborn child who is a man holding a permanent residence permit in RSA, has another type of visitor's visa available to be applied for. It is part of the composite commonly referred to as spousal visas. It is provided for in section 11(6) which reads:

*"**Visitor's visa***

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

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

*(b) on application, the holder of such visa may be authorised to perform any of the activities provided for in the visas contemplated in sections 13 to 22; and*
*(c) the holder of such visa shall apply for permanent residence contemplated in section 26(b) within three months from the date upon which he or she qualifies to be issued with that visa."*

[14] There is no explanation from the first applicant as to why she did not apply for the section 11(6) visa. The further requirements that the first applicant would have had to meet for that spousal visa, to enable her to sojourn in the Republic for a period exceeding three months, were:
(a) a medical and radiological report – [regulation 9(1)(c)],
(b) proof of a permanent heterosexual or homosexual relationship as contemplated in regulation 3 – [regulation 9(1)(e)], and
(c) a police clearance certificate – [regulation 11(2)].

[15] An accompanying spouse of a holder of a business or work visa, and any other foreigner who is a member of the immediate family of a citizen or a permanent resident, to be able to be admitted to and sojourn in the Republic, has to meet requirements that are equal to that of the type of a spousal visa which was available to the first applicant which she chose not to apply for when she was admitted into RSA. The further requirements for an accompanying spouse of a holder of a business or work visa or any other immediate family of a citizen or a permanent resident are:
(a) a medical and radiological report – [regulation 9(1)(c)],
(b) a marriage certificate or proof of a relationship as contemplated in regulation 3 – [regulation 9(1)(e),
(c) a police clearance – [regulation 11(2)] and

(d) financial assurance.

[16] “Accompanying” is not defined either in the Act or the regulations. The regulations define “unaccompanied minor” as a child under the Age of 18 years who travels alone. The first expression of this definition clearly refers to the part “minor”. The latter part of the definition gives an indication of the relevant time periods applicable, and in my view provides the context in which the words and expressions used in these regulations are to be interpreted. For these reasons, in my view, “accompanying spouse or child” means “the spouse or child going with at the time of travel”. It follows that section 10(6) and regulation 9(9)(a) refers to a person who was a spouse or child of a holder of a business or work visa at the time of travel into RSA. It means a person who was a spouse or child when he or she made the journey from another country through the port of entry into RSA.

[17] The section and the regulation both envisage a spouse or child who has been through the assessment process of the social, health, economic and security risks to RSA at the time of admission into the country. The definition of “spouse” includes a person who is a party to a permanent heterosexual or homosexual relationship [section 1] and regulation 3 prescribes the documents, interviews and obligations of such spouse at the time of application for admission into the country and during such person’s sojourn in RSA. The first applicant in my view, is not an “accompanying spouse” as envisaged in the Act. She is simply a visitor, and not a spouse, in terms of the Act and the regulations.

[18] In my view, the applicant ought to have applied for a section 11(6) visitor's visa as a spouse of a permanent resident when she first entered RSA. This would have enabled DHA to do a health, social, economic, and security risk assessment at her admission into RSA. Where she made a conscious choice in respect of which fruit to pluck from the tree of democratic RSA visas, she cannot be heard to complain of the taste of her section 11(1) visitor's visa.

[19] The right to life and the achievement of the realization of the right to have access to health care are the foundations upon which regulation 9(9)(a)(i) is built, for a person who otherwise should return to their home country. RSA in fulfillment of its values allows a regulation 11(1) visitor's visa holder who is in need of emergency life- saving medical treatment for longer than three months, to remain in the country for such purpose. Section 18(2) provides that the holder of a relative's visa may not conduct work. Regulation 9(9)(a)(ii) allows for a foreigner who is an immediate family member of the holder of a business or work visa, which family member has already been assessed in relation to health, social, economic and security risks to RSA at the time of admission, to approach the DG for authority to study or work in RSA.

[20] In both instances covered by regulation 9(9)(a), the need to be met requires the change of status of the applicant. In respect of (i), the desire to save the life of a section 11(1) visa holder in an emergency situation forces provision for medical treatment. In respect of (ii), for all intents and purposes the DG simply allows the foreigner to either study or work. In respect of (i), the urgency do not allow for delays, which delays may lead to substantial injustice, irreparable harm and/or even death. In respect of (ii) there is no need for health, social, economic and

security risk assessments, as they have already been done at admission of the spouse or child. Information already available to RSA makes it possible for the DG to apply his mind to both such applications and rule on them whilst the applicant is within the borders of RSA.

[21] The status of a person is the creation of law. It consists of the capacity to acquire and exercise legal rights and to perform legal acts [*Govu v Stuart* (1903) 24 NLR 440 at 441]. "Status" is a relative term and varies according to the different laws of RSA. The object of the Act is the regulation of admission, residence and departure of individuals who are not citizens of RSA. In my view, the status of a foreigner who entered RSA as a section 11(1) visitor and gets married whilst within the Republic, differ from the ordinary standard accorded to a foreigner who entered RSA as an accompanying spouse in that rights of the former fall short of those of the latter so that what is law for the latter is not law for the former.

[22] The status as a spouse in terms of the Act, is not transmissible at marriage whether within or outside RSA. It is acquired at the time of admission of a foreigner into the Republic. It is an official classification given to an applicant determining their responsibilities and rights. It is a tool for RSA to control entry into, presence in and exit out of its borders.

[23] It is earned by those with moral accountability to properly apply for an appropriate visa, capable of being trusted by RSA and have met the requirements for authorization to carry the title. In my view, the marriage of the first applicant after entry into the RSA did effect a change of her status from a spinster to a

married woman. She became a spouse, but this did not transmit to her the status of a spouse as defined and envisaged in the Act. Her relationship with RSA is fixed by the Act and how she stands towards RSA is as ascribed to her by RSA subject to certain obligations. Section 1(1) 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 the Act.

[24] It follows that I do not agree with Donen AJ in *Stewart and Others v Minister of Home Affairs and Another* 12520/2015 [2016] ZAWCHC 20 (29 January 2016) (unreported) when it is said at paragraphs 41 and 42:

*"[41] … That is the "spousal visa" second applicant seeks. No question of a change of status as described in s 10(6)(b) of the Act therefore arises.*

*[42] When the second applicant applied for a "spousal visa" it could only have meant (a visitor's) visa in terms of s 11(6). As an existing holder of a visitor's visa (under s 11(1)) she could not have been making an application for a change of status attached to a visitor's visa."*

The first applicant seeks to change her status from a section 11(1) visitor to a section 11(6) spouse. She is not applying for a renewal or extension of a section 11(1) visa and amongst others is not covered by the proviso in the definition of police clearance in Regulation 1.

[25] The marriage of the first applicant within two months of entering RSA whilst a section 11(1) visitor within the borders of RSA did not and cannot absolve her of her obligation to meet the requirements which are to be met by a foreigner who aspires to the status of a spouse in terms of the Act and wishes to sojourn in RSA with some degree of permanence. Her marriage bears no relationship to the risks that her health condition may expose to those within the borders of RSA or the

safety and security of inhabitants of RSA or its sovereignty, which are issues that the requirements for admission on a permanent basis are intended to assess. DHA as a national department, which is a sphere of government that constitutes RSA, has a constitutional obligation to secure the well-being of the people of the Republic [section 41(1)(b) of the Constitution]. A registrable ritual to prove the constitution of a family, which is sealed by the first applicant kissing another is simply not enough to exempt her to account for her health, social, economic and security risks to RSA and its people.

[26] The mere fact that a section 11(1) visitor is treated differently from a section 11(6) visitor is not in itself a reason to hold them to be unconstitutional. A visitor is different from a spouse or child in terms of the Act, and the reasons and the requirements for their admission and presence are different.

[27] It is against this background that the provisions of section 10(6) read with regulation 9(9)(a) are to be understood. Checks and balances have been considered and assessments done on the health, economic, social and security implications on admission to RSA of an accompanying spouse or child of a holder of the business or work visa or any other immediate family of a citizen or a permanent resident. Such checks and balances had not been done for a section 11(1) visitor's visa. In my view, section 10(6) in its reference to a visitor's visa, is with specific reference to a section 11(1) visa. This is an interpretation which is in line with the purpose of the legislation and the Constitution.

[28] It is clear that the acquisition of legal representation did not help the first applicant to understand the concept of status as envisaged in the Act. With the benefit of legal representation first applicant still did not understand that a section 11(1) visitor's visa is for a tourist who visits for a short period and that a section 11(6) visa is for a spouse in her position and that if she needs to be in the country for three years she needs to apply for a section 11(6) visa and not seek the extension of a section 11(1) visa.

[29] With respect to the attorney who handled this matter at Eisenberg De Saude Attorneys, the inability to recognise the difference in status between a section 11(1) visitor and 11(6) spouse is exhibited in the following paragraph in the first applicant's appeal against the decision of DHA that no change of status or conditions attached to the section 11(1) visa had occurred in terms of section 10(6), in the letter to the DG dated 25 October 2015:

*"(iv) Our client resides in the Republic on a visitor's visa issued upon his arrival in terms of section 11(1) of the Act. Our client wishes to extend her visitor's visa for three years in terms of section 11(6) of the Act to enable her to continue to reside with her lawful spouse, Mr Tomlinson. Our client is not changing her status in terms of section 10(6) of the Act."*

[30] This paragraph of the letter also reveals the true reason for the push. The first applicant arrived in the Republic under section 11(1) visa, but seeks the benefits of a section 11(6) visa without complying with the requirements for admission under that subsection. The wording chosen by the first applicant in her request that this court read in words into Regulation 9(9)(a), according to her to render the regulation valid and consistent with the Constitution further gives her opportunistic tendencies to avoid accountability. She requests the insertion of:

*"(iii) is the spouse of a citizen or permanent resident".*

[31] In my view, the deliberate exclusion of the word *"accompanying"* is calculated to specifically ward off the obligation of a foreigner to comply with the requirements for a permanent sojourn simply because he or she married a citizen or permanent resident whilst within the borders of RSA. This avoidance to account to RSA and its people has the tendency to make a marriage of a foreigner within the borders of RSA a loophole for criminals and their syndicates to avoid detection and expose the country to being a safe haven for criminal activities, including organized crime. It has the tendency to expose the Republic to attack, simply because those who pose security threats would simply marry within our borders to avoid detection. It has the tendency to expose those within the borders of the Republic to health risks which could have been avoided, prevented or mitigated by government. It has the tendency to compromise the welfare of the people of RSA.

[32] Amongst the requirements that the first applicant had to meet to qualify for a section 11(6) visa, was to provide a police clearance certificate. A police clearance certificate is defined as follows in Regulation 1:

*"**Definitions***

1. *"police clearance certificate" means a certificate issued by the police or security authority in each country where the relevant applicant resided for 12 months or longer after attaining the age of 18 years, in respect of criminal records or the character of the applicant, which certificate shall not be older than six months at the time of its submission: Provided that the certificate shall not be required from a foreign country in the case of renewal or extension of a visa but from the Republic;"*

A person in the position of the first applicant, who has been in RSA since 2015, must provide DHA with at least two police clearance certificates, to wit, the one issued by the relevant authority in Uganda, and the one issued by the relevant authority in RSA. If she had resided in any other country for 12 months or longer, she is required to provide DHA with police clearance certificates from the relevant countries as well.

[33] Furthermore, the applicant for a section 11(6) visa has to provide a report by a registered radiologist certifying that the applicant has been examined and that no signs of active pulmonary tuberculosis could be detected, which report shall not be older than six months at the time of its submission [see definition of radiological report in Regulation 1 read with regulation 9(1)]. Such applicant should also provide a report by a registered medical practitioner with regard to their general state of health, detailing any medical condition he or she suffers from, which report shall not be older than six months at the time of its submission [definition of medical report in Regulation 1 read with Regulation 9(1)]. The applicant also had to submit an affidavit confirming the continued existence of the permanent homosexual or heterosexual relationship [Regulation 3(1), (2) read with regulation 9(1)(e)].

[34] In my view, on the papers before me, no case is made out that the first applicant submitted the relevant documents in order to satisfy the DG that she met the requirements and qualified for the issue of a section 11(6) visa. Her case is distinguishable from that of *Stewart, supra.* From day one whilst in Zimbabwe, Mrs Stewart applied for a section 11(6) visa and was let down by the officials at

the RSA mission in that country as to how they chose to classify her and what visa they issued to her. After her entry into RSA, she was alerted to what was missing on the requirements to meet the status that she aspired for, and she travelled to Zimbabwe to obtain a police clearance certificate of that country, in order to meet the requirements for a spousal visa. There was nothing to gainsay that Mrs Stewart met the requirements for a section 11(6) visa.

[35] The authority to issue a section 11(1) or (6) visa is that of the DG. Ordinarily, the DG is represented by officials of DHA throughout the Republic, who accepts applications and make decisions thereon in line with the authority and powers delegated to them as the DG deems meet. RSA sent deputations and missions to Uganda. The body of persons representing the RSA in Uganda is entrusted to represent the government of the Republic. DHA has a responsibility to uphold the principle of co-operative government and intergovernmental relations which places a duty on its officials at its national office to preserve the national unity and the indivisibility of the Republic as envisaged in section 41(1)(a) of the Constitution. This obligation, in my view, negates the elevation of an application for change of status from a section 11(1) visitor to a section 11(6) spouse filed at a foreign mission of RSA in Kampala, Uganda, to some special status which is more equal than the same application lodged at any office of DHA within RSA where the DG is represented.

[36] There is an obligation on officials of DHA within the country to co-operate with either their national office or missions of RSA in foreign countries in mutual trust and good faith, consulting one another on matters of common interest or

guidance or co-ordination of actions or adherence to agreed procedures. The failure of DHA to put such systems in place, in my view, should not be visited on foreign nationals seeking to enter, sojourn or depart from RSA. The answer should lie in strategies that seek to place DHA and its officials to be loyal to the Constitution, the Republic and its people [section 41(1)(d)].

[37] The question, in my view, should be whether an applicant has filed an application together with all supporting documents, accompanied by, complying with and that meet the requirements for the issue of the visa which confers the status applied for, to a person who has the authority to represent the DG and has the delegation and power to decide on that application, and not whether the applicant is submitting the change of status application whilst in Kampala, Uganda or in the City of Cape Town, RSA at the time of application.

[38] Section 31(2)(c) of the Act provides as follows:

*"**Exemptions***

*31. (2) Upon application, the Minister may under terms and conditions determined by him or her –*

*(c) for good cause, waive any prescribed requirement or form; …"*

A person issued with a section 11(1) visa who meets the requirements for the change of status to a section 11(6) in terms of the Act may apply to the Minister for waiver. Section 31(2)(c) does not allow the Minister to waive the requirement in the Act. This means that the Minister may not waive what section 10(6)(b) provides for. The section allows the Minister to waive any prescribed requirement or form, which in my view means that the Minister may waive what is provided

for in the Regulations that the Minister made in terms of section 7. Such applicant has to show good cause.

[39] Where the Minister is satisfied that good cause has been shown, for purposes of that application only, in my view, the Minister may deem the facts set out upon which good cause is shown as sufficient to waive the requirement of the exceptional circumstances as set out Regulation 9(9). In my view the applicant will still be covered by the exception in section 10(6)(b), and the applicant will be able to lodge his or her application while in the Republic.

[40] On the papers filed by the first applicant, there is no indication that she had applied for the waiver in terms of section 31(2)(c) to lodge her papers in South Africa and not in Kampala. As a result, the Minister was never taken into first applicant's confidence through the disclosure of facts set out upon which it was submitted that good cause existed for the waiver. It is simply premature of me to express a view on a waiver, which expression will simply be speculative conjecture, for nothing can come out of nothing.

[41] It is against this background that the decision of officials of DHA, the DG and the Minister on first applicant's application is to be understood. Consistently, the reason was set out in the following terms by all three:

*"NO CHANGE OF STATUS OR CONDITIONS ATTACHED TO THE TEMPORARY VISA WHILE IN THE REPUBLIC IN TERMS OF SECTION 10(6) OF THE IMMIGRATION ACT 2002."*

As already mentioned, neither in the application to the respondents and the appeals lodged nor in the papers before this court does it appear that the first

applicant filed an application with supporting documents which complied with the requirements for her to qualify for a section 11(6) visa to be issued to her. She further did not apply for waiver of the requirements by the Minister, setting out facts upon which she relied that good cause existed for the waiver of the requirement for her to apply from outside the Republic.

[42] It is simply untrue for first applicant to allege that the only reason for the respondents to reject her application is that she submitted her application within the Republic. As shown it is further untrue to suggest that Regulation 9(9) is a total bar for consideration of an application for change of status whilst an applicant is within the Republic. If there is any material error of law, it is found in the interpretation of the Act and the Regulations attributable to the advice which first applicant received, which she verily believe to be correct and not in the provisions of the Act and the Regulations.

[43] Confirmation of that material error of law found in interpretation of the Act also finds expression in third applicant's affidavit, para 15, which read as follows:
*"15. … As I was currently residing in South Africa on a visitor's visa issued in terms of section 11(1) of the Act, I was merely wishing to extend my visitor's visa for three years in terms of section 11(6) of the Act to enable me to continue living with the second applicant."* From the facts the last words should read fourth applicant as earlier in the affidavit third applicant alleges that he is in a life partnership with fourth applicant who is a citizen of RSA.

[44] Third applicant is a Greek citizen who was also admitted into RSA on a section 11(1) visa and applied for a section 11(6) visa whilst within the RSA. He had lived together with the fourth applicant in an exclusive relationship and need to be enabled to continue to cohabit with his partner in RSA. It is simply legally impossible to extend a visitor's visa issued in terms of section 11(1) to a spousal visa provided for in terms of section 11(6). One cannot, in law and in terms of the Act, extend one status into another different status.

[45] Third applicant's application was rejected and the same terms used in rejecting first applicant's application were advanced by DHA officials, except that in his case there was a further reason set out in the following terms:

*"No documentation to prove 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)".*

The third applicant also applied for authorization to work as a freelancer, or independent service provider.

[46] Third applicant submitted a medical report from Dr De Kock, a radiological report from Dr K Naidu of Drs Schnetler Corbett and Partners, what purports to be a police clearance from Greece, a letter and affidavits from fourth applicant and himself confirming their relationship including a notarial cohabitation agreement between them as well as bank statements of fourth applicant to show his financial means.

[47] In my view, third applicant is required to submit a police clearance from RSA in relation to the period from the date of his admission into the country to the

date of his application, as he has resided in the Republic for longer than 12 months. Furthermore, the third applicant is required to submit confirmation from the relevant authority in Greece indicating that he has not lived in any other country for a period of 12 months or longer after he attained the age of 18. If he had resided in another country for 12 months or longer after attaining the age of 18, he is required to also submit a police clearance from such country. This in my view is necessary to meet the purpose for which the police clearance is sought to enable DHA to do its security assessment. The third applicant did not submit these documents.

[48] Third applicant submitted a document which purports to be a copy of his penal record, in lieu of the police clearance certificate. Generally, countries use fingerprints, bodily features like photographs and other scientific evidence from the body of a person, present in that country for purposes of identification. Secondly, RSA use diplomatic channels to receive official documents held by another country in respect of official business in relation to persons within its borders. It remains unclear as to how it was possible to identify third applicant in Greece whilst he was within the borders of RSA at the time of the issue of his purported penal record. It remains unclear as to how the document found its way from Greece into RSA.

[49] In an application for a section 11(1) visa, it is understandable that this particular section require of the foreigner who applies for the visa to provide the financial or other guarantee as proof of sufficient available financial resources. The third applicant submitted bank statements of fourth applicant. Regulation

11(3) requires that it be bank certified statements. I am unable to trace any certificate from the bank, not even a bank stamp, duly dated and signed appended to the statements submitted by third applicant.

[50] Third applicant completed a pro forma form prepared and issued by DHA in Government Gazette 37679 dated 22 May 2014, (DHA-1712A) also known as Form 12. It is titled "AFFIDAVIT IN RESPECT OF PARTIES TO PERMANENT HOMOSEXUAL OR HETEROSEXUAL RELATIONSHIP" and makes reference to section 7(1)(g), read with section 11(6) and 26(b) and regulations 3(2) and (4). Section 7(1)(g) provides for the power of the Minister to make regulations relating to forms whereas section 26(b) provides for the DG to issue a permanent residence permit to a spouse of a citizen or permanent resident. Regulation 3(2)(d) provides as follows:

*"**Permanent homosexual or heterosexual relationship***

*3 (2) An applicant contemplated in subregulation (1) must submit –*

*(d) documentation to prove –*

*(i) the financial support of each other; and*

*(ii) the extent to which the related responsibilities are shared by the applicant and his or her spouse;"*

[51] Form 12 has a DHA typed paragraph which reads as follows:

*"To substantiate our relationship we attach documentation proving cohabitation and the extent to which the related financial responsibilities are shared by us."*

An affidavit of fourth respondent is attached in which he confirms the relationship, cohabitation and the reciprocal obligation of emotional and financial support. He further alleges that third applicant contributes to the property rental whilst he contributes to the day to day living expenses and that third applicant

would start contributing on an equal basis once he has obtained authorization to work in RSA. Third applicant submitted a confirmatory affidavit. The two also submitted a notarial cohabitation agreement which regulates their relationship. In my view, in the absence of countervailing evidence, the respondents have no reason not to accept these allegations as sufficient proof of the financial support to each other and the extent to which the related responsibilities are shared by third and fourth applicant. It follows that in my view, the further reason provided by DHA on 14 May 2015 for the rejection of third applicant's application, as earlier referred to, cannot be sustained by the facts.

[52] The decision on the appeal lodged by third applicant somewhat muddies the waters. The relevant part reads as follows:

*"I wish to inform you that I have decided to uphold the decision to reject your application for a temporary residence visa. No contract of employment to support the category 11(6) which applicant applied for in terms of Regulation 11(7(a)."*

In my view, what remained outstanding were proper police clearance certificates as well as proper financial assurance as required in the Act and the regulations. It has to be mentioned that whereas for a section 11(1) visa the financial assurance should be provided by the applicant, in my view, for a section 11(6) spouse such prescribed financial assurance may be provided by the citizen or permanent resident who is the spouse of the applicant. Section 18 of the Act provides that guidance. The person who considered the appeal may have lost themselves in their reasoning because of the third applicant's application to be allowed to conduct freelance work. The work was an irrelevant factor, having regard to the requirements to be met for a spousal visa. It is only on specific application to the

DG that the spouse may be authorised to work and only to that extent may a contract of employment be a relevant factor to be considered.

[53] On third applicant's appeal to the Minister, the reasons for the decision are provided as follows:

*"I wish to inform you that I have decided to uphold the decision to reject your application for a Visitor's visa in terms of section 11(6) of the Immigration Act 2002, ( Act No 13 of 2002) as amended. My decision is based on the fact 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."*

[54] The Minister appear to hold the view that a person holding a section 11(1) visa may not change the status to a section 11(6) visa whilst in the Republic. Clearly, the Minister's attention was not drawn to the provisions of section 31(2)(c) read with regulation 9(5). Regulation 9(5) reads as follows:

***"Visas to temporarily sojourn in Republic***

*9. (5) A foreigner who is in the Republic and applies for a change of status or terms and conditions relating to his or her visa shall –*

*(a) submit his or her application on Form 9 illustrated in Annexure A, no less than 60 days prior to the expiry date of his or her visa; and*

*(b) provide proof that he or she has been admitted lawfully into the Republic,*

*Provided that no person holding a visitor's or medical treatment visa may apply for a change of status to his or her visa while in the Republic, unless exceptional circumstances set out in subregulation (9) exist."*

[55] Where the holder of a visitor's visa sets out facts which in the opinion of the Minister constitutes good cause, in terms of section 31(2)(c) the Minister has the power to waive the prescribed exceptional circumstances as set out in regulation

9(9). In my view, where the requirement for exceptional circumstances is provided for in the Regulations made by the Minister, and the Minister waives such requirement for an applicant as provided for by the same Regulations, the waiver should suffice to satisfy the exception in section 10(6)(b). Once the Minister grants the waiver, the holder of a section 11(1) visitor's visa should be able to apply for a section 11(6) spousal his/her visa whilst in the Republic.

[56] Upon application and on good cause shown, the Minister may waive the requirement in regulation 9 (9) (a). Nothing in my view precludes the Minister to provide such waiver on those terms as to the Minister deems meet. In considering the application for waiver, the Minister has a discretion which is exercised upon consideration of all the facts. It is a question of fairness to both the Republic of South Africa and the applicant. In that application relevant considerations for the Minister includes the explanation for the application and the prospects of success of a section 11 (6) application.

[57] The respondents are not without recourse should the first and third applicant fail to submit the necessary documents in support of their application to qualify for a section 11(6) visa whilst within the Republic, after they have been given a reasonable opportunity to do so, even if the waiver had been granted. They could be ordered to depart [section 32] failing which they may be arrested, detained and deported [section 34].

[58] An application for change of status while the applicant is within RSA requires verification of documents allegedly issued by the relevant authorities. The

application for relevant documents from their home country remains an issue between an applicant and his or her home country. However in my view, the best way for RSA to receive authentic documents while an applicant is within its borders is through diplomatic channels.

[59] I am not persuaded that the first and third applicants have submitted all the supporting documents necessary to show that they have a right in law to the section 11(6) spousal visa. I am further not persuaded that the applicants have been subjected to prejudice or a real threat of prejudice as a result of the provisions of the Regulations. I am not persuaded that Regulation 9(9)(a) prohibit a foreign spouse of a citizen or permanent residence who holds a section 11(1) visitor's visa from remaining in South Africa while his or her application for a section 11(6) spousal visa is being submitted to and considered by the DG.

[60] I am not persuaded that section 10(6)(b) read with Regulation 9(9) has been established as an infringement of the right to human dignity. To the contrary, read within the context of other provisions of the Act, the Regulations are structured in such a way that they may afford protection to the core element of the institution of marriage which is to live together as spouses in the community of life in that the Minister require "good cause" for a section 11(1) visitor in lieu of "exceptional circumstances" for others.

[61] The requirement does not offend equal treatment of a section 11(1) visitor's visa holders who wishes to apply for a section 11(6) spousal visa when compared to an accompanying spouse of a holder of the business or work visa who wishes

to apply for a study or work visa. The Regulations enhance parity and not inequality of the two classes of spouses. By extension, the provisions read within context help to allow the section 11(1) visitor an opportunity to undergo the health, social, financial and security assessment for their admission to acquire some degree of permanence, like an accompanying spouse of a holder of a business or work visa already did at their admission.

[62] It follows that Regulation 9(9) of the Regulations made by the Minister of Home Affairs in terms of section 7 after consultation with the Immigration Advisory Board, is not inconsistent with the Constitution. The provisions, read in context, are reasonably capable of an interpretation which would be consistent with the Constitution [*S v Bhulwana, S v Gwadiso* 1996(1) SA 388 (CC) para 28]. The fact that officials of DHA, who are generally immigration officials and have no legal training, interpreted the provisions otherwise does not render the provisions solely for that misinterpretation unconstitutional.

[63] In my view, the applicants seek to seize an unfair advantage out of the misinterpretation by administration officials, through an extension to themselves of such undue benefits as to include their circumvention of the Act. As persons whose risks to the Republic have not been assessed, they have a provision in the Act that provides a remedy which exposes them to no prejudice whatsoever. The remedy accords with the checks and balances built into the Act and it is not inconsistent with the Constitution. They are not entitled to marry or establish heterosexual or homosexual relationships with citizens or permanent residence permit holders and thereby avoid compliance with the checks and balances built

into the laws of this country for admission to sojourn with a degree of permanence.

[64] In *Mistry v Interim Medical and Dental Council of South Africa* 1998(4) SA 1127 at para 24 the Constitutional Court said:

*"[24] In S v Makwanyane and Another this Court held that there was no absolute standard which could be laid down for determining reasonableness and justifiability. Principles could be established, but the application of those principles to particular circumstances could only be done on a case by case basis:*

*"This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and , particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question."*

It is not preferable to lay down an absolute standard for use by the Minister when he considers applications by section 11(1) visitor's visa holders who apply for a section 11(6) spousal visa and a section 31(2)(c) waiver.

[65] The Legislature generally reserves matters of policy for the Executive arm of the State when drafting laws. The decision to waive prescribed requirements is not only influenced by issues of legality, but also issues of policy which do not generally fall within the judicial authority of the courts. Judicial restraint demands that I not venture into the determination of circumstances which may be deemed by the Minister to be reasonable and justifiable to constitute "good cause" in order to waive any prescribed requirement. The decision to permit to remain in

the country a person whose risk to the RSA and its people had not yet been assessed, is a policy-laden decision best left to the Minister.

[66] In concluding, the silence which is too loud to be ignored in these proceedings, is that of the 2 year old Joshua, first applicant's son. Because of the dispute between the parties, his birth has not yet been registered. He is a child without an official name, parents, identity and nationality. The best interests of Joshua require the matter regarding the status of first applicant to be attended to with urgency.

For these reasons I make the following order:

1. The application is dismissed.
2. First and third applicants are granted leave to submit their applications in terms of section 31(2)(c) of the Act to the Minister, for good cause, to consider waiving the requirement as prescribed in Regulation 9(9) within 30 days of the date of this order or within such longer period as the Minister may determine.
3. Pending the decision of the Minister on the section 31(2)(c) applications, immigration officials and the Director-General, Department of Home Affairs are directed not to refuse applications, together with supporting documents as prescribed, by holders of valid section 11(1) visitors' visa for a section 11(6) spousal visa only because such applicants are within the Republic, unless the Minister had dismissed the section 31(2)(c) application of such applicant or other good cause is established for such refusal.

4. First and second applicants are granted leave to submit their applications with supporting documents, as prescribed for a section 11(6) spousal visa, within 30 days of this order or within such longer period as the Minister may determine or prescribe.
5. The Director-General, Department of Home Affairs, is instructed to assist the child Joshua in having his birth registered, failing which the Director-General of the Department of Home Affairs, or his designate, is to appear before the Children's Court, Bellville, on Wednesday 16 May 2018 at 9H00 or so soon as the matter may be heard, to give reasons for the failure, and for the Children's Court to make an order it deems just and in the best interests of the child.
6. No cost order is made.

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DM THULARE

ACTING JUDGE OF THE HIGH COURT

**Counsel**
Appellant: Advocate L de la Hunt
Respondent: Advocate N Mangcu - Lockwood

**Instructing Attorneys**
Appellant: G Eisenberg/Eisenberg and Associates
Respondent: Ms. Lombard /STATE ATTORNEY
JUDGMENT READ AND DAY(S) IN COURT: 18 April 2018