IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No: 1301/03

In the matter between:

EISENBERG AND ASSOCIATES Applicant

and

THE MINISTER OF HOME AFFAIRS First Respondent

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA Second Respondent

THE SPEAKER OF THE NATIONAL ASSEMBLY Third Respondent

THE CHAIRPERSON OF THE NATIONAL COUNCIL
OF PROVINCES Fourth Respondent

THE DEPUTY PRESIDENT OF THE REPUBLIC
OF SOUTH AFRICA Fifth Respondent

JUDGMENT: 27 MARCH 2003

VAN ZYL J:

INTRODUCTION

[1] This is an application for a declaratory order invalidating the Immigration Regulations made by the first respondent and published in the *Government Gazette* No 24952 (Notice 487 of 2003) on 21 February 2003. The application was brought on an urgent basis and sought an order declaring the said regulations to be unlawful and inconsistent with the Constitution of the Republic of South Africa, Act 108 of 1996, and hence to be invalid. In addition an order was sought requiring the first respondent, in making immigration regulations, to comply with the

provisions of section 7 of the *Immigration Act* 13 of 2002. Finally the applicant sought an order that the first respondent bear all disbursements incurred by the applicant, including those consequent upon the employment of two counsel.

[2] When the matter came before this court on 11 March 2003 the applicant was represented by Mr Katz and Mr De Waal and the first respondent, being the Minister of Home Affairs, by Mr Hiemstra and Ms Bawa. The second, third and fourth respondents gave notice that they abided the decision of this court. The fifth respondent initially opposed the application but later likewise gave notice of his intention to abide the decision of this court. Shortly before the hearing of this matter, however, the applicant expressed an intention to amend the relief sought by it by inserting an additional prayer relating to the partial invalidity of the proclamation issued by the fifth respondent in his capacity as Acting President. Pursuant thereto Ms R Williams appeared on behalf of the second and fifth respondents with a view to opposing only such additional relief. Inasmuch as the third and fourth respondents had filed a joint affidavit containing their views on the interpretation of sections 7 and 52 of the *Immigration Act*, Mr Heunis appeared on their behalf with a view to assisting the court in this regard.

[3] After hearing full argument by counsel, this court gave an order declaring the said regulations unconstitutional and hence invalid, and requiring the first respondent to comply with the provisions of section 7 of the *Immigration Act* when making such regulations. The costs order sought by the applicant was likewise granted. The court refused, however, to grant an order relating to the partial invalidation of the fifth respondent's proclamation aforesaid on the basis that the issue had not been ventilated in the papers. In any event, such relief was not, on the facts and in the circumstances of the case, justified. In view of the urgency of the matter, my learned brother presiding gave, *ex tempore*, only the briefest of reasons for the order, subject thereto that full reasons would be advanced in due course in a reserved judgment.

[4] During his argument Mr Hiemstra submitted, on behalf of the first respondent, that should the court be disposed to grant the order, it should rule, in terms of the provisions of section 172(1)(b)(ii) of the Constitution, that the declaration of invalidity be suspended for a year. This would allow the first respondent sufficient time to correct the defective regulations in accordance with the provisions of section 7 of the *Immigration Act*. Only sections 4, 7 and 52 of such Act had already come into operation, whereas the remaining provisions of such Act would come into operation at midnight on 11 March 2003. The main argument in this regard was that the existing regulations, issued in terms of the *Aliens Control Act* 96 of 1991, were irreconcilable with the *Immigration Act* and would lead to chaos at border posts, ports, airports and elsewhere. If the declaration of invalidity of the new regulations were to be suspended, however, they could be applied to the *Immigration Act*, as they were intended to be. During the period of suspension yet another set of regulations, consonant with the provisions of section 7 of the *Immigration Act*, could be prepared and promulgated in due course.

[5] Inasmuch as it had not been persuaded that justice and equity, or considerations of good government, justified such suspension in terms of section 172(1)(b) of the Constitution, this court refused to suspend the declaration of invalidity. In this regard it placed special emphasis on section 52(2) of the *Immigration Act*, which provides that any regulations adopted under the previous Act (the *Aliens Control Act*) would "remain in force and effect until repealed or amended".

[6] Immediately after this court had made its order aforesaid, the first respondent approached us with an application for leave to appeal. One of the grounds of appeal was that my learned brother presiding had created the impression, in furnishing his brief *ex tempore* reasons for such order, that the provisions of section 172(1) of the Constitution precluded the court from suspending the order relating to the invalidity of the regulations. If such an impression was indeed created it was certainly unintentional, inasmuch as careful consideration was given to the request for suspension before the order was issued and the suspension was refused. Counsel for the first respondent were given the assurance that the apparent *lapsus linguae* would be remedied in the reserved judgment, when full reasons would be furnished.

[7] During the late afternoon, when my learned brother presiding was no longer available, I was approached in chambers by counsel for the first respondent with an urgent application for leave to appeal. In its notice of application the first respondent sought a certificate from this court, in terms of rule 18 of the Constitutional Court rules, to appeal directly to the Constitutional Court. Simultaneously leave was sought, in terms of rule 49(11) of the rules of this court, to appeal to the Supreme Court of Appeal. Leave in the latter case was to be suspended pending the decision of the Constitutional Court whether or not to entertain the appeal. The applicant in the present matter opposed the application. Mr Katz requested me to rule, in terms of the provisions of rule 49(11), that the automatic suspension of this court's order, which would take effect on the noting of the appeal unless this court should "otherwise direct", should itself be suspended. In the absence of my learned brother presiding, I had no alternative but to hear counsel out and to consider the application being brought before me.

[8] In considering the application for leave to appeal I made it quite clear to counsel for the first respondent that I was embarrassed by the application inasmuch as this court had not yet furnished full reasons for its order. Only once this had been done could an application for leave to appeal be properly entertained. I suggested to counsel for the first respondent that their client should consider suspending the operation of the remainder of the *Immigration Act* for a period of some six months. This would enable the Department of Home Affairs to get its house in order and apply its mind to promulgating new regulations in terms of the provisions of section 7 of such Act. It would also have the effect that the *Aliens Control Act*, presently in force, would remain in force and would continue to function with the old regulations on exactly the same basis, however unsatisfactorily, as it had hitherto done. In this way application of the new regulations to the old Act would be avoided.

[9] After consultations with the first and fifth respondents, as I was given to understand, Mr Hiemstra informed me that he was unable to obtain instructions to this effect. He was, indeed, instructed to continue with the application for leave to appeal and to oppose vigorously the applicant's request to suspend the automatic suspension of our order in terms of rule 49(11). His

client in fact insisted that he be allowed to present evidence relating to the chaos that he envisaged would ensue should I be disposed to suspend the automatic suspension of this court's order in terms of rule 49(11). I refused to allow any further evidence than that already on file and was constrained, on 11 March 2003 at approximately 22h00, to make an order suspending the automatic suspension of the order made by this court earlier that day. I likewise ordered that only sections 4, 7 and 52 of the *Immigration Act* would remain in force until 18h00 on 17 March 2003. This had the effect of preventing the remaining provisions of the Act from coming into operation at midnight, some two hours later and, consequently, of preventing the chaotic situation envisaged by the first respondent from developing. Hence the old *Aliens Control Act* and its regulations would remain in force at least until the evening of 17 March 2003.

[10] On Monday 17 March 2003 the first respondent requested that the suspension order granted on Tuesday night 11 March 2003 be extended for a period of twenty-one days, until 7 April 2003. The extension was granted on the basis that it would enable the court to furnish a fully reasoned judgment and would facilitate the formulation of grounds of appeal, should the first respondent be disposed to continue with his application for leave to appeal.

THE ISSUES

[11] A number of issues have been raised in the papers, chief among which are whether or not the applicant had *locus standi* to bring this application and whether or not the regulations were required to comply with the provisions of section 7 of the *Immigration Act*. In regard to the latter issue the first respondent submitted that the regulations were issued in terms of section 52 of the Act and were intended to be interim or transitional regulations that would remain in force only until the Immigration Advisory Board (the "Board") was duly constituted and operational. Section 7 of the Act was hence not applicable thereto.

[12] A further issue related to whether or not the fifth respondent, the Deputy President of South Africa, had duly acted in his capacity as Acting President when issuing the relevant proclamation. The applicant has since indicated that this is no longer in issue. It is hence not necessary to deal with it.

THE LOCUS STANDI OF THE APPLICANT

[13] The applicant is a Cape Town based law firm devoted exclusively to the practice of immigration law. The applicant's sole proprietor, Mr Gary Eisenberg, is the South African

representative to the International Bar Association's Immigration and Nationality Law Committee and has served on the International Faculty of the American Immigration Lawyers' Association. The applicant has been involved in a number of immigration matters, including the unreported case of *Eisenberg and Associates v The Minister of Home Affairs and The President of the Republic of South Africa* (case number 251/02) heard on 17 February 2003.

[14] In that matter this court, constituted by our learned brethren Blignault and Davis JJ, granted an application declaring the immigration regulations made by the first respondent on 25 November 2002 to be unlawful, unconstitutional and hence invalid. The learned judges gave consideration to the fact that the applicant was actively involved in immigration law matters both nationally and internationally and maintained an ongoing interest in the development of South African immigration law. On this basis the applicant purported to be acting in its own and in the public interest. As in the present matter, the first respondent averred that the applicant did not have the requisite *locus standi* to bring the application. Although the court did not, in its judgment, deal specifically with the arguments relating to *locus standi*, it clearly accepted that the applicant had the necessary legal standing to approach the court, as appears from the following *dictum* at page 7 of the typewritten judgment:

> Applicant was thus faced with the fact that the first respondent publicly purported to exercise his powers under the Immigration Act by making these Regulations. In these circumstances applicant was, in my view, entitled to come to Court to ask for a declaratory order in regard to the validity of the regulations.

The court concluded that the applicant was entitled to the relief sought by it.

[15] In his founding affidavit Mr Eisenberg averred that the applicant has an interest in the lawful and constitutional administration of all laws, and in particular the immigration laws of South Africa. For this reason alone it had standing in the application. In addition the applicant and members of the public have a legal right, in terms of section 7(1)(a) of the *Immigration Act*, to comment on the subject matter of the intended immigration regulations. They likewise have the right, in terms of section 7(1)(b) of the Act, to comment on the draft regulations prior to their publication in final form in terms of section 7(1)(c) of the Act. The applicant fully intended to exercise this right, as it had done when the previous regulations had appeared in draft form. It was hence directly affected by the first respondent's failure to comply with the provisions of section 7 of the Act inasmuch as this failure deprived the applicant of its right to comment as aforesaid.

[16] In support of its *locus standi* argument, the applicant relied not only on its own interest in the matter, as provided in section 38(a) of the Constitution, but also on section 38(d) thereof. This provides that anyone acting in the public interest may approach this court for relief when a

right specified in the Bill of Rights has been infringed. Inasmuch as this might not be consonant with the prevailing common law, the relevant common law principles should be developed in terms of section 39(2) of the Constitution in order to bring it in line with the spirit, purport and objects of the Bill of Rights.

[17] In his argument on behalf of the applicant, Mr Katz emphasised that the right infringed by the first respondent had been the applicant's right to comment on the regulations before their promulgation, as provided in section 7 of the *Immigration Act.* Inasmuch as the general public's right to comment had likewise been infringed, the applicant was acting in both its own and the public's interest to have the regulations invalidated. He relied in this regard on the following *dictum* of O'Regan J in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) at 1104 G-H (para 234):

> Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court. These factors will need to be considered in the light of the facts and circumstances of each case.

[18] Mr Hiemstra submitted on behalf of the first respondent that the applicant's interest and involvement in immigration law did not constitute a sufficient legal interest to justify its standing in terms of section 38(1) of the Constitution. A statutory right to comment in terms of the provisions of section 7 of the *Immigration Act* was not a fundamental right protected by the Bill of Rights. In any event the applicant's right to comment was not being denied nor threatened, but only delayed until such time as the section 7 procedure came into operation. The same applied to members of the public who might wish to comment on the regulations. From that point of view the applicant could not be said to be acting in the public interest. Inasmuch, therefore, as the applicant did not have *locus standi* in terms of the Constitution, it likewise had no *locus standi* in terms of the common law.

[19] Under the heading "enforcement of rights" section 38 of the Constitution provides thus:

> Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:
> a) anyone acting in their (*sic*) own interest;
> b) anyone acting on behalf of another person who cannot act in their (*sic*) own name;
> c) anyone acting as a member of, or in the interest of, a group or class of persons;
> d) anyone acting in the public interest; and
> e) an association acting in the interest of its members.

[20] The concept of a "right" in the context of section 38(1) is not restricted to the rights specified under the various headings contained in the Bill of Rights. The Bill of Rights is described in wide terms in section 7(1) as "a cornerstone of democracy" that "enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom". The "rights of all people" must necessarily include their right to participate in the democratic process by being enabled to comment upon or otherwise be involved in the law-making process. If they were excluded therefrom, mere lip service would be paid to the democratic values of human dignity, equality and freedom underlying the Bill of Rights. Members of the public, including the applicant, should have an unfettered right to express their views on proposed legislation and other statutory enactments, such as regulations relating thereto.

[21] In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) at 1082G-H (para 165) Chaskalson P stated as follows on the issue of standing:

> Whilst it is important that this Court should not be required to deal with abstract or hypothetical issues, and should devote its scarce resources to issues that are properly before it, I can see no good reason for adopting a narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled. Such an approach would also be consistent in my view with the provisions of s 7(4) of the Constitution [ie

> the interim Constitution, Act 200 of 1993] on which counsel for the respondents based his argument.

[22] Similarly in *Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another* 2001 (2) SA 609 (ECD) at 618J-619F Froneman J said the following in regard to section 38 of the Constitution:

> Section 38 is new and introduces far-reaching changes to our common law of standing … There is no cogent reason for a restrictive interpretation of the provisions of the section because of the narrow content given to standing under the common law …
>
> Particularly in relation to so-called public law litigation there can be no proper justification of a restrictive approach. The principle of legality implies that public bodies must be kept within their powers. There should, in general, be no reason why individual harm should be required in addition to the public interest of the general community. Public law litigation may also differ from traditional litigation between individuals in a number of respects. A wide range of persons may be affected by the case. The emphasis will not only be backward-looking, in the sense of redressing past wrongs, but also forward-looking, to ensure that the future exercise of public power is in accordance with the principle of legality …All this speaks against a narrow interpretation of the rules of standing.
>
> It is true that the nature of public law litigation creates problems of its own, namely that of proper representation. The kind of problems that may arise are those associated with ensuring (1) that only those who wish to be involved in the case are; (2) that those who wish to be involved are given the chance to make the representations they may wish to make; and (3) that the party presenting the case adequately represents future interests. These problems are, however, not factors that militate against a broad view of standing. At most they require safeguards to ensure the broadest and most effective representation in and presentation of public interest litigation.

At 620A-B the learned judge continued:

> The provisions of s 38 are not self-explanatory in a single unambiguous way. They may be interpreted and applied in different ways, with enormously varied consequences. This does not mean that I am entitled simply to interpret the section in the manner that I would like to. The interpretation has to be done within the constraints of legal reasoning, one of them being that like cases should be treated alike. This principle lies at the heart of our law of precedent.

[23] We respectfully endorse the approach in both these matters. Not only does it accord with fundamental democratic values and principles, but it is also expressed in eminently rational and logical terms. The ancient values of justice, fairness, reasonableness, good faith and good morals

or public policy require a flexible approach to matters of *locus standi*, particularly where private or public interests cannot otherwise be protected.

[24] In the present matter no suggestion was made as to any alternative way in which redress could be afforded the applicant or other interested members of the public. Nor was it suggested that the issues at stake are purely academic or hypothetical. See in this regard the judgments in *Zantsi v Council of State, Ciskei, and Others* 1995 (4) SA 618 (CC) at 619 B (para 7); *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) at 1082 C-F (para 164); *Port Elizabeth Municipality v Prut NO and Another* 1996 (4) SA 318 (ECD) at 324H-325F.

[25] We are, therefore, quite satisfied, on consideration of all the relevant facts and circumstances mentioned above, that the applicant was indeed acting in its own and in the public interest when it resolved to bring this application. On the view we take of the first respondent's obligation to comply with the provisions of section 7 of the *Immigration Act*, the applicant was perfectly justified in bringing this application, just as it was justified in bringing the previous application heard by our learned brethren Blignault and Davis JJ.

[26] It follows that we must needs hold that the applicant has, at all relevant times, had the requisite *locus standi* to bring the present application. This brings us to the major issue in this matter, namely whether or not the first respondent was enjoined to comply with the provisions of section 7 of the *Immigration Act*.

THE APPLICABILITY OF SECTIONS 7 AND 52 OF THE IMMIGRATION ACT

[27] Although the *Immigration Act* 13 of 2002 was assented to by the second respondent on 30 May 2002, only sections 4, 5 and 52 thereof have come into operation. Section 4 establishes an Immigration Advisory Board (the “Board”), section 7 deals with the requirements for the making of regulations and section 52 contains transitional provisions relating to the functions of the Board and the Department of Home Affairs. For the rest, the predecessor of this Act, namely the *Aliens Control Act* 96 of 1991 (as amended) remains in force, as do the regulations pertaining thereto. In addition to these regulations there is an extensive consular code which, although unpublished, governs the so-called "aliens control regime". By virtue of the order of this court issued on 11 March 2003 and extended on 17 March 2003, this regime continues to function, at least until 7 April 2003 when the applicant's application for leave to appeal will be heard by this

court.

[28] Section 7 of the *Immigration Act* reads as follows:

> 7 (1) The Minister shall have the power to make regulations called for, or conducive to, the implementation of this Act and in making regulations in terms of this Act, the Minister shall –
>
> a) publish and table in Parliament his or her intention of adopting regulations specifying their subject matter and soliciting public comment during a period not shorter than 21 calendar days;
> b) having considered public comments received, publish and table in Parliament draft regulations soliciting further comments during a period not shorter than 21 calendar days; and
> c) publish the final regulations together with a summary of comments which have not been accommodated and the reasons for their rejection.
>
> (2) Only subsection (1)(b) and (c) shall apply in respect of any regulations which this Act requires to be prescribed from time to time.
>
> (3) The Board may request the Minister to –
>
> a) reconsider any intended regulations prior to their promulgation; or
> b) consider the need to adopt, repeal or amend regulations.
>
> (4) Regulations shall be consistent with this Act, and shall not disregard the advice of the Board and public comments in an arbitrary or capricious manner: Provided that any regulation made in terms of this section shall be tabled within 30 days after its promulgation if Parliament is in session and if Parliament is in recess when the regulation is published, within 12 days after the resumption of the session.

[29] If for some or other reason the Board has not been constituted and become operational, the first respondent still has the power, in terms of the transitional provisions contained in section 52 of the Act, to make any regulation that may be required. This section provides as follows:

> 52 (1) Until the Board is duly constituted and operational, any regulation required in terms of this Act shall be prescribed.
>
> (2) Subject to this Act, any regulations adopted under the previous Act shall remain in force and effect until repealed or amended.
>
> (3) The Board shall be convened within 90 days of the coming into force of this Act.

[30] In the present matter the regulations invalidated by this court were made by the first respondent in terms of section 52, read with section 51, of the Act. This may be contrasted with the previous regulations struck down by Blignault and Davis JJ, where they were made in terms

of section 52 read with section 7 of the Act. In the present case there has hence been a deliberate omission of any reference to section 7. The reference to section 51, although not yet operational, was clearly to provide for the incorporation of the "transitional definitions" of "prescribe" and "regulation" as they occur in section 52(1) of the Act. The question arising immediately, of course, is whether the first respondent was empowered by section 52 to make any regulation not falling within the ambit of section 7.

[31] In this regard the applicant avers that the first respondent is not empowered in terms of section 52 to make regulations. This section provides simply that he may make regulations before the Board is constituted and becomes operational. Such regulations must, however, comply with section 7 of the Act. If they do not, the regulations are invalid. On this point Mr Katz, in his argument on behalf of the applicant, relied on the following *dictum* of Chaskalson P in *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at 687H-688A (para 20):

> The exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The question whether the President acted *intra vires* or *ultra vires* in bringing the Act into force when he did is, accordingly, a constitutional matter. The finding that he acted *ultra vires* is a finding that he acted in a manner that was inconsistent with the Constitution.

On this basis, Mr Katz argued, this court should find that the first respondent acted *ultra vires* in making the regulations, which were hence unconstitutional and invalid.

[32] Mr Katz emphasised that this interpretation of section 7 as read with section 52 of the Act was in accordance with the plain meaning of the language used in the Act. No provision was made in the Act for interim regulations, as submitted by the first respondent. Section 7 was peremptory and any regulation made in terms of section 52 would have to comply therewith. Mr Katz argued further that the first respondent's interpretation of the Act would bring it into conflict with the *Promotion of Administrative Justice Act* 3 of 2000 and also with the principle of "participatory democracy". For present purposes it is not necessary to deal with these arguments.

[33] In his affidavit opposing the present application, the first respondent avers that the provisions of section 7 of the Act are not applicable to regulations made during the transitional period in accordance with section 52 thereof. Sections 7(1) and 52(1), he says, contain "distinct powers with different scope and latitude": the power to issue regulations in terms of section 52 is not intended to circumvent the provisions of section 7, but rather to "co-exist" with the power to

make regulations in terms of section 7. In this regard Mr Hiemstra submitted on behalf of the first respondent that no regulation in terms of section 7 can be made before the Board is duly constituted and operational. Section 52 provides specifically for a period of transition when regulations will be required prior to the Board's being constituted and becoming operational. Such regulations are in fact of an interim nature and will continue to exist only until such time as regulations in terms of section 7 have been produced.

[34] This argument was taken a step further in the joint affidavit of the third and fourth respondents, who purported to assist the court with their assessment of the applicable statutory regime. According to them the intention of the legislature in enacting the regulations was to empower the first respondent to promulgate "specific and limited regulations for a transitional period and until the Immigration Advisory Board was constituted". Such regulations would be of limited duration and would not require the advice of the Board as would be the case where regulations are made in terms of section 7 of the Act. Section 52 was limited in ambit and was restricted to regulations required in terms of the Act, as opposed to section 7 regulations that were to be "conducive to the implementation of the Act, which has a much wider ambit of operation". Thus the legislation provided for "two distinct regimes of regulation, one in terms of section 7 and a transitional one in terms of section 52".

[35] Mr Heunis, on behalf of the third and fourth respondents, conceded that it is for this court to interpret the relevant legislation. He supported their two regime interpretation, however, submitting that section 52(1) should be understood to mean that, until such time as the Board has been constituted and become operational, the first respondent is enjoined to make and publish, by way of regulation, general and specific rules required in terms of the Act. Such regulations may not go beyond what is strictly required by the Act, expressly or by implication, and must be of a transitional nature, in the sense that they will endure only until the Board is indeed duly constituted and operational.

[36] The fundamental rules relating to the interpretation of statutes are trite. This court is enjoined to establish the intention of the legislature from the ordinary grammatical meaning of the words used in the provision or provisions requiring interpretation. In doing so it must necessarily take cognisance of the aims and ambit of the legislation in question, with reference to the particular context in which it occurs. The *locus classicus* in this regard appears in the judgment of Schreiner JA in *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another* 1950 (4) SA 653 (A) at 662G-663A:

> Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement

> that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that "the context", as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background. The second point is that the approach to the work of interpreting may be along either of two lines. Either one may split the inquiry into two parts and concentrate, in the first instance, on finding out whether the language to be interpreted has or appears to have one clear ordinary meaning, confining a consideration of the context only to cases where the language appears to admit of more than one meaning; or one may from the beginning consider the context and the language to be interpreted together.

See also *University of Cape Town v Cape Bar Council and Another* 1986 (4) SA 903 (A) at 913I-914C; *Fundstrust (Pty) Ltd (in liquidation) v Van Deventer* 1997 (1) SA 710 (A) at 727H-728A.

[37] In the present case I believe it is justified to consider the language and context together in interpreting the relevant provisions of the *Immigration Act*. This will of necessity entail taking into account its background to the extent that it may be required for purposes of establishing and comprehending its scope and purpose. It will likewise require a brief consideration of its content and general arrangement with a view to ascertaining, in particular, the intention of the legislature in enacting the provisions of sections 7 and 52, which came into operation simultaneously on 20 February 2003. In addition cognisance must be taken of the provisions of section 4, which is the only other section of the Act to have come into operation, namely on 26 February 2003.

[38] It appears to be common cause that the existing Act relating to immigration, namely the *Aliens Control Act* 96 of 1991, as supplemented by comprehensive regulations and an equally comprehensive consular code, may, with some justification, be regarded as far from perfect. It has clearly required extensive and radical amendments, alternatively replacement by a wholly new Act. The legislature opted for the latter course and the *Immigration Act* 13 of 2002 was assented to and signed by the second respondent as long ago as 30 May 2002. While the conception of the Act was relatively easy, its birth as a fully-fledged statute governing all aspects

of immigration law in this country, has been fraught with difficulties. This may be attributable, *inter alia*, to over-hastiness in attempting to get the Act on track and, perhaps, to old-fashioned bureaucratic bungling. One may only hope that, after having suffered two unsuccessful attempts at publishing immigration regulations, which have been decisively struck down by this court, the first respondent will insist that his departmental house be brought in order to prevent any repetition thereof.

[39] The *Immigration Act* states, in its preamble, that it is directed at "providing for the regulation of admission of foreigners to, their residence in, and their departure from the Republic and for matters connected therewith". It "aims at setting in place a new system of immigration control" which will, in general, be efficiently managed and administered. Its objectives are set out in some detail in section 2. Foremost among them, as appears from section 2(1)(a), is "[p]romoting a human-rights based culture in both government and civil society in respect of immigration control".

[40] The structures of immigration control are dealt with side by side with the said objectives. It sets out, *inter alia*, the powers of the Department of Home Affairs and of its chief officers (section 3), the establishment (section 4) and functions (section 5) of an Immigration Advisory Board and the making of regulations (section 7). This is followed by provisions relating to: admission and departure (section 9), temporary residence (sections 10 to 24), permanent residence (sections 25 to 28), exclusions and exemptions (sections 29 to 31), enforcement and monitoring (sections 32 to 36), immigration courts (section 37), duties and obligations (sections 38 to 45), miscellaneous matters (sections 46 to 48), offences (sections 49 to 50) and transitional provisions (sections 51 to 55).

[41] Section 4 which, as mentioned before, has already come into operation and provides for the establishment of an Immigration Advisory Board, deals in some detail with the membership of the Board and the proceedings to be followed at its meetings. Its main function, to advise the Minister of Home Affairs on various matters, including the contents of immigration regulations, appears in section 5, which has not yet come into operation. Similarly the general definitions, appearing from section 1, and transitional definitions, as set forth in section 51, are not yet operative. This does not, of course, mean that they may be ignored for purposes of interpreting sections 7 and 52 respectively.

[42] It is clear that the first respondent derives his power to make regulations "called for, or conducive to, the implementation" of the Act from the provisions of section 7(1). That is certainly the reason why, prior to the Act coming into operation, the second respondent was called upon to proclaim that section 7, together with sections 4 and 52, become operational at an earlier date than the remainder of the Act. It was obviously directed at enabling the first respondent to establish the Board and to prepare the necessary regulations before the Act became functional in immigration law and practice. The Board could then be duly constituted in terms of section 4 of the Act and prepare itself for executing its function of advising the first respondent, in terms of section 5(a) of the Act, on matters such as the content of regulations. In terms of section 7(3) the Board would then be empowered to exercise its right to request the Minister to

reconsider intended regulations prior to their promulgation, or to consider the need to adopt, repeal or amend them. In the meantime "any regulation required" in terms of the Act could be made by the first respondent by virtue of the transitional provisions of section 52(1), without consultation with the Board.

[43] Does this mean that the regulations made in terms of section 52(1) need not comply with the provisions of section 7? We have carefully considered the various arguments put forward by counsel in this regard and have come to the conclusion that, although section 52 is dealt with under the heading "transitional provisions", the regulations made in terms of section 52(1) are not transitional, provisional or interim regulations. This appears from the following.

[44] Nowhere in the Act is provision made for any other form of regulations than "draft" or "final" regulations as they occur in sections 7(1)(b) and (c) respectively. In section 1(xxxii) of the Act regulations are defined as "general rules adopted by the Minister after consultation with the Board in terms of this Act and published". In the "transitional definition" contained in section 51(iv), again, regulations are defined as “both general and specific rules adopted by the Minister and published”. This clearly makes provision for regulations in respect of which the Board has not been consulted, either because it has not yet been established or because it is not yet operational.

[45] Section 52(1) makes it clear that the regulation in question must be "required in terms of this Act" and must be "prescribed". "Prescribe" in this sense means, according to section 51(i), “to provide through regulations”, and “prescribed” has a corresponding meaning. This may be compared with the definition in section 1(xxix), where “prescribed” is said to mean “provided for by regulation”. The verb “to prescribe” has a corresponding meaning, whereas “prescribed from time to time” refers exclusively to the use of these words in section 7(2) of the Act, in which event, as provided in section 7(2), only sections 7(1)(b) and (c) are applicable. Nowhere is it suggested that "prescribed" in section 52(1) means anything other than "prescribed by regulation". There is hence not the slightest difference between the definition of "prescribed" in section 1(xxix) and that in section 51(i). On the contrary, they appear to bear, and to have been intended to bear, an identical meaning.

[46] It follows that there is only one substantial difference between regulations made in terms of section 7(1) and those made in terms of section 52(1) of the Act. In the former, the Board has the right, in terms of section 7(3), to give the Minister advice in regard to existing or intended regulations. In the latter the Minister is enabled to make regulations without such input. This does not, however, mean that the provisions of section 7(1) may otherwise be ignored when making regulations in terms of section 52(1). On the contrary, it is essential that they comply with all the prescribed conditions, more specifically as set forth with great clarity in sections 7(1)(a), (b) and (c).

[47] In our view interested members of the public must undoubtedly have the right to comment on intended and draft regulations before they are brought into force. If this were not so, the Minister would have the unfettered right to make "interim" regulations of whatever nature, ambit and effect he or she might wish, regardless of the democratic right of interested persons to

make their input in regard thereto. They might simply be confronted with arbitrary, capricious or even oppressive regulations as a *fait accompli* and would be compelled to bide their time until new or amended regulations are duly made in terms of section 7. By the time the so-called "interim" regulations have been supplanted by such new regulations, untold damage might already have been caused and suffered. Such a situation could never have been envisaged by the legislature when formulating and finalising the new *Immigration Act*. It would be in conflict with the most basic of the fundamental and eternal values underlying our Constitution and, indeed, required by the Rule of Law and the precepts of legality.

[48] It follows that, inasmuch as the immigration regulations published on 21 February 2003 purport to have been issued in terms of section 52 read with section 51 of the *Immigration Act*, the first respondent was nevertheless enjoined to comply with the provisions of section 7 of the Act. As a result of the first respondent's failure to comply therewith, the regulations in question were unconstitutional and invalid.

THE REQUEST FOR SUSPENSION OF THE ORDER OF INVALIDITY

[49] Mr Hiemstra argued in the alternative that, if this court should be disposed to grant the relief sought by the applicant, it should, in terms of section 172(1)(b)(ii) of the Constitution, suspend the declaration of invalidity for a period of one year. This would have the effect that the invalid regulations would come into operation on 12 March 2003, on the same date as the remainder of the *Immigration Act*. The *Aliens Control Act* and its regulations would be repealed on such date, leaving the new Act and new regulations relating to such Act in place. Such an order would be just and equitable, as required by section 172(1)(b), in that it would eliminate the envisaged chaos that would ensue should the old regulations remain applicable to the new Act. At the same time it would enable the first respondent to remedy the defects giving rise to the invalidity of the new regulations.

[50] In this regard Mr Hiemstra referred to *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) para 94, where Kriegler J stated that, "when courts give relief, they attempt to synchronise the real world with the ideal construct of a constitutional world …". This means, Mr Hiemstra submitted, that a court should not only consider what is appropriate relief under the circumstances, but also what the effect of its order on the general

public will be. It must take into account the interests of all persons affected thereby. It must also determine whether the declaration of invalidity will give rise to a situation less consistent with the Constitution than the existing situation. This accords with what was said by Mokgoro J in *First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa and Others; Sheard v Land and Agricultural Bank of South Africa and Another* 2000 (3) SA 626 (CC) para 13:

> To suspend an order in terms of s 172(1)(b)(ii) it is required that the purpose served by the challenged statute outweighs the constitutional violation effected under its provisions.

[51] Mr Hiemstra launched a scathing attack on the existing *Aliens Control Act*, which has been the subject of a number of successful constitutional and administrative challenges. This has resulted in statutory *lacunae* that require to be addressed forthwith by promulgation of the *Immigration Act* and its regulations. Should the old regulations continue to exist side by side with the new Act, migration control would come to a standstill in that immigration officials at entry and exit points on South African borders and at a number of foreign offices would not be able to implement the new Act.

[52] In his argument on behalf of the applicant Mr Katz submitted that the first respondent had not placed sufficient facts before the court to persuade it that it would be just and equitable to suspend the order of invalidity. There was no reason why the old Act and old regulations could not continue in force until such time as the new regulations had been properly promulgated. This argument, of course, was based on the amended prayer requesting that the second respondent's proclamation be partially set aside. As mentioned in our introductory observations, however, the said amendment was not granted. It was only the supplementary order of this court that had the effect that the Act has also been on hold pending the first respondent's application for leave to appeal.

[53] Section 172(1) reads thus:

> When deciding a constitutional matter within its power, a court -
>
> a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> b) may make an order that is just and equitable, including -
>
> i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> ii) an order suspending the declaration of invalidity for any period and on any conditions to allow the competent authority to correct the defect.

[54] This section supplanted sections 98(5) and (6) of the interim Constitution, Act 200 of 1993, which were formulated as follows:

> 5) In the event of the Constitutional Court finding that any law or any provision thereof is inconsistent with this Constitution, it shall declare such law or provision invalid to the extent of its inconsistency: Provided that the Constitutional Court may, in the interests of justice and good government, require Parliament or any other competent authority, within a period specified by the Court, to correct the defect in the law or provision, which shall then remain in force pending correction or the expiry of the period so specified.
> 6) Unless the Constitutional Court in the interests of justice and good government orders otherwise, and save to the extent that it so orders, the declaration of invalidity of a law or provision thereof -
> a) existing at the commencement of this Constitution, shall not invalidate anything done or permitted in terms thereof before the coming into effect of such declaration of such declaration of invalidity; or
> b) passed after such commencement, shall invalidate everything done or permitted in terms thereof.

[55] In *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) para 106 Chaskalson P described the effect of this section in the following terms:

> Section 98(5) permits this Court to put Parliament on terms to correct the defect in an invalid law within a prescribed time. If exercised, this power has the effect of making the declaration of invalidity subject to a resolutive condition. If the matter is rectified, the declaration fall away and what was done in terms of the law is given validity. If not, the declaration of invalidity takes place at the expiry of the prescribed period, and the normal consequences attaching to such a declaration ensue.

In regard to the need for the provisions of sections 98(5) and (6) the learned judge said (in para 107):

> The powers conferred on the Courts [sic] by sections 98(5) and (6) are necessary powers. When the [interim] Constitution came into force there were many old laws on the statute book which were inconsistent with the Constitution. If all of them were to have been struck down and all action taken under them declared to be invalid there could have a

> legislative vacuum and chaotic conditions. Sections 98(5) and (6) enable the Court to regulate the impact of a declaration of invalidity and avoid such consequences. There may also be situations in which it is necessary for the Court to act to avoid or control the consequences of a declaration of invalidity of post-constitutional legislation where the result of invalidating everything done under such legislation is disproportional to the harm which would result from giving the legislation temporary validity.

[56] In *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC) para 32 O'Regan J elucidated this approach further when she said:

> Central to a consideration of the interests of justice in a particular case is that successful litigants should obtain the relief they seek. It is only when the interests of good government outweigh the interests of the individual litigants that the Court will not grant relief to successful litigants. In principle, too, the litigants before the Court should not be singled out for the grant of relief, but relief should be afforded to all people who are in the same situation as the litigants … On the other hand … we should be circumspect in exercising our powers under s 98(6)(a) so as to avoid unnecessary dislocation and uncertainty …

[57] On what was required to persuade a court to suspend a declaration of invalidity in terms of section 98(5) aforesaid, see *Mistry v Interim Medical and Dental Council of South Africa and Others* 1998 (4) SA 1127 (CC) para 37. Sachs J made it quite clear that any party requesting such suspension had a substantial *onus* to discharge:

> Section 98(5) authorises this Court 'in the interests of justice and good government' to require Parliament to correct within a specified time a defect in the law found to be invalid. No information was laid before us, however, as to why in the present matter it would be in the interests of justice and good government for this Court to make such an order. A party wishing the Court to make such an order must provide it with reliable information to justify it doing so. The requisite information will necessarily depend for its detail on the nature of the law in question and the character of the defect to be corrected. Yet, as a general rule, a government organ or other party wishing to keep an unconstitutional provision alive should at least indicate the following: what the negative consequences for justice and good government of an immediately operational declaration of invalidity would be; why other existing measures would not be an adequate alternative stop-gap; what legislation on the subject, if any, is in the pipeline; and how much time would reasonably be required to adopt corrective legislation. Parties interested in opposing such an order should be given an opportunity to motivate their opposition. Legal representatives should ensure that they have appropriate and timeous instructions on the matter, and not do their best while on their feet or else rely on a rushed telephone call at the tail-end of the hearing.

See also *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) para 51; *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC) para 42.

[58] That these principles are in like manner applicable to section 172(1)(b)(ii) of the present Constitution appears with great lucidity in *Lesapo v North West Agricultural Bank and Another* 1992 (12) BCLR 1420 (CC), where Mokgoro J stated in para 33:

> Counsel agreed that, should section 38(2) be found to be unconstitutional and invalid, this Court would need to suspend its order of invalidity in terms of section 172(1)(b)(ii) of the Constitution. However, there was no evidence to support that submission, nor are there any other grounds for so doing. This Court has, in several of its judgments, stressed the importance of laying a proper foundation for the granting of ancillary orders of suspension of invalidity, retrospectively or prospectively. Although the rule was formulated in terms of section 98(6) of the interim Constitution, which required this Court to take into account "the interests of justice and good government" before suspending an order of invalidity, these requirements are included in section 172(1)(b)(ii) of the Constitution, which provides that an order must be "just and equitable". Such evidence would relate to what the effect of the order would be on the successful litigant and on those prospective litigants in positions similar to that of the former, as well as the effect on the administration of justice or State machinery. No such evidence is before this Court. There is therefore no basis for this Court to suspend an order of invalidity.

[59] Reference may also be made to *First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa and Others; Sheard v Land and Agricultural Bank of South Africa and Another* 2000 (3) SA 626 (CC) para 13, where Mokgoro J observed that suspension of an order in terms of section 172(1)(b)(ii) of the Constitution requires "that the purpose served by the challenged statute outweighs the constitutional violation effected under its provisions". See further *Hoffmann v South African Airways* 2000 (11) BCLR 1211 (CC) para 42; *S v Steyn* 2001 (1) SA 1146 (CC) para 45.

[60] Section 172(1)(b)(ii) of the Constitution gives this court the discretion to suspend its declaration of invalidity of the new regulations if it should be satisfied that it is just and equitable to do so. This, in our view, encompasses a reasonable or rational approach to the realities of the situation. According to the first respondent the reality was that the introduction of the new Act without its concomitant regulations would lead to a chaotic situation. The nature of the "chaos" envisaged was dealt with in sweeping terms in the first respondent's answering affidavit and was

somewhat embroidered upon in Mr Hiemstra's argument.

[61] It may well be that the old regulations would cause inconvenience if applied to the new Act in that they may, in several respects, not be consistent or compatible therewith. The legislature must have given this possibility consideration, however, in enacting that the old regulations would remain in force until repealed or amended. This means that it must have envisaged that the new Act might come into operation before new regulations were properly promulgated. Certainly it did not regard the continuation of the old rules alongside the new Act as creating a potentially chaotic situation. It could not, in our view, have believed that migration control would come to a standstill and that immigration officials would not be able to implement the new Act, as submitted by Mr Hiemstra.

[62] With reference to the authorities cited above we do not believe that the present case may, on the facts and circumstances placed before us, be regarded as giving rise to "a legal vacuum and chaotic conditions" (*Western Cape Legislature* case cited in par 55 above). Nor is it a case where "the interests of good government outweigh the interests of the individual litigants" or where "unnecessary dislocation and uncertainty will arise should the declaration of invalidity not be suspended (*Bhulwana* case cited in par 56 above). Section 52(2) of the Act was, in our view, accepted by the legislature as an "adequate stop-gap" (*Mistry* case cited in par 57 above) pending the promulgation of new regulations in terms of the new Act.

[63] It follows that we have not been persuaded that it is just and equitable or, for that matter, in the interests of justice and good government to suspend the declaration of invalidity.

[64] For the reasons set forth above we confirm the following order made on 11 March 2003:

1. The Immigration Regulations made by the first respondent and published in the *Government Gazette* No 24952 (Notice 487 of 2003) on 21 February 2003 are declared unconstitutional and invalid.
2. The first respondent is required to comply with the provisions of section 7 of the *Immigration Act* 13 of 2002 in making new immigration regulations.
3. The first respondent is ordered to pay all disbursements incurred by the applicant, including those consequent upon the employment of two counsel.

D H VAN ZYL

Judge of the High Court of South Africa
Cape of Good Hope Provincial Division

I agree. The order is confirmed.

J M HLOPHE

Judge-President
Cape of Good Hope Provincial Division of the
High Court of South Africa