CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 35/99

RAHIM DAWOOD	First Applicant
KHAHATTHA DAWOOD (born CHAISORN)	Second Applicant
versus	
THE MINISTER OF HOME AFFAIRS	First Respondent
THE DIRECTOR-GENERAL: HOME AFFAIRS	Second Respondent
THE MINISTER OF FINANCE	Third Respondent

and

NAZILA SHALABI (born ADAMS)	First Applicant
AHMED TALAAT MAHMOUD HAFED SHALABI	Second Applicant
versus	
THE MINISTER OF HOME AFFAIRS	First Respondent
THE DIRECTOR-GENERAL: HOME AFFAIRS	Second Respondent
THE REGIONAL REPRESENTATIVE OF THE DEPARTMENT OF HOME AFFAIRS (CAPE TOWN)	Third Respondent

and

MAUREEN SHEILA THOMAS (born FREDERICKS)	First Applicant
COLIN PATRICK THOMAS	Second Applicant
versus	

THE MINISTER OF HOME AFFAIRS First Respondent

THE DIRECTOR-GENERAL: HOME AFFAIRS Second Respondent

THE REGIONAL REPRESENTATIVE OF THE
DEPARTMENT OF HOME AFFAIRS (CAPE TOWN) Third Respondent

Heard on : 23 March 2000

Decided on : 7 June 2000

JUDGMENT

O'REGAN J:

Introduction

[1] All three cases before us concern the circumstances in which foreign spouses of South African residents are permitted to reside temporarily in South Africa pending the outcome of their applications for immigration permits. In each case the applicants are married to each other. One spouse is permanently and lawfully resident in South Africa while the other is seeking to obtain an immigration permit to reside permanently in South Africa. Because the matters raised similar issues they were heard together by the Cape of Good Hope High Court[1] and by this Court.

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[1] The judgment of that court is reported as *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (1) SA 997 (C).

[2] In terms of the Aliens Control Act, 96 of 1991 (the Act), a person who is not a South African citizen may not enter or reside in South Africa without a valid permit. Permits may be issued on a temporary basis for a variety of purposes, including holiday visits, business, employment, or study,[2] or on a permanent basis.[3] Permanent permits or "immigration permits"

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[2] Section 26(1) of the Act provides as follows:

> "There shall for the purposes of this Act be the following categories of temporary residence permits:
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> (a) A visitor's permit, which may be issued to any alien who applies for permission to temporarily sojourn in the Republic for any *bona fide* purpose other than a purpose for which a permit referred to in paragraphs (b) to (f) is required;
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> (b) a work permit, which may be issued to any alien who applies for permission—
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> (i) to be temporarily employed in the Republic with or without any reward; or
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> (ii) to temporarily manage or conduct any business in the Republic whether for his or her own account or not;
>
> (c) a business permit, which may be issued to any alien who applies for permission to enter the Republic to attend to business matters, other than business matters for which a work permit is required;
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> (d) a study permit, which may be issued to any alien who applies for permission to enter and temporarily sojourn in the Republic as a *bona fide* student at any primary, secondary or tertiary educational institution;
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> (e) a workseeker's permit, which may be issued to any alien who applies for

authorise a person to reside permanently in South Africa. The non-South African spouse in each of the cases before us is seeking to obtain an immigration permit.

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permission to enter the Republic in order to enter into a contract of employment with an employer in the Republic referred to in paragraph (b)(i) or to enter into a contract for the purposes of paragraph (b)(ii); and

(f) a medical permit, which may be issued to any alien who applies for permission to enter the Republic for the purposes of receiving medical treatment."

[3] Applications for and grants of immigration permits are made in terms of section 25 of the Act.

[3] There were two principal issues raised by the three applications in the High Court. The first related to a non-refundable fee payable by applicants for immigration permits when they lodge their applications. This fee was introduced, in effect, in 1998 and set at R7 750.[4] A year later it was increased to R10 020.[5] The applicants sought an order declaring that in so far as spouses were concerned, the regulations providing for these fees were inconsistent with the Constitution and invalid. The second issue concerned section 25(9)(b)[6] of the Act, and in particular, the question whether it was constitutional for the Act to require that an immigration permit could be granted to the spouse of a South African citizen who is in South Africa at the time only if that spouse is in possession of a valid temporary residence permit.

[4] The Cape High Court upheld the applicants' arguments in respect of both issues and made an order declaring the relevant fee regulations and section 25(9)(b) of the Act to be invalid. Both these declarations of invalidity were suspended, the first for three months and the second for twelve months. The Court also granted consequential relief. The facts of the three applications appear in full from the judgment of Van Heerden AJ. I shall therefore only set out the key facts

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4 Item 13 of the annexure to regulation 2 of the Schedule to the Fifth Amendment of the Aliens Control Regulations (Fees), 1998 *Government Gazette* 18791, GN R461 of 30 March 1998.

5 Item 16 of the annexure to regulation 2 of the Schedule to the Sixth Amendment of the Aliens Control Regulations (Fees), 1999 *Government Gazette* 19881, GN R386 of 25 March 1999.

6 The provisions of this subsection are set out at para 19 below.

in this judgment.

The Dawood application

[5] Mr and Mrs Dawood, the first and second applicants, were married according to Islamic law on 4 October 1997 and they have one child, a daughter, who was born on 11 March 1999. Mr Dawood, a South African citizen, is a watchmaker who earns approximately R3 000 per month. Mrs Dawood, a Thai national, is presently unemployed. She entered South Africa early in 1997 for a holiday and was granted a temporary residence permit valid until 30 April 1997. This permit was subsequently extended three times. In December 1997, shortly after their marriage, Mr and Mrs Dawood obtained application forms for an immigration permit for Mrs Dawood to obtain permission to reside permanently in South Africa. These forms required the submission of a police clearance certificate from Thailand. It apparently took some time for Mrs Dawood to obtain this certificate. When she returned to the Department of Home Affairs (the Department) in June 1998, she was informed that if a complete application for an immigration permit was not submitted before 30 June 1998, she would be required to pay the non-refundable fee of R7 750 that had recently been introduced by regulation.[7] As she was not at that stage able to submit a completed application, the Dawoods sought an exemption from payment of this fee. An exemption was refused and the Dawoods then approached the High Court for relief. They sought, in particular, an order declaring the regulations that imposed the fees (both the earlier regulation setting the fee at R7 750 and the subsequent regulation increasing it) to be inconsistent with sections 9, 10, 21(3) and 28 of the Constitution and therefore invalid.

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[7] See above n 4.

The Shalabi application

[6] Mr and Mrs Shalabi married according to South African civil law on 7 May 1996 in Cape Town and they have one child, a son, born on 11 January 1999. The first applicant, Mrs Shalabi, is a South African citizen employed as a staff nurse earning approximately R2 800 per month. Mr Shalabi is an Egyptian citizen. He first entered South Africa on 16 November 1995 and was granted a temporary residence permit. On several occasions thereafter Mr Shalabi was granted further temporary residence permits. The details of the grant of these permits need not be set out, save to say that on several occasions Mr Shalabi was granted an extension of his temporary residence permit even though his application for that extension was made only after the permit had expired. On 2 September 1997, while in possession of a valid temporary residence permit due to expire only on 31 December 1997, Mr Shalabi applied for an immigration permit. At the time, he was given a notice by the Department stating that even though he had made an application for an immigration permit, he was required to ensure that his temporary residence permit did not lapse.[8] In April 1998, after his permit had expired, Mr Shalabi was informed by the Department that his application for an immigration permit could not be processed unless he applied for an extension of his temporary residence permit. On 9 July 1998, Mr Shalabi made such an application which was refused on the grounds that he was illegally in South Africa and he was ordered to leave South Africa by 11 August 1998. Mr Shalabi then sought the assistance of a member of Parliament who took the matter up with the Department. This approach also

[8] There is a factual dispute on the papers between the applicants and respondents. Mr and Mrs Shalabi aver that they were informed verbally by an official in the Cape Town Regional Office of the Department that there was no need for Mr Shalabi to make a further application for a temporary residence permit. However, this is denied by the respondents. Little turns on this dispute of fact.

proved unsuccessful and Mr Shalabi was once again told to leave the country ─ this time by the end of September 1998. The application was then launched as a matter of urgency on 30 September 1998. The relief sought, after several amendments to the notice of motion, was an order declaring that Mr Shalabi was entitled to a temporary residence permit pending the final determination of his application for an immigration permit and ordering the Department to issue such a temporary residence permit. In the alternative, the applicants sought an order declaring section 25(9)(b) of the Act inconsistent with the Constitution to the extent that it authorises the grant of immigration permits to the spouses of South African residents when the applicant spouse is present in South Africa only if the applicant is in possession of a valid temporary residence permit.

The Thomas application

[7] Mr and Mrs Thomas were married according to South African civil law in Cape Town on 27 August 1994. Mrs Thomas, the first applicant, is a South African citizen by birth who is employed as a clerk and earns approximately R2 000 per month. Mr Thomas, the second applicant, is a citizen of St Helena Island, and therefore a British national. Although he is presently unemployed, he previously worked as a deep sea fisherman which resulted in his visiting Cape Town regularly. On these occasions he was generally issued with temporary residence permits in terms of section 26(1) of the Act. Mr Thomas lost his job in June 1998 when the company for which he worked "was sold". He thereafter sought to extend his temporary residence permit but that extension was refused on the basis that he could not change the basis of his temporary residence permit "from a transit permit to a holiday permit" and he was ordered to leave the country and make an application "from outside". In August 1998 he also

sought to make an application for an immigration permit but as he did not have his birth certificate, the application was rejected as incomplete. Mr and Mrs Thomas also aver that they were not able to afford to pay the fee for the immigration permit. After Mr Thomas' application for an extension of his temporary residence permit was refused on 14 September 1998, he was ordered to leave South Africa by 28 September 1998. Mr and Mrs Thomas then sought legal advice and the application was launched on an urgent basis at the end of September 1998. The relief sought, as subsequently amended, included the following: a declaration that the fee prescribed by regulation as a requirement for an immigration permit was inconsistent with sections 9, 10, 21(3) and 28 of the Constitution and therefore invalid; that Mr Thomas was entitled to remain in South Africa pending the finalisation of his application for an immigration permit; and directing the Director-General of Home Affairs (the DG) to issue a temporary residence permit to Mr Thomas pending the finalisation of that application.

[8] It is worth noting the following. The reason given for the refusal of the extension of Mr Thomas' temporary residence permit ─ that it was not possible to extend the permit when the underlying purpose for which the permit was sought had changed ─ conflicts with the fact that Mr Shalabi had on several occasions had the underlying purpose of his temporary residence permit changed when he sought and obtained extensions of the permits even though he did not leave the country.[9]

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[9] So for example, Mr Shalabi obtained a temporary residence permit during mid-1996 for "holiday purposes" which was subsequently changed to a temporary resident permit for "work purposes". This was later changed again to a temporary residence permit "for self-employment purposes". See the judgment of the High Court, above n 1 at 1015 B - E.

The order made by the High Court

[9] As stated above, the High Court made an order in favour of the applicants on both issues before it. The full terms of that order are as follows:

> "1. The *Dawood* application
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> 1.1 Item 13 of the annexure to reg 2 of the Schedule to the fifth amendment of the Aliens Control Regulations (Fees), published under Government Notice R461 (*Government Gazette* 18791) of 30 March 1998 (which came into operation on 1 April 1998) is declared to be inconsistent with the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution), and invalid.
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> 1.2 Item 16 of the annexure to reg 2 of the Schedule to the sixth amendment of the Aliens Control Regulations (Fees) published under Government Notice R386 (*Government Gazette* 19881) of 25 March 1999 (which came into operation on 1 April 1999) is declared to be inconsistent with the Constitution and invalid.
>
> 1.3 The declarations of invalidity referred to in paras 1.1 and 1.2 above are suspended for a period of three months from the date of this order to enable the first respondent to correct the constitutional inconsistency which has resulted in the declarations of invalidity.
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> 1.4 Section 25(9)(b) of the Aliens Control Act 96 of 1991, as amended (the Act) is declared to be inconsistent with the Constitution and invalid.
>
> 1.5 The declaration of invalidity of s 25(9)(b) of the Act referred to in para 1.4 above is suspended for a period of 12 months from the date of confirmation of this order by the Constitutional Court to enable Parliament to correct the inconsistency which has resulted in the declaration of invalidity.

1.6 The second respondent is ordered to extend the period of validity of the temporary residence permit (the 'visitor's permit') currently held by the second applicant, such extension to remain in force until such time as the second applicant has submitted an application for an immigration permit to the second respondent, in terms of s 25(1) of the Act and the Western Cape Regional Committee of the Immigrants Selection Board (the Board) has made a final decision, in terms of s 25 of the Act, as to whether or not to authorise the issue of such a permit to the second applicant.

1.7 As regards any alien non-resident spouse of a person who is permanently and lawfully resident in the Republic of South Africa, where such alien spouse is inside the Republic but has not had a temporary residence permit (as referred to in s 26(1) of the Act) issued to him or her, the second respondent is ordered to issue to such alien spouse a temporary residence permit in terms of s 26(1)(a) of the Act and to extend the period of validity of such permit from time to time (in terms of s 26(6) of the Act), until such time as the alien spouse has submitted an application for an immigration permit to the second respondent in terms of s 25(1) of the Act and the relevant regional committee of the Board has made a final decision (under s 25 of the Act) as to whether or not to authorise the issue of such a permit to the alien spouse. This part of the order shall remain in force until such time as the first respondent has corrected the constitutional inconsistency referred to in paras 1.1 and 1.2 above and Parliament has corrected the constitutional inconsistency referred to in para 1.4 above.

1.8 As regards any alien non-resident spouse of a person who is permanently and lawfully resident in the Republic of South Africa, where such alien spouse is inside the Republic and the period of validity of the temporary residence permit most recently issued to him or her has expired, the second respondent is ordered to extend the period of

validity of the said temporary residence permit from time to time (in terms of s 26(6) of the Act) until such time as the said alien spouse has submitted an application for an immigration permit to the second respondent in terms of s 25(1) of the Act, and the relevant regional committee of the Board has made a final decision (under s 25 of the Act) as to whether or not to authorise the issue of such permit to the alien spouse. This part of the order shall remain in force until such time as the first respondent has corrected the constitutional inconsistency referred to in paras 1.1 and 1.2 above and Parliament has corrected the constitutional inconsistency referred to in para 1.4 above.

1.9 It is declared that reg 14(2) of the Aliens Control Regulations made by the first respondent in terms of s 56 of the Act, published under Government Notice R999 (*Government Gazette* 17254) of 28 June 1996, permits an alien to make an application for an immigration permit, in terms of s 25(1) of the Act, while such alien is inside the Republic, provided that such alien is a person falling within the ambit of s 25(9) of the Act.

1.10 It is ordered that the first and second respondents shall, jointly and severally, pay the applicants' costs, including the costs of two counsel.

2. The *Shalabi* Application

2.1 The second respondent is ordered to extend the period of validity of the temporary residence permit 'for self-employment purposes' issued by or on behalf of the second respondent to the second applicant during 1997 (which permit expired on 31 December 1997), such extension to remain in force until such time as the Western Cape Regional Committee of the Board has made a final decision (under s 25 of the Act) as to whether or not to authorise the issue to the second applicant of the immigration permit applied for by him by means of an application 'received' by or on behalf of the second respondent on 2 September 1997.

2.2 The second respondent is ordered to submit the application for an immigration permit made by the second applicant (as referred to in para 2.1 above) to the Western Cape Regional Committee of the Board in terms of s 25(2)(a) of the Act.

2.3 It is ordered that the respondents shall, jointly and severally, pay the applicants' costs, including the costs of two counsel.

3. The *Thomas* Application

3.1 Item 13 of the annexure to reg 2 of the Schedule to the fifth amendment of the Aliens Control Regulations (Fees), published under Government Notice R461 (*Government Gazette* 18791) of 30 March 1998 (which came into operation on 1 April 1998) is declared to be inconsistent with the Constitution and invalid.

3.2 Item 16 of the annexure to reg 2 of the Schedule to the sixth amendment of the Aliens Control Regulations (Fees) published under Government Notice R386 (*Government Gazette* 19881) of 25 March 1999 (which came into operation on 1 April 1999) is declared to be inconsistent with the Constitution and invalid.

3.3 The declarations of invalidity referred to in paras 3.1 and 3.2 above are suspended for a period of three months from the date of this order to enable the first respondent to correct the constitutional inconsistency which has resulted in the declarations of invalidity.

3.4 Section 25(9)(b) of the Act is declared to be inconsistent with the Constitution and invalid.

3.5 The declaration of invalidity of s 25(9)(b) of the Act referred to in para 3.4 above is suspended for a period of a period of 12 months from the

date of confirmation of this order by the Constitutional Court to enable Parliament to correct the inconsistency which has resulted in the declaration of invalidity.

3.6 The second respondent is ordered to issue to the second applicant a temporary residence permit in terms of s 26(1)(a) of the Act, which permit shall remain valid until such time as the Western Cape Regional Committee of the Board has made a final decision (under s 25 of the Act) as to whether or not to authorise the issue to the second applicant of an immigration permit.

3.7 Once the temporary residence permit referred to in para 3.6 above has been issued to the second applicant, the second applicant is entitled to apply from inside the Republic of South Africa for an immigration permit (in terms of s 25(1) of the Act), and to remain in South Africa while such application is submitted to and considered by the Western Cape Regional Committee of the Board.

3.8 The second applicant shall submit the application for an immigration permit referred to in para 3.7 above to the second respondent (in terms of s 25(1) of the Act) within 90 days of the date of this order.

3.9 As regards any alien non-resident spouse of a person who is permanently and lawfully resident in the Republic of South Africa, where such alien spouse is inside the Republic but has not had a temporary residence permit (as referred to in s 26(1) of the Act) issued to him or her, the second respondent is ordered to issue to such alien spouse a temporary residence permit in terms of s 26(1)(a) of the Act and to extend the period of validity of such permit from time to time (in terms of s 26(6) of the Act), until such time as the alien spouse has submitted an application for an immigration permit to the second respondent in terms of s 26(1) of the Act, and the relevant regional committee of the Board has made a final decision (under s 26 of the

Act) as to whether or not to authorise the issue of such a permit to the alien spouse. This part of the order shall remain in force until such time as the first respondent has corrected the constitutional inconsistency referred to in paras 3.1 and 3.2 above and Parliament has corrected the constitutional inconsistency referred to in para 3.4 above.

3.10 As regards any alien non-resident spouse of a person who is permanently and lawfully resident in the Republic of South Africa, where such alien spouse is inside the Republic and the period of validity of the temporary residence permit most recently issued to him or her has expired, the second respondent is ordered to extend the period of validity of the said temporary residence permit from time to time (in terms of s 26(6) of the Act), until such time as the said alien spouse has submitted an application for an immigration permit to the second respondent in terms of s 25(1) of the Act, and the relevant regional committee of the Board has made a final decision (under s 25 of the Act) as to whether or not to authorise the issue of such permit to the alien spouse. This part of the order shall remain in force until such time as the first respondent has corrected the constitutional inconsistency referred to in paras 3.1 and 3.2 above and Parliament has corrected the constitutional inconsistency referred to in para 3.4 above.

3.11 It is declared that reg 14(2) of the Aliens Control Regulations made by the first respondent in terms of s 56 of the Act, published under Government Notice R999 (*Government Gazette* 17254) of 28 June 1996, permits an alien to make an application for an immigration permit, in terms of s 25(1) of the Act while such alien is inside the Republic, provided that such alien is a person falling within the ambit of s 25(9) of the Act.

3.12 It is ordered that the respondents shall, jointly and severally, pay the applicants' costs, including the costs of two counsel."

[10] In effect, therefore, the High Court declared the fee regulations to be inconsistent with the Constitution and therefore invalid, and suspended that order for three months.[10] The High Court also declared section 25(9)(b) of the Act to be inconsistent with the Constitution and therefore invalid, and suspended that order for 12 months.[11] In addition, the High Court made further orders flowing from the conclusion that section 25(9)(b) of the Act is inconsistent with the Constitution.[12] The orders made in paragraphs 1.9 and 3.11 related to regulation 14(2) of the Aliens Control Regulations,[13] which provides as follows:

> "Subject to the provisions of section 25(9) of the Act, an application for an immigration permit must be made in the country or territory of which the applicant validly holds a passport, or in which he or she normally lives and to which he or she returns regularly after any period of temporary absence."

The regulation states that subject to section 25(9), applicants for immigration permits must be outside South Africa *at the time* they make their applications. Section 25(9), however, refers to the time applications are *granted*. Although regulation 14(2) is anomalously formulated, I agree with Van Heerden AJ that the only proper contextual meaning that can be given to it is to permit spouses and other family members referred to

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10 In terms of paras 1.1, 1.2 and 1.3 of its order in respect of the *Dawood* application and paras 3.1, 3.2 and 3.3 of its order in respect of the *Thomas* application.

11 In terms of paras 1.4 and 1.5 of its order in respect of the *Dawood* application and paras 3.4 and 3.5 of its order in respect of the *Thomas* application.

12 In paras 1.6, 1.7 and 1.8 of its order in respect of the *Dawood* application, paras 2.1 and 2.2 of its order in respect of the *Shalabi* application and paras 3.6, 3.7, 3.8, 3.9 and 3.10 of its order in respect of the *Thomas* application.

13 *Government Gazette* 17254, GN R999 of 28 June 1996.

in section 25(9)(b) to make applications for immigration permits from within South Africa.[14] As this is the proper meaning to be afforded to the regulation, as declared in paragraphs 1.9 and 3.11 of the order of the High Court, no constitutional challenge can lie to the regulation. There is no appeal against paragraphs 1.9 and 3.11 of the order as appears below, and it needs no further comment.

[11] Section 172(2) of the Constitution provides as follows:

> "(a) The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.
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> (b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct."

In terms of this provision, the order made by the High Court declaring section 25(9)(b) of the Act to be inconsistent with the Constitution and therefore invalid has no effect until it is confirmed by this Court. On the other hand, the order of the Court declaring the fee regulations to be invalid does not need confirmation by this Court to be effective.

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14 See the judgment of the High Court, above n 1 at 1021 G - J. An apparently contradictory conclusion is reached at 1055 G - I.

[12] The applicants in all three matters sought confirmation of the orders of constitutional invalidity in relation to section 25(9)(b) of the Act but sought to appeal against the suspension of the declaration of invalidity in relation to that section. The respondents,[15] the Minister of Home Affairs (the Minister),[16] the DG[17] and the Regional Representative of the Department of Home Affairs in Cape Town (the Regional Representative),[18] approached the High Court for leave to appeal, in effect, against the whole of the order made by the High Court in each of the three applications.

[13] Leave to appeal was granted by this Court on 16 November 1999. Directions were given for the filing of heads of argument by the parties and heads of argument were received. A few days before the hearing, the Court was notified informally by counsel for the respondents that the respondents were abandoning their appeal and not opposing the application for confirmation made by the applicants. Formal notice of their intention was lodged with the Court shortly before close of business on the day before the hearing. There was no appearance for the respondents at the hearing. For the reasons that follow, this is to be regretted.

[14] The Minister and DG are respectively the political and administrative heads of the

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15 The only respondent not to seek leave to appeal against the decision of the High Court was the Minister of Finance, the third respondent in the *Dawood* application, who did not oppose the relief sought in the High Court and who abided by the decision of the Court.

16 The Minister was the first respondent in each of the three applications.

17 The DG was the second respondent in all three applications.

national government department responsible for the implementation of the Act and the foremost source of knowledge about its terms, objectives and general application. Their last-minute abandonment of both their appeal and their opposition to the confirmation proceedings was inconvenient and discourteous.

[15] The absence of legal representation on behalf of the respondents at the hearing, however, has much more serious consequences. Where the confirmation of an order of constitutional invalidity is under consideration by this Court, the abandonment of an appeal does not put an end to the proceedings. The Court must still decide whether to confirm, vary or set aside the order. Moreover, the Court must determine what ancillary orders should be made, if any. The relevant government department is best placed to assist the Court to craft such ancillary orders by informing it of the potential disruption that an order of invalidity may cause. A common issue relates to the time the department will need to replace the unconstitutional provision.

[16] Section 8(2) of the Constitutional Court Complementary Act, 13 of 1995, provides that when an order of constitutional invalidity is referred to this Court for confirmation, the President of the Court may request the Minister of Justice to appoint counsel to present argument to the Court at the confirmation proceedings. This provision enables the Court to ensure that it obtains the necessary argument in relation to such proceedings. By withdrawing from these proceedings

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[18] The Regional Representative was the third respondent in the *Shalabi* and *Thomas* applications.

at such a late stage, the respondents not only deprived this Court of the benefit of being able to canvass the issues relating to confirmation fully at the proceedings, but also made it impossible for the President of this Court to ask the Minister of Justice to appoint counsel to assist the Court in terms of section 8(2).

[17] Our Constitution recognises the separation of powers, holds high the rule of law and enjoins all organs of state to protect the Constitution. Within this scheme, this Court is given the special and onerous responsibility finally to determine the constitutionality of legislation. Once it concludes that legislation is unconstitutional, it must declare it invalid. Such an order may be tempered by ancillary orders that are just and equitable. In the light of this constitutional scheme, this Court can best carry out its task if careful and detailed evidence and argument are placed before it by those in government qualified to do so, particularly when legislation is under challenge. If this is not done, the Court's ability to perform its constitutional mandate is hampered and the constitutional scheme itself may be put at risk. It is for these reasons that the late abandonment of the appeal and the absence of the respondents at the confirmation hearing were unfortunate.

[18] As the respondents do not persist in their appeal, the main issue remaining before this Court relates to the confirmation of the order of unconstitutionality relating to section 25(9) made by the High Court[19] as well as the orders that suspended the effect of the declaration of

[19] In paragraphs 1.4 and 3.4 of its order.

invalidity.[20] However, it is not only these orders that are before this Court for confirmation. For it is not only the direct order of unconstitutionality itself that must be confirmed but all the orders made by the High Court that flowed from that finding of unconstitutionality. If this Court were to find that the High Court's conclusion that section 25(9)(b) is inconsistent with the Constitution is incorrect, none of the orders made consequent upon that finding could stand. These orders required the Department to grant temporary residence permits to applicants for immigration permits who are married to South African residents.[21] All of these orders granted relief consequent upon the finding of unconstitutionality and are accordingly before this Court as part of the confirmation proceedings.

Interpretation of section 25(9)(b)

[19] The High Court declared section 25(9)(b) of the Act to be inconsistent with the Constitution on the ground that it conflicts with section 10 of the Constitution, the right to dignity. Section 25(9) provides as follows:

> "(a) A regional committee may, on an application mentioned in subsection (1) made by an alien who has been permitted under this Act to temporarily sojourn in the Republic in terms of a permit referred to in section 26(1)(b),[22] authorize the issue to him or her of a permit in terms of this section *mutatis mutandis* as if he or she were outside the Republic, and upon the issue of that permit he or she may reside permanently in the Republic.

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20 In paragraphs 1.5 and 3.5 of its order.

21 In paragraphs 1.6 - 1.8, 2.1 - 2.2, and 3.6 - 3.10 of its order.

22 Section 26(1) is set out in full at n 2 above. Section 26(1)(b) is the provision in terms of which work permits are issued.

(b) Notwithstanding the provisions of paragraph (a), a regional committee may authorize a permit in terms of this section to any person who has been permitted under section 26(1) to temporarily sojourn in the Republic, if such person is a person referred to in subsection 4(b)[23] or 5.[24]" (footnotes added)

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[23] Section 25(4)(b) refers to a person who —

"is a destitute, aged or infirm member of the family of a person permanently and lawfully resident in the Republic who is able and undertakes in writing to maintain him or her."

[24] Persons referred to in section 25(5) are spouses and dependent children of persons lawfully and permanently resident in South Africa. Section 25(5) provides:

"Notwithstanding the provisions of subsection (4), but subject to the provisions of subsections (3) and (6), a regional committee may, upon application by the spouse or the dependent child of a person permanently and lawfully resident in the Republic, authorize the issue of an immigration permit."

In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 98, after finding that section 25(5) of the Act was

inconsistent with the Constitution to the extent that the words "or partner, in a permanent same-sex life partnership" were not included in it, this court made an order declaring that the words "or partner, in a permanent same-sex life partnership" should be read into subsection (5) after the word "spouse".

[20] Van Heerden AJ, after observing that subsection 25(9) is not a model of legislative clarity, concluded that it establishes a general rule that an immigration permit may not be granted unless the applicant is outside the country at the time the permit is granted and that section 25(9)(b) establishes an exception to this rule in relation to spouses, dependent children and aged, infirm or destitute family members in possession of valid temporary residence permits.[25]

[21] An important element of the interpretation adopted by Van Heerden AJ is that the temporary residence permit referred to in both section 25(9)(a) and (b) must be valid at the time the immigration permit is granted. This interpretation, supported by the respondents, was not disputed by the applicants in the High Court. Before this Court, however, the applicants argued for a different interpretation. It was submitted that as long as the person had once been issued a temporary residence permit under section 26(1), it did not matter if that permit had since expired. On this approach section 25(9)(b) would mean that any person who fell within the special categories of person identified by sections 25(4)(b) and (5) would need only at some stage to have been in possession of a valid temporary residence permit in order to fall within the scope of the exemption.

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25 See the High Court judgment, above n 1 at 1020 G - H and 1021 A - C.

[22] Even if the language of section 25(9)(b) in isolation is capable of the meaning advanced by the applicants, it is clear that the language is also capable of the meaning adopted by Van Heerden AJ, and in my view that interpretation fits more closely with the context of the statute as a whole. The purpose of the statute is to regulate and control the entry of foreigners into and their residence in South Africa. The control of such entry and residence is a difficult and complex task for the state. The statute seeks to control immigration by requiring all non-citizens to be in possession of a valid immigration permit, temporary residence permit or an exemption[26] and to enforce this requirement through criminal sanction.

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26 Section 28 is the provision governing exemptions. It provides that in certain circumstances people may be exempted from the obligations imposed by section 23 of the Act (discussed at para 23 below).

[23] Central to the structure of the statute is section 23 which provides that no foreigner shall enter or sojourn in the Republic unless he or she is in possession of an immigration permit or temporary residence permit. Section 27 of the Act imposes an obligation, on pain of criminal sanction, upon foreigners who do not possess either an immigration permit or a temporary residence permit to present themselves to the Department.[27] Furthermore, it is clear from section 26(7) that people who continue to reside in South Africa once their temporary residence permits have expired are guilty of a criminal offence.[28] The responsibility for ensuring compliance with

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[27] Section 27 provides (where relevant):

> "(1) An alien who at any time entered the Republic and, irrespective of the circumstances of his or her entry, is not or is not deemed to be in possession of an immigration permit issued to him or her under section 25 or a temporary residence permit issued to him or her under section 26 or has not under section 28 been exempted from the provisions of section 23(a) or (b), shall present himself or herself to an immigration officer or to an officer of the Department in one of its offices.
>
> (2) . . .
>
> (3) An alien referred to in subsection (1) who fails to comply with the provisions of that subsection or an alien referred to in subsection (2) who fails to comply with the provisions of the last-mentioned subsection or any alien so referred to who fails, on being called upon to do so by an immigration officer, then and there to furnish to such immigration officer the particulars determined by the Director-General to enable such immigration officer to consider the issuing to the said alien of a temporary residence permit under section 26(1)(a), shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 12 months, and whether or not he or she has been convicted of that offence, any immigration officer may, if he or she is not in custody, arrest him or her or cause him or her to be arrested without a warrant, and may remove him or her or cause him or her to be removed from the Republic under a warrant issued by the Minister and may, pending such removal, detain him or her or cause him or her to be detained in such manner and at such place as may be determined by the Director-General.
>
> (4) . . .
>
> (5) The provisions of section 44(4) and (5) shall *mutatis mutandis* apply to any alien referred to in subsection (3) of this section in the same manner in which they apply to persons referred to in subsection (1) of the first-mentioned section."

[28] Section 26(7) provides as follows:

> "Any person to whom a permit was issued under subsection (3) and who remains in the Republic after the expiration of the period for which, or fails to comply with the purpose for which, or with a condition subject to which, it was issued, shall be guilty of an offence and may be dealt with under this Act as a prohibited person."

the provisions of the Act is therefore placed squarely on the shoulders of those wishing to obtain permits to reside in South Africa. Evading or ignoring those responsibilities constitutes criminal conduct and may result in deportation.[29]

[24] In this context, the interpretation of section 25(9)(b) urged upon us by the applicants is extraordinary. It suggests that a person whose temporary residence permit is no longer valid, and who is therefore unlawfully residing in South Africa (and thereby committing an offence), will be afforded an exemption from a general rule that immigration permits may only be granted to those outside South Africa. Such an interpretation is quite out of keeping with the overall purpose of the Act, which seeks to induce foreigners to ensure that their permits to remain in South Africa are current and valid, and not to permit people to remain when those permits have expired. Therefore, it is plain that when section 25(9)(b) refers to a person "who has been permitted under section 26(1) to temporarily sojourn in the Republic", it refers to a person whose temporary residence permit is still valid and not to a person whose permit has expired.

[25] In my view there is a three-fold conclusion. First, section 25(9), read in the context of section 23, establishes a general rule that a regional committee of the Immigrants Selection Board (the agency empowered to grant immigration permits) may grant such permits only when the applicant is not in South Africa. Secondly, section 25(9)(a) creates an exception to this rule

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[29] See section 44 of the Act and, in particular, subsections (4) and (5), read with section 27(5), above n 27.

in terms of which an applicant for an immigration permit who possesses a valid work permit need not be outside of South Africa when the immigration permit is granted. Thirdly, section 25(9)(b) creates a further exception in terms of which spouses, dependent children and aged, infirm or destitute family members who are in possession of a valid temporary residence permit issued in terms of section 26 also need not be outside South Africa at the time their immigration permit is granted.

[26] The grant of temporary residence permits is governed by section 26(3) of the Act, which provides:

> "(a) An immigration officer, in the case of an application for a visitor's permit, business permit or a medical permit referred to in subsection (1), or the Director-General, in the case of an application for any of the permits referred to in that subsection, may, on the application of an alien who has complied with all the relevant requirements of this Act, issue to him or her the appropriate permit in terms of subsection (1) to enter the Republic or any particular portion of the Republic and to sojourn therein, during such period and on such conditions as may be set forth in the permit.
>
> (b) . . . ."[30]

The extension of a temporary permit is governed by section 26(6):

> "The Director-General may from time to time extend the period for which, or alter the conditions subject to which, a permit was issued under subsection (3), and a permit so altered shall be deemed to have been issued under the said subsection."

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30 The provisions of section 26(1) are set out at n 2 above.

It can be seen from these provisions that no guidance is provided as to the circumstances in which it would be appropriate to refuse to issue or extend a temporary residence permit.[31] I return to this later. I now turn to the question whether section 25(9)(b) is unconstitutional or not.

Constitutional challenge to section 25(9)(b)

[31] Section 56(1)(f) of the Act provides, however, that the Minister may make regulations relating to the conditions subject to which permits may be issued.

[27] The applicants argued that the effect of section 25(9)(b) is to deny spouses the right to cohabit and therefore infringes several rights in the Constitution: the right to dignity;[32] the right of citizens to remain and reside in South Africa;[33] the right of children to family or parental care;[34] and the right not to be subjected to unfair discrimination.[35] Van Heerden AJ held that section 25(9)(b) indeed violates the right to respect for and protection of dignity which she held included the right of spouses to live together.[36]

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32 Section 10.

33 Section 21(3).

34 Section 28(1)(b).

35 Section 9(3).

36 See the judgment of the High Court, above n 1 at 1038 B - C and 1040 B - I.

[28] Our Constitution contains no express provision protecting the right to family life or the right of spouses to cohabit. The omission of such a right from the Constitution was challenged during the first certification proceedings on the basis that such a right constituted a "universally accepted fundamental right" which in terms of Constitutional Principle II had to be entrenched in the Constitution.[37] The Court observed from its survey of international instruments that states are obliged in terms of international human rights law to protect the rights of persons freely to marry and raise a family. However, it also observed that these obligations are achieved in a great variety of ways in different human rights instruments.[38] It continued:

> "International experience accordingly suggests that a wide range of options on the subject would have been compatible with CP II. On the one hand, the provisions of the NT [new constitutional text] would clearly prohibit any arbitrary State interference with the right to marry or to establish and raise a family. NT 7(1) enshrines the values of human dignity, equality and freedom, while NT 10 states that everyone has the right to have their dignity respected and protected. However these words may come to be interpreted in future, it is evident that laws or executive action resulting in enforced marriages, or oppressive prohibitions on marriage or the choice of spouses, would not survive constitutional challenge. Furthermore, there can be no doubt that the NT prohibits the kinds of violations of family life produced by the pass laws or the institutionalised migrant labour system, just as it would not permit the prohibitions on free choice of marriage partners imposed by laws such as the Prohibition on Mixed

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37 Constitutional Principle II provided that:

> "Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to *inter alia* the fundamental rights contained in Chapter 3 of this Constitution."

38 See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at para 97.

Marriages Act 55 of 1949."[39] (footnote omitted)

The Court therefore concluded that the new constitutional text, although it contained no express clause protecting the right to family life, nevertheless met the obligations imposed by international human rights law to protect the rights of persons freely to marry and to raise a family.

[29] International human rights law imposes obligations upon states to respect and protect marriage and family life. Article 16 of the Universal Declaration of Human Rights provides:

> "(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
> (2) Marriage shall be entered into only with the free and full consent of the intending spouses.
> (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

Similarly, article 23 of the International Covenant on Civil and Political Rights, which South Africa has ratified, provides:

> "(1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

39 Id at para 100.

(2) The right of men and women of marriageable age to marry and to found a family shall be recognized.

(3) No marriage shall be entered into without the free and full consent of the intending spouses.

(4) States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children."[40]

The African Charter on Human and Peoples' Rights, also ratified by South Africa, provides in article 18:

"1. The family shall be the natural unit and basis of society. It shall be protected by the State . . . .

2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.

. . . ."

International human rights law therefore clearly recognises the importance of marriage and a state obligation to protect the family.

40 See also article 10 of the International Covenant on Economic, Social and Cultural Rights.

[30] Marriage and the family are social institutions of vital importance. Entering into and sustaining a marriage is a matter of intense private significance to the parties to that marriage for they make a promise to one another to establish and maintain an intimate relationship for the rest of their lives which they acknowledge obliges them to support one another, to live together and to be faithful to one another.[41] Such relationships are of profound significance to the individuals concerned. But such relationships have more than personal significance at least in part because human beings are social beings whose humanity is expressed through their relationships with others.[42] Entering into marriage therefore is to enter into a relationship that has public significance as well.

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41 See the comments in *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at para 93; 1997 (11) BCLR 1489 (CC) at para 92 and also the comments of Ackermann J in his discussion of same-sex life partnerships in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*, above n 24 at para 58.

42 Umuntu ngumuntu ngabantu — a person is a person because of other people. See the judgments of Langa J, Madala J, Mahomed J and Mokgoro J in *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC);1995 (2) SACR 1 (CC) at paras 223 - 227; 237 - 243; 263; and 307 - 313 respectively.

[31] The institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children. The celebration of a marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage. These legal obligations perform an important social function. This importance is symbolically acknowledged in part by the fact that marriage is celebrated generally in a public ceremony, often before family and close friends. The importance of the family unit for society is recognised in the international human rights instruments referred to above when they state that the family is the "natural" and "fundamental" unit of our society. However, families come in many shapes and sizes. The definition of the family also changes as social practices and traditions change.[43] In recognising the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms.

[32] South African families are diverse in character and marriages can be contracted under several different legal regimes including African customary law, Islamic personal law and the

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[43] See *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*, above n 24 at paras 47 - 48 and *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996*, above n 38 at para 99. See also the helpful discussion in Sinclair and Heaton *The Law of Marriage* (Juta, Cape Town 1996) Volume 1 at 5 - 15.

civil or common law. However, full legal recognition has historically been afforded only to civil or common law marriages. Even if the legal implications of the marriage differ depending on the legal regime that governs it, the personal significance of the relationship for those entering it and the public character of the institution, remain profound. In addition, many of the core elements of the marriage relationship are common between the different legal regimes.

[33] In terms of common law, marriage creates a physical, moral and spiritual community of life.[44] This community of life includes reciprocal obligations of cohabitation, fidelity and sexual intercourse, though these obligations are for the most part not enforceable between the spouses. Importantly, the community of life establishes a reciprocal and enforceable duty of financial support between the spouses and a joint responsibility for the guardianship and custody of children born of the marriage.[45] An obligation of support flows from marriage under African customary law as well.[46] In terms of Muslim personal law, the husband bears an enforceable

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44 Referred to as a consortium omnis vitae. See *Peter v Minister of Law and Order* 1990 (4) SA 6 (E) at 9; *Grobbelaar v Havenga* 1964 (3) SA 522 (N) at 525 and the discussion in Sinclair and Heaton, above n 43 at 422ff.

45 See for example, section 1 of the Guardianship Act, 192 of 1993.

46 Bennett *Sourcebook of African Customary Law for Southern Africa* (Juta, Cape Town 1991) at 228.

duty of support of the wife during the subsistence of the marriage.[47]

The constitutional protection of marriage and family life

[34] Section 10 of the Constitution provides as follows:

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

[47] See *Ryland v Edros* 1997 (2) SA 690 (C) at 698 - 699. In that case, the tenets of Muslim personal law as acknowledged by the Shafi'i school (and set out by experts) were agreed between the litigants. One of the agreed principles was the husband's obligation to maintain his wife during the subsistence of the marriage.

This Court has on several occasions emphasised the importance of human dignity to our constitutional scheme.[48] It is clear from the text of the Constitution itself that human dignity is a fundamental value of our Constitution. Section 1 of the Constitution provides:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) human dignity, the achievement of equality, and the advancement of human rights and freedoms;
>
> . . . ."

Similarly, section 7(1) of the Constitution states:

> "This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

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48 See for example, *S v Makwanyane and Another*, above n 42 at para 144 (per Chaskalson P). See also *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at paras 47 - 49 (per Ackermann J); *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 41 (per Goldstone J); *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at paras 31 - 33 (per Ackermann, O'Regan and Sachs JJ); *Harksen v Lane NO and Others* above n 41 at paras 46 and 50 - 53 (per Goldstone J), paras 91 - 92 (per O'Regan J dissenting); *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC); 1998 (2) SACR 556 (CC) at paras 17 - 32 (per Ackermann J), paras 120 - 129 (per Sachs J); and *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*, above n 24 at paras 41 - 2 and 48.

And section 36(1):

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom . . . ."

Finally, section 39(1) states:

> "When interpreting the Bill of Rights, a court, tribunal or forum —
>
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
>
> . . . ."

[35] The value of dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels.[49] It is a value that informs the interpretation of many, possibly all, other rights.[50] This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to

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49 For a discussion of dignity in our constitutional order, see A Chaskalson "Human Dignity as a Foundational Value of our Constitutional Order" Third Bram Fischer Memorial lecture delivered in Johannesburg on 18 May 2000, as yet unpublished, and LWH Ackermann "Equality and the South African Constitution: The role of dignity" Bram Fischer lecture delivered in Oxford on 26 May 2000, as yet unpublished.

50 See the concurring judgment of Sachs J in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*, above n 48 at para 120:

> "It will be noted that the *motif* which links and unites equality and privacy, and which, indeed, runs right through the protections offered by the Bill of Rights, is dignity."

equality,[51] the right not to be punished in a cruel, inhuman or degrading way,[52] and the right to life.[53] Human dignity is also a constitutional value that is of central significance in the limitations analysis.[54] Section 10, however, makes it plain that dignity is not only a *value* fundamental to our Constitution, it is a justiciable and enforceable *right* that must be respected

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51 See for example, *Prinsloo v Van der Linde and Another*, above n 48; *President of the Republic of South Africa and Another v Hugo*, above n 48; and *Harksen v Lane NO and Others,* above n 41.

52 See *S v Makwanyane and Another*, above n 42 at para 95.

53 Id at para 327.

54 See section 36(1). See also the interesting discussion of the limitations clause by Meyerson *Rights Limited* (Juta, Cape Town 1997).

and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity,[55] the right to equality or the right not to be subjected to slavery, servitude or forced labour.[56]

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55 Section 12(2) of the Constitution.

56 Section 13 of the Constitution.

[36] In this case, however, it cannot be said that there is a more specific right that protects individuals who wish to enter into and sustain permanent intimate relationships than the right to dignity in section 10. There is no specific provision protecting family life as there is in other constitutions and in many international human rights instruments. The applicants argued that legislation interfering with the right to enter into such relationships infringed the rights to freedom of movement[57] and the rights of citizens to reside in South Africa.[58] It may well be that such legislation will have an incidental and limiting effect on these rights, but the primary right implicated is, in my view, the right to dignity. As it is the primary right concerned, it is the right upon which we should focus.

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57 Section 21(1) of the Constitution. The Zimbabwe Supreme Court found an infringement of the freedom of movement in an influential line of cases based on similar facts to this case: *Rattigan and Others v Chief Immigration Officer, Zimbabwe* 1995 (2) SA 182 (ZS); *Salem v Chief Immigration Officer, Zimbabwe and Another* 1995 (4) SA 280 (ZS) and *Kohlhaas v Chief Immigration Officer, Zimbabwe and Another* 1998 (3) SA 1142 (ZS).

58 Section 21(3) of the Constitution.

[37] The decision to enter into a marriage relationship and to sustain such a relationship is a matter of defining significance for many if not most people and to prohibit the establishment of such a relationship impairs the ability of the individual to achieve personal fulfilment in an aspect of life that is of central significance.[59] In my view, such legislation would clearly constitute an infringement of the right to dignity. It is not only legislation that prohibits the right to form a marriage relationship that will constitute an infringement of the right to dignity, but any legislation that significantly impairs the ability of spouses to honour their obligations to one another would also limit that right.[60] A central aspect of marriage is cohabitation, the right (and

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59 Under apartheid law, for example, marriages between white and black people were prohibited in terms of the Prohibition of Mixed Marriages Act, 55 of 1949. That legislation clearly had grievous implications for the right to human dignity. Couples who wished to enter into a marriage relationship were denied the right to do so simply because of their racial classification.

60 See Ackermann J's judgment in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others,* above n 24 at para 78 where he stated that —

> "[i]t is unnecessary and undesirable to decide in the present case whether the failure to afford spouses the benefits that they currently enjoy by virtue of the provisions of s 25(5) would be constitutionally defensible. It would be equally undesirable to suggest the contrary by making a striking-down order."

The conclusion he expressly avoided has been reached in this judgment.

duty) to live together, and legislation that significantly impairs the ability of spouses to honour that obligation would also constitute a limitation of the right to dignity.[61] Like all rights, however, the question of whether such a limitation is unconstitutional or not will depend upon whether it is reasonable and justifiable in an open and democratic society in terms of section 36(1) of the Constitution. I now turn to the question of the effect of section 25(9)(b).

The effect of section 25(9)

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

[38] It is implicit in section 25(9), read against the background of section 23, that applicants for immigration permits may not be in South Africa at the time their applications are granted. In the context of this general prohibition, the overall purpose of section 25(9)(b) is to afford to spouses, dependent children and destitute, aged or infirm family members of people lawfully and permanently resident in South Africa a benefit that is not afforded to other applicants for immigration permits. It allows them to remain in South Africa pending the outcome of their application for an immigration permit while other applicants[62] have to leave the country. The effect of section 25(9) read with subsections 26(3) and (6) of the Act is that foreign spouses may continue to reside in South Africa while their applications for immigration permits are being considered only if they are in possession of valid temporary residence permits. Given the fact that such applications are not automatically granted but have to be considered on their merits, these provisions necessarily authorise immigration officials and the DG to refuse to issue or extend such temporary permits.

[39] The effect of such a refusal is that a South African married to a foreigner is forced to choose between going abroad with his or her partner while the application is considered, or remaining in South Africa alone. Many South African spouses will not even face this dilemma on account of their poverty or other circumstances and will have to remain in South Africa without their spouses. The right (and duty) to cohabit, a key aspect of the marriage relationship, is restricted in this way. Accordingly the right to dignity of spouses is limited by the statutory provisions that empower immigration officers and the DG to refuse to grant or extend a

62 Save for those in possession of work permits in terms of section 26(1)(b).

temporary permit. Having regard to the general prohibition against remaining in South Africa pending the outcome of an application for an immigration permit, the power to refuse the temporary permit is a power, in effect, to limit the right of cohabitation of spouses. It is necessary now to consider whether that limitation is justifiable or not.

Limitations analysis

[40] Section 36(1) of the Constitution provides that a limitation of a constitutional right may be justified.[63] It will be justified only if the Court concludes that the limitation of the right, considering the nature and importance of the right and extent of its limitation on the one hand, is justified in relation to the purpose, importance and effect of the provision causing the limitation, taking into account the availability of less restrictive means to achieve the purpose of the provision, on the other.[64]

The scope of the limitation of the right

[41] In order fully to grasp the scope of the limitation of the right, therefore, it is necessary to

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63 Section 36(1) provides as follows:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose."

64 See *S v Makwanyane and Another*, above n 42 at para 104; *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*, above n 48 at paras 33 - 35; *S v Manamela and Another* 2000 (5) BCLR 491 (CC) at paras 32 - 34.

consider the manner in which temporary permits may be issued and extended and, in particular, the circumstances in which they may be refused. For the denial of the constitutional right only occurs when a temporary permit has been refused.

[42] Temporary permits are issued in terms of section 26(3) of the Act, and extended in terms of section 26(6).[65] The discretion conferred upon the relevant officials (immigration officers and the DG) by these provisions contains no suggestion that the marital status of the applicant is of any relevance to an application for a temporary permit or its extension. However, the discretion must be understood in the context of the Act which in terms of section 25(5)[66] and section 25(9)(b) recognises the importance of family relationships. These last-mentioned sections contain a clear legislative indication that the marital or family status of applicants for the grant of temporary residence permits under section 26(3) or their extension under section 26(6) ought to be a factor relevant to the exercise of the discretionary powers conferred by those sections.

[43] But temporary permits can also be refused. This is clear from the formulation of section 25(9)(b) read with sections 26(3) and (6). If the legislature had intended permits *always* to be granted, it would have said so. The requirement in section 25(9)(b) that a foreign spouse be in possession of a valid temporary permit therefore necessarily implies that there are other considerations that must or may be taken into account, and that would be relevant particularly to

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65 The terms of these provisions are set out in full at para 26 above.

66 See above n 24.

the refusal of a temporary permit. Yet these considerations are not identified at all. As sections 26(3) and (6) stand there is nothing to indicate what factors or circumstances can or ought to be taken into consideration by the relevant immigration officials and the DG.

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

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

However, section 25(5) of the Act states that a regional committee, *notwithstanding the provisions of section 25(4)*, may issue an immigration permit to a spouse of a permanent and lawful resident of South Africa.[67] Section 25(5) does not substitute any other criteria for those provided by section 25(4)(a). There is therefore no guidance to be found in either of these provisions as to the circumstances in which immigration officials or the DG may refuse to issue or extend a temporary residence permit.

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67 Section 25(5) is cited above n 24.

[45] Can it nevertheless be said that the statute is reasonably capable of bearing a meaning that identifies factors relevant to the refusal to grant or extend permits that should be taken into consideration in addition to the marital or family status of the parties?[68] In determining whether a legislative provision is reasonably capable of a particular meaning, the Court must, as the Constitution requires, "promote the spirit, purport and objects of the Bill of Rights."[69]

[46] The Constitution also makes it plain that all government officials when exercising their powers are bound by the provisions of the Constitution. So section 8(1) of the Constitution provides that ―

> "[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."

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68 See *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*, above n 24 at paras 25 - 26.

69 See section 39(2) of the Constitution.

There is, however, a difference between requiring a court or tribunal in exercising a discretion to interpret legislation in a manner that is consistent with the Constitution and conferring a broad discretion upon an official, who may be quite untrained in law and constitutional interpretation, and expecting that official, in the absence of direct guidance, to exercise the discretion in a manner consistent with the provisions of the Bill of Rights. Officials are often extremely busy and have to respond quickly and efficiently to many requests or applications. The nature of their work does not permit considered reflection on the scope of constitutional rights or the circumstances in which a limitation of such rights is justifiable. It is true that as employees of the state they bear a constitutional obligation to seek to promote the Bill of Rights as well.[70] But it is important to interpret that obligation within the context of the role that administrative officials play in the framework of government which is different from that played by judicial officers.

[47] It is an important principle of the rule of law that rules be stated in a clear and accessible manner.[71] It is because of this principle that section 36 requires that limitations of rights may be justifiable only if they are authorised by a law of general application. Moreover, if broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in

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70 Sections 7(2) and 8(1) of the Constitution.

71 The rule of law is a foundational value of our Constitution (see section 1(c) of the Constitution). See also *Pharmaceutical Manufacturers Association of SA and Others; In re: Ex parte Application of President of the RSA and Others* 2000 (3) BCLR 241 (CC) at para 40. For a consideration of the relationship between the rule of law and discretion, see the authorities cited at n 73 below.

what circumstances they are entitled to seek relief from an adverse decision. In the absence of any clear statement to that effect in the legislation, it would not be obvious to a potential applicant that the exercise of the discretion conferred upon the immigration officials and the DG by sections 26(3) and (6) is constrained by the provisions of the Bill of Rights, and in particular, what factors are relevant to the decision to refuse to grant or extend a temporary permit. If rights are to be infringed without redress, the very purposes of the Constitution are defeated.

[48] There may be circumstances, of course, where a decision to refuse the grant or extension of the permit may subsequently be challenged in administrative review proceedings. Indeed in two of the cases before us the primary challenge was to the refusal to grant a temporary permit. The High Court, however, held for the applicants on the basis of their constitutional challenge to the statute. The fact, however, that the exercise of a discretionary power may subsequently be successfully challenged on administrative grounds, for example, that it was not reasonable, does not relieve the legislature of its constitutional obligation to promote, protect and fulfil the rights entrenched in the Bill of Rights. In a constitutional democracy such as ours the responsibility to protect constitutional rights in practice is imposed both on the legislature and on the executive and its officials. The legislature must take care when legislation is drafted to limit the risk of an unconstitutional exercise of the discretionary powers it confers.

[49] There will be circumstances in which there are constitutionally acceptable reasons for refusing the grant or extension of a temporary residence permit but those circumstances are not identified at all in the Act. An obvious example one can think of is where the foreign spouse has been convicted of serious criminal offences that suggest that his or her continued presence in

South Africa even under a temporary residence permit would place members of the public at risk. Another would be where it is clear to the official that the immigration permit itself will not be granted and that pending that decision it would not be in the public interest to permit the foreign spouse to remain. These are examples only. It is for the legislature, in the first place, to identify the policy considerations that would render a refusal of a temporary permit justifiable. However, as the legislation is currently drafted, the grant or extension of a temporary residence permit may be refused where no such grounds exist.

[50] The foregoing discussion assists in determining the interpretation of the relevant provisions that would best "promote the spirit, purport and objects of the Bill of Rights". In the case of the statutory discretion at hand, there is no provision in the text providing guidance as to the circumstances relevant to a refusal to grant or extend a temporary permit. I am satisfied that in the absence of such provisions, it would not promote the spirit, purport and objects of the Bill of Rights for this Court to try to identify the circumstances in which the refusal of a temporary permit to a foreign spouse would be justifiable. Nor can we hold in the present case that it is enough to leave it to an official to determine when it will be justifiable to limit the right in the democratic society contemplated by section 36. Such an interpretation, of which there is no suggestion in the Act, would place an improperly onerous burden on officials, which in the constitutional scheme should properly be borne by a competent legislative authority. Its effect is almost inevitably that constitutional rights (as in the case of two of the respondents before this Court) will be unjustifiably limited in some cases. Of even greater concern is the fact that those infringements may often go unchallenged and unremedied. The effect, therefore, of section 25(9)(b) read with sections 26(3) and (6) is that foreign spouses may be refused temporary

permits in circumstances that constitute an infringement of their constitutional rights.

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

The purpose, importance and effect of section 25(9)(b)

[52] It is necessary now to turn to the second leg of the limitations analysis and consider the purpose, importance and effect of section 25(9)(b) taking into account whether there are means whereby that purpose could be achieved that would be less restrictive of the constitutional right at issue. As I have already said, the overall purpose of the Act is clearly to control immigration

into South Africa. The importance of this purpose cannot be disputed.[72] The purpose of section 25(9)(b) read with sections 26(3) and (6) within this framework, however, is somewhat different. It affords a limited privilege to spouses and dependent children of people lawfully and permanently resident in South Africa, by permitting them to remain in South Africa while their applications for immigration permits are considered as long as they are in possession of a valid temporary residence permit. This purpose is an important and legitimate one that recognises the importance of family life. It is, however, dependent upon the exercise of the discretion conferred upon officials by sections 26(3) and (6). The exercise of the discretion to grant or extend temporary permits therefore *determines* in any particular case whether the privilege section 25(9)(b) attempts to afford to spouses and other family members is in fact afforded to those intended beneficiaries. The absence of any guidance as to the factors relevant to the refusal of the grant or extension of such permits, therefore considerably undermines the effect of the limited privilege afforded by section 25(9)(b).

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72 See generally, *Larbi-Odam and Others v Member of the Executive for Education (North-West Province) and Another* 1998 (1) SA 745 (CC); 1997 (12) BCLR 1655 (CC).

[53] Discretion plays a crucial role in any legal system.[73] It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner. The scope of discretionary powers may vary. At times, they will be broad, particularly where the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible for the legislature to identify them in advance. Discretionary powers may also be broadly formulated where the factors relevant to the exercise of the discretionary power are indisputably clear. A

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73 Although there was a time when some thought that discretion was inappropriate in a legal system based on the rule of law (see for example, Dicey *Introduction to the Study of the Law of the Constitution* 10 ed (Macmillan, London 1959)), this is no longer the case. It is recognised that discretion cannot be separated from rules and that it has an important role to play in any legal system. See the ground-breaking work by K C Davis *Discretionary Justice: A Preliminary Inquiry* (Louisiana State University Press, Baton Rouge 1969). Administrative lawyers now generally acknowledge the importance of discretion to a functioning legal system. The challenge for administrative law is to ensure that discretion be properly regulated. See generally, Galligan *Discretionary Powers: A Legal Study of Official Discretion* (Clarendon Press, Oxford 1986); Harlow and Rawlings *Law and Administration* 2 ed (Butterworths, London 1997); Craig *Administrative Law* 3 ed (Sweet & Maxwell, London 1994); and Baxter *Administrative Law* (Juta, Cape Town 1984). See also *Baron v Canada* (1993) 99 DLR (4th) 350 at 363 and 365 - 368; and the discussion in the dissenting judgment of L'Heureux-Dubé J in *Young v Young* (1993) 108 DLR (4th) 193 at 238.

further situation may arise where the decision-maker is possessed of expertise relevant to the decisions to be made. There is nothing to suggest that any of these circumstances is present here.

[54] We must not lose sight of the fact that rights enshrined in the Bill of Rights must be protected and may not be unjustifiably infringed. It is for the legislature to ensure that, when necessary, guidance is provided as to when limitation of rights will be justifiable. It is therefore not ordinarily sufficient for the legislature merely to say that discretionary powers that may be exercised in a manner that could limit rights should be read in a manner consistent with the Constitution in the light of the constitutional obligations placed on such officials to respect the Constitution. Such an approach would often not promote the spirit, purport and objects of the Bill of Rights. Guidance will often be required to ensure that the Constitution takes root in the daily practice of governance. Where necessary, such guidance must be given. Guidance could be provided either in the legislation itself, or where appropriate by a legislative requirement that delegated legislation be properly enacted by a competent authority.[74]

[55] Such guidance is demonstrably absent in this case. It is important that discretion be conferred upon immigration officials to make decisions concerning temporary permits. Discretion of this kind, though subject to review, is an important part of the statutory framework

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[74] In this case, section 56(1)(f) of the Act provides that the Minister—

> "*may* make regulations relating to . . . the conditions subject to which such permits or certificates may be issued . . . ." (my emphasis)

Affording the executive a power to regulate such matters is not sufficient. The legislature must take steps where the limitation of rights is at risk to ensure that appropriate guidance is given.

under consideration. However, no attempt has been made by the legislature to give guidance to decision-makers in relation to their power to refuse to extend or grant temporary permits in a manner that would protect the constitutional rights of spouses and family members.

[56] Nor can it be said that there is any legislative purpose to be achieved by not supplying such guidance at all. The Minister, in his written argument, did not seek to suggest the contrary. It would be neither unduly complex nor difficult to identify the considerations relevant to a justifiable refusal of a temporary permit. There is no reason therefore for the legislative omission that can be weighed in the limitations analysis. In this case, the effect of the absence of such guidance, coupled with the breadth of the discretion conferred upon immigration officials and the DG by sections 26(3)and (6), significantly undermines the purpose of section 25(9)(b).

Proportionality analysis

[57] There is a clear limitation of the right to dignity caused by section 25(9)(b) read with sections 26(3) and (6). Like all constitutional rights, that right is not absolute and may be limited in appropriate cases in terms of section 36(1) of the Constitution. As stated above, there can be no doubt that there will be circumstances when the constitutional right to dignity that protects the rights of spouses to cohabit may justifiably be limited by refusing the spouses the right to cohabit in South Africa even pending a decision upon an application for an immigration permit. As also stated earlier, it is for the legislature, in the first instance, to determine what those circumstances will be and to provide guidance to administrative officials to exercise their discretion accordingly.

[58] In this case, the legislature has sought to give a limited privilege to spouses and certain other family members through enacting section 25(9)(b). However, when that subsection is read with sections 26(3) and (6), it is plain that the privilege afforded by section 25(9)(b) may not in fact be of assistance to the groups section 25(9)(b) seeks to assist (as indeed it was not for Mr Shalabi or Mr Thomas). The privilege is dependent upon the grant of a valid temporary permit. However, the statutory provisions contemplate the refusal of such a permit, but contain no indication of the considerations that would be relevant to such refusal. Whatever the language and purpose of section 25(9)(b), its effect is uncertain in any specific case because of the discretionary powers contained in sections 26(3) and (6). The failure to identify the criteria relevant to the exercise of these powers in this case introduces an element of arbitrariness to their exercise that is inconsistent with the constitutional protection of the right to marry and establish a family.[75] In my view, the effect of section 25(9)(b) read with sections 26(3) and (6) results in an unjustifiable infringement of the constitutional right of dignity of applicant spouses who are married to people lawfully and permanently resident in South Africa. There is no government purpose that I can discern that is achieved by the complete absence of guidance as to the countervailing factors relevant to the refusal of a temporary permit. In my view, therefore, section 25(9)(b) as read with sections 26(3) and (6) of the Act is unconstitutional.

Order

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75 It was precisely such arbitrariness that this Court held would be prohibited by the provisions of the Constitution in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996*, above n 38. See para 28 above.

[59] It is now necessary to consider the appropriate order to be made in this case. Section 172 of the Constitution provides that:

> "(1) When deciding a constitutional matter within its power, a court —
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> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
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> (b) may make an order that is just and equitable, including —
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> (i) an order limiting the retrospective effect of the declaration of invalidity; and
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> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.
>
> (2) (a) The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.
>
> (b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct."

It is clear from this provision that a court is obliged, once it is has concluded that a provision of a statute is unconstitutional, to declare that provision to be invalid to the extent of its inconsistency with the Constitution. In addition, the court may also make any order that it considers just and equitable including an order suspending the declaration of invalidity for some time.

[60] Although this matter is before this Court for the confirmation of an order of invalidity,

there is nothing in section 172 that suggests that the Court's power to make appropriate orders is limited in such matters. It seems clear from the language of section 172(1), in particular, that as long as a court is deciding a constitutional matter "within its power", it has the remedial powers conferred by that section, as broad as they may be. In the circumstances, therefore, the Court is not empowered merely to confirm or refuse to confirm the order that is before it. The Court, as section 172(1) requires, must, if it concludes that the provision is inconsistent with the Constitution, declare the provision invalid and then the Court may make any further order that is just and equitable.[76]

[61] I have concluded that section 25(9)(b) read with sections 26(3) and (6) is inconsistent with the Constitution because of the absence of legislative guidance identifying the circumstances in which a refusal to grant or extend a temporary permit would be justifiable and that therefore those provisions constitute an infringement of the applicants' constitutional right to dignity, which protects their rights to marry and cohabit. The inconsistency with the Constitution therefore lies in a legislative omission, the failure to provide guidance to the decision-maker. As such, therefore, it cannot be cured by the technique of actual or notional severance employed by this Court, for example, in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*.[77]

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[76] See for example, *The Minister for Welfare and Population Development v Fitzpatrick and Others*, CCT 08/00, unreported judgment of this Court dated 31 May 2000. In that case, although we upheld the order of constitutional invalidity made by the Cape of Good Hope High Court, we did not confirm the order suspending that order.

[77] See above n 48 at para 157. The order read as follows:

> "The provisions of s 417(2)(b) of the Companies Act 1973 are, with immediate effect declared invalid, *to the extent only* that the words 'and any answer given to any such question may thereafter by used in evidence against him' in s 417(2)(b) apply to the use

of any such answer against the person who gave such answer, in criminal proceedings against such person, other than proceedings where that person stands trial on a charge relating to the administering or taking of an oath or the administering or making of an affirmation or the giving of false evidence or the making of a false statement in connection with such questions and answers or a failure to answer lawful questions fully and satisfactorily." (original emphasis)

See the discussion in *National Coalition for Gay and Lesbian Equality and Others v Minister for Home Affairs and Others*, above n 24 at para 64.

[62] In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others,*[78] this Court held that it could introduce words into a legislative provision if such an order were appropriate. In deciding whether such an order were appropriate, the Court held that there were two primary considerations — the need to afford appropriate relief to successful litigants, on the one hand, and the need to respect the separation of powers, and, in particular, the role of the legislature as the institution constitutionally entrusted with the task of enacting legislation.

78 Above n 24 at paras 65 - 66.

[63] It would be inappropriate for this Court to seek to remedy the inconsistency in the legislation under review. The task of determining what guidance should be given to the decision-makers, and in particular, the circumstances in which a permit may justifiably be refused, is primarily a task for the legislature and should be undertaken by it. There are a range of possibilities that the legislature may adopt to cure the unconstitutionality.[79] For example, the legislature may decide that it is not necessary for foreign spouses of persons permanently and lawfully resident in South Africa to possess valid temporary residence permits while their applications for immigration permits are being processed. Another alternative would be for the legislature to provide an exhaustive list of circumstances that it considers would permit an official justifiably to refuse to grant a temporary permit. There are almost certainly other alternatives as well.

[64] Where, as in the present case, a range of possibilities exists, and the Court is able to afford appropriate interim relief to affected persons, it will ordinarily be appropriate to leave the legislature to determine in the first instance how the unconstitutionality should be cured. This Court should be slow to make those choices which are primarily choices suitable for the legislature.

[65] In determining the appropriate order, I am mindful of the fact that the Department has

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79 This case, therefore, is different both to *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*, above n 24, where the scope for legislative choice was minimal, and *S v Manamela and Another*, above n 64, where it was neither reasonable nor appropriate to refer the matter back to Parliament.

published a White Paper on International Migration[80] which suggests that a fundamental review of the legislation under scrutiny in this case is in train. It is for these reasons that I think it is appropriate to suspend the order of invalidity for a period of two years which should be sufficient time to permit the legislature to attend to rectifying the cause for constitutional complaint in the legislation.

80 *Government Gazette* 19920, GN 529 of 1 April 1999.

[66] Given the Court's power to make an order that is just and equitable in terms of section 172(1)(b) of the Constitution, we should ensure that appropriate relief is provided to the successful litigants in this case,[81] and to those who are situated similarly to those litigants in the meantime. The order I propose is similar to that made by Van Heerden AJ in the Cape High Court. Relief is granted to Mrs Dawood, Mr Shalabi and Mr Thomas and is also afforded to those similarly situated to these applicants ─ that is people who have lodged an application for an immigration permit or who lodge such an application before the legislation is amended or replaced.

[67] The relief we afford is the only relief that we can identify that would protect constitutional rights adequately pending the amendment or replacement of the Act. It is in the form of a mandamus and requires immigration officials and the DG, when exercising the discretion conferred upon them by sections 26(3) and (6) in relation to applicants who are people referred to in sections 25(4)(b) or (5) of the Act, to take into account the constitutional rights of such people and to issue or extend temporary permits to such people unless good cause exists to refuse to issue or extend such permits. Good cause, for instance, would be established were it to be shown that the issue or extension of a permit, even for the temporary period until the

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81 It is an important principle of constitutional adjudication that successful litigants should be awarded relief. See *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC); 1995 (2) SACR 748 (CC) at para 32.

immigration permit application has been finalised, would constitute a real threat to the public. Good cause to refuse to issue or extend such permits would also exist if the applicants fail within a reasonable time to lodge a complete application for an immigration permit.

[68] It is true that in providing a test of "good cause" for the exercise of the section 26(3) and (6) discretions, this Court is providing guidance to the decision-makers as to how to exercise their powers. This is occasioned by the need to avoid further unjustifiable limitation of constitutional rights pending Parliament's amendment or replacement of the legislative provisions found to be unconstitutional. This route seems the best way in which to avoid usurping the function of the legislature on the one hand without shirking our constitutional responsibility to protect constitutional rights on the other.

Costs

[69] As indicated above, the respondents in this case initially sought leave to appeal against the whole of the order made by the High Court. Leave to appeal was granted by this Court. Only a few days before the hearing of the matter in this Court the respondents indicated, and then only informally, that they intended to abandon the appeal. The day before the hearing, the respondents filed a notice of withdrawal of the appeal and opposition to the confirmation proceedings and tendered costs. The application for confirmation by the applicants has been successful, though their partial appeal against the suspension of the order of invalidity has not been successful. Nevertheless, they have successfully vindicated their constitutional rights in the face of opposition from the government and they should be awarded costs of preparation and hearing in respect of both the confirmation proceedings and the abandoned appeal. Such costs

should include the costs of two counsel.

[70] The following order is made:

1. Paragraphs 1.4, 1.5, 1.6, 1.7, 1.8, 2.1, 2.2, 3.4, 3.5, 3.6, 3.7, 3.8, 3.9 and 3.10 of the High Court order are set aside and replaced with the following:

   1.1 Section 25(9)(b) read with sections 26(3) and (6) of the Aliens Control Act 96 of 1991 (the Act) is declared to be inconsistent with the Constitution and therefore invalid;

   1.2 The declaration of invalidity made in paragraph 1.1 above is suspended for a period of twenty-four (24) months from the date of this order to enable Parliament to correct the inconsistency that has resulted in the declaration of invalidity;

   1.3 Mr Thomas and Mrs Dawood are given leave to submit an application for an immigration permit within ninety (90) days of the date of this order, if they have not already submitted such applications;

   1.4. Pending the enactment of legislation by Parliament or the expiry of the period referred to in paragraph 1.2 above, whichever is the sooner, immigration officials and the Director-General of Home Affairs, when exercising the discretion conferred upon them by section 26(3) of the Act are directed not to refuse to issue temporary residence permits to such applicants unless good cause for a refusal to issue such permits is established;

   1.5 Pending the enactment of legislation by Parliament or the expiry of the

period referred to in paragraph 1.2 above, whichever is the sooner, the Director-General of Home Affairs, when exercising the discretion conferred upon him or her by section 26(6) of the Act is directed not to refuse to extend the validity of temporary residence permits to such applicants unless good cause for refusal to issue such permits is established;

1.6 Paragraphs 1.4 and 1.5 apply only to applications for the grant or extension of temporary residence permits by people referred to in sections 25(4)(b) and 25(5) of the Act, who have lodged or have formally indicated their intention to lodge an application for an immigration permit in terms of section 25(1) of the Act, and which applications have not yet been finally determined;

1.7 The Director-General of Home Affairs is directed to ensure that the terms of this order are made known to all immigration officials within his Department; and

1.8 Applications for the grant or extension of temporary residence permits by Mrs Dawood, Mr Shalabi and Mr Thomas shall be dealt with in accordance with paragraphs 1.4, 1.5 and 1.6 above.

2. The orders in paragraph 1 above shall come into effect on the date of this judgment.

3. Should Parliament fail to remedy the unconstitutionality in the sections declared to be inconsistent with the Constitution in terms of paragraph 1.1 above within the period referred to in paragraph 1.2 above, any interested person or

organisation may, before the expiry of that period, apply to this Court for a further suspension of the declaration of invalidity and/or any appropriate further relief.

4. The costs of the appeal and confirmation proceedings in this Court, including the costs of two counsel, are to be paid by the respondents.

Chaskalson P, Langa DP, Goldstone J, Kriegler J, Madala J, Mokgoro J, Ngcobo J, Sachs J, Yacoob J and Cameron AJ concur in the judgment of O'Regan J.

For the applicants	:	W Trengove SC, A Katz and P Farlam, instructed by UCT Legal Aid Clinic and the Legal Resources Centre, Cape Town.
For the respondents	:	No appearance for the respondents.