CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT 22/01

MINISTER OF HOME AFFAIRS Applicant

versus

DOMINIQUE LIEBENBERG Respondent

Delivered on : 8 October 2001

JUDGMENT

SKWEYIYA AJ:

Introduction

[1] This is an application by the Minister of Home Affairs (the Minister) which purports to be brought in terms of section 172(2)(d) of the Constitution, which in relevant part provides that —

> "Any . . . organ of state with a sufficient interest may . . . apply, directly to the Constitutional Court to confirm . . . an order of constitutional invalidity by a court in terms of this subsection."

The "order of constitutional invalidity" referred to in the above paragraph relates, in terms of section 172(2)(a), only to "an Act of Parliament, a provincial Act or any conduct of the President."

[2] The order that the Minister seeks to confirm is one made in the Witwatersrand High Court pursuant to a draft order agreed upon by the parties and is in the following terms:

> "1. That such Temporary Residence Permit be granted 'free'.
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> 2. Declaring that none of the fees published in Annexure to Regulation 2 of the Schedule to the (secont) [sic] Seventh Amendment of the Aliens Control Regulations (Fees) 2000, dated 1st April, Regulation Gazette No. 21 1016, be applicable to aliens [sic] spouses and dependent children of persons who are lawfully and premanently [sic] resident in the Republic, and that such fees mentioned in such Regulations to be invalid to the extent that it applies to persons falling under S 25(5) of the Aliens Control Act.
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> 3. That the Respondent and Parliament to correct the Constitutional inconsistency that alien spouses married to South African citizens or residents cannot be allowed to work, seek work, undergo medical treatment, sutdy [sic] and/or exercise business activities in South Africa, unless such alien spouses of a person who is permanently and lawfully resident in the Republic applies for such Temporary Residence Permit which is usually valid for a relatively short period and pays a fee thereof, because such conduct/requirement is inconsistent with sections 9, 10, 14, 21, 28 and 29 of the Constitution of South Africa Act 108 of 1996, and therefore should be declared invalid.
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> 4. That the Department of Home Affairs undertakers [sic] to facilitate Applicant's husbands [sic] movements in and out of the Republic."

The Minister applied for confirmation of paragraphs 2 and 3 of this order.

[3] The matter was not argued before us in open court. It was considered and decided on the written argument submitted on behalf of the Minister and the respondent's affidavits filed in this Court, all seeking confirmation of the relevant paragraphs of the order.

[4] Crucial to the decision of the present application is the correct construction of the above order for only if the order or any part thereof can properly be categorised as the constitutional invalidation of "an Act of Parliament, a provincial Act or any conduct of the President" can it be confirmed by this Court. Before addressing this issue, it is useful to sketch the history of the matter.

[5] Dominique Liebenberg, a South African citizen who is the respondent in this application, lawfully married a Senegalese national in Johannesburg on 27 June 2000. Her husband first entered South Africa in December 1997, using a Senegalese passport; he thereafter sought political asylum and was, on 8 April 1998, granted a temporary permit and allowed to take up employment on certain conditions. After the marriage, the respondent's husband lost his Senegalese passport. The respondent applied for a temporary residence permit on his behalf at the Johannesburg regional office of the Department of Home Affairs. Apparently, this application was made to enable the husband to remain in South Africa pending an application for an immigration permit for him in terms of section 25(5) of the Aliens Control Act[1] (the Act). The application was refused on the ground that the respondent's husband, having lost his passport, had no legal status to remain in South Africa. The respondent alleges that she was informed by the applicant's Johannesburg regional office that in order for her husband to remain

[1] Act 96 of 1991.

in South Africa, she would have to replace his passport and would have to pay the following fees:

(i) R310,00 in order to obtain what is described as "a spouse visa";

(ii) a non-refundable and non-guaranteeable amount of R560,00 which would entitle her husband to seek employment; and

(iii) an additional non-refundable and non-guaranteeable amount of R1100,00 which would entitle her husband to take up the employment, in the event of his receiving an offer of employment.

[6] The respondent was dissatisfied with the decision and launched urgent application proceedings in the High Court, challenging the need for payment of fees as scheduled in the Regulations[2] by a person in her circumstances. She had no legal representation in those proceedings and her papers are not well drafted. The Department of Home Affairs did not oppose the application but rather undertook to issue a temporary residence permit to the respondent's husband on condition that he applied for a new passport from his country of origin within a period of six months of the issue of such permit; it also undertook to facilitate his movements between South Africa and Senegal for the purpose of his acquiring a new passport. The Witwatersrand High Court made the order referred to in paragraph 2 above.

[7] Paragraphs 1, 2 and 3 of the order granted by the High Court are a verbatim repetition of prayers 3, 4 and 5 of the respondent's notice of motion which were incorporated by reference into

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[2] Titled the "Seventh Amendment of the Aliens Control Regulations (Fees)" in Government Notice R276 *Government Gazette* 21016 of 1 April 2000 (*Reg Gaz* 6759), referred to hereafter as "the regulations".

the draft agreed order and mirror all its defects. The order was probably granted in circumstances of great pressure, as prevail in the motion division of the High Court in question, without the parties apparently being aware of the obscurities in the agreed draft order, or bringing them to the attention of the court. This is all regrettable, as an order issued by a court "binds all persons to whom and organs of state to which it applies."[3] It is particularly important that, where orders invalidate legislation, such orders be specific.

Analysis of the order

[8] The Minister did not ask that paragraphs 1 and 4 of the order be confirmed, as they clearly do not relate to any order of constitutional invalidity contemplated by section 172(2) of the Constitution.

[3] Section 165(5) of the Constitution.

[9] While the first half of paragraph 2 of the order (up to permanently "resident in the Republic") does not purport to declare any statutory instrument invalid, its terms merely being of a declaratory interpretative nature, the latter part does declare invalid "such fees mentioned in such Regulations". This paragraph of the order does not fall within the purview of section 172(2). It declares invalid a statutory instrument which is merely a regulation and, on the authority of the judgments in *Dawood*[4] and *Booysen*,[5] does not fall within the ambit of this section and cannot be confirmed.

[10] In written submissions made on behalf of the Minister it is contended that, because section 1 of the Act defines a "regulation" as meaning "any regulation made or in force under this Act" and "this Act" is defined as including "any order, direction or regulation issued or made or deemed to have been issued or made under this Act" the regulations made in terms of section 56 should be regarded as being equivalent to Acts of Parliament.

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4 *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 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) para 11.

5 *Booysen and Others v Minister of Home Affairs and Another* 2001 (7) BCLR 645 (CC) para 1.

[11] The contention on the Minister's behalf has no substance. Section 167(5) and section 172(2) of the Constitution make it clear that an order of constitutional invalidity requiring confirmation by this Court is one that concerns "an Act of Parliament, a provincial Act or any conduct of the President." The terms "an Act of Parliament" and "provincial Act" are not expressly defined anywhere in the Constitution, but there is no doubt as to what these terms mean. An Act of Parliament is an Act passed by the national legislature.[6] A provincial Act is an Act passed by a provincial legislature.

[12] The definition in section 1 of the Act does not purport to convert a regulation (or anything else referred to in the definition) to the status of an Act of Parliament, nor could it. The purpose of the definition is to clarify the applicability of the Act. For example, section 7(1)(iii) empowers an immigration officer to require certain persons to "submit to any examination or test to which he may be subjected under this Act". The definition makes clear that the applicable test would include one prescribed by regulation.

[13] The Constitution does not prescribe how regulations are to be made or enacted. All it does is to provide in section 92(1) that "Ministers are responsible for the powers and functions of the executive assigned to them by the President."[7] This highlights the fact that Ministers exercise

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6 See *Zantsi v Council of State, Ciskei, and Others* 1995 (4) SA 615 (CC); 1995 (10) BCLR 1424 (CC) where this Court held that an Act of Parliament is an Act of the national legislative authority.

7 Section 133(1) has a corresponding provision for provinces.

no more than subordinate, delegated authority when they make regulations in terms of Acts of Parliament or perform other ministerial duties. Accordingly, regulations are not Acts of Parliament and their invalidity is not subject to confirmation by this Court.

[14] Paragraph 3 of the order does two things. First, it orders the "Respondent and Parliament" to "correct [a] Constitutional inconsistency". This constitutional inconsistency is described to be ―

> ". . . that alien spouses married to South African citizens or residents cannot be allowed to work, seek work, undergo medical treatment, sutdy [sic] and/or exercise business activities in South Africa, unless such alien spouses of a person who is permanently and lawfully resident in the Republic applies for such Temporary Residence Permit . . . and pays a fee thereof, because such conduct/requirement is inconsistent with sections 9, 10, 14, 21, 28 and 29 of the Constitution of South Africa Act 108 of 1996 . . . ."

Up to this point in the paragraph nothing is declared to be constitutionally inconsistent. At most it seems to me to be a mandamus on the Minister or on Parliament. We are not called upon to decide whether such an order is permissible. There is no appeal against it. Whatever the phrase "the Respondent and Parliament to correct the constitutional inconsistency" in paragraph 3 of the order may mean, nothing it declares constitutionally invalid requires confirmation under section 172(2). The words following on "because", in so far as they relate to the preceding part of the paragraph, constitute no more than a reason for the mandamus; they do not in this context constitute a *declaration of constitutional inconsistency.*

[15] Secondly, the last phrase of paragraph 3 of the order decrees that "therefore [something] should be declared invalid." It will be assumed in favour of the Minister that ―

(a) the words "should be declared invalid" in their context mean "is hereby declared invalid";

(b) what accordingly is declared invalid is the "conduct/requirement" which is stated to be "inconsistent with sections 9, 10, 14, 21, 28 and 29 of the Constitution"; and

(c) such requirement is ―

> ". . . that alien spouses married to South African citizens or residents cannot be allowed to work, seek work, undergo medical treatment, sutdy [sic] and/or exercise business activities in South Africa, unless such alien spouses of a person who is permanently and lawfully resident in the Republic applies for such Temporary Residence Permit . . . and pays a fee thereof . . . ."

Even if all these assumptions are made, there is no declaration of invalidity that can be confirmed under section 172. Where any declaration of invalidity is made under the provisions of section 172(2)(a) of the Constitution, the order in question should clearly indicate precisely what Act of Parliament, or provisions thereof, what provincial Act, or provisions thereof, or what conduct of the President, is being declared constitutionally invalid. No statutory provisions are mentioned in the order and one is left to speculate as to what provisions could be the subject of the order. This is not the form of declaration contemplated by the Constitution under section 172(2)(d).

[16] In the result, the application is dismissed.

Chaskalson P, Langa DP, Ackermann J, Kriegler J, Madala J, Mokgoro J, O'Regan J, Sachs J, Yacoob J and Du Plessis AJ concur.