IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC Case no.: 273/2017
SCA Case no.: 1383/2016
WCHC Case No.: 3096/2016

In the matter between:

TASHRIQ AHMED	First Applicant
ARIFA MUSADDIK FAHME	Second Applicant
KUZIKESA JULES VALERY SWINDA	Third Applicant
JABBAR AHMED	Fourth Applicant

and

THE MINISTER OF HOME AFFAIRS	First Respondent
THE DIRECTOR-GENERAL OF HOME AFFAIRS	Second Respondent

APPLICANTS' WRITTEN SUBMISSIONS

Introduction

1. Should asylum seekers be allowed to apply for visas and permanent residence permits?

2. The respondents, unequivocally and unconditionally, answer this question in the negative in Directive 21 of 2015 ("Directive 21"). It is their "considered view" that a foreigner who happens to hold an asylum seeker permit cannot, under any circumstances, apply for a temporary visa or a permanent residence permit.

3. The applicants submit that the question must be answered in the positive for two reasons.

   3.1. First, a proper reading of the Immigration Act 13 of 2002 ("the Immigration Act") and Refugees Act 130 of 1998 ("the Refugees Act") reveals that all foreigners are able to apply for temporary visas or permanent residence permits. This includes asylum seekers. To pass directives that contradict this rule is ultra vires, unlawful, and an unjustifiable limitation of the applicant's rights to just administrative action.[1]

   3.2. Second, Directive 21 unjustifiably limits the right to dignity of those asylum seekers with familial relations in South Africa.

4. The applicants applied to declare Directive 21 unconstitutional and for the respondents to (re)consider the second to fourth applicants' applications for visas in terms of the Immigration Act. In the Western Cape High Court, Sher AJ (as he then was) granted the applicants the relief sought.[2] The respondents

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1 Section 33 of the Constitution of the Republic of South Africa, 1996 ("the Constitution").

2 *Ahmed and Others v Minister of Home Affairs and Another* (3096/2016) [2016] ZAWCHC 123 (21 September 2016); 2017 (2) SA 417 (WCC).

appealed to the Supreme Court of Appeal, which upheld their appeal.[3] It is against this decision that the applicants seek leave to appeal.

5. These written submissions deal with the following:

5.1. The reasons for granting the applicants leave to appeal;

5.2. A brief factual background to this application;

5.3. The grounds for the unconstitutionality of Directive 21;

5.4. The Supreme Court of Appeal's judgment; and

5.5. The conclusion and relief sought.

Leave to Appeal

6. This Court will grant leave to appeal where the application raises a constitutional issue and where it is in the interests of justice to grant leave to appeal.[4]

7. This application raises various constitutional issues. It concerns whether Directive 21 is unlawful and contravenes the applicant's right to just administrative action. It also concerns whether Directive 21 unjustifiably infringes the applicants' right to dignity.

8. The interests of justice dictate that leave to appeal be granted. This is because:

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3 *Minister of Home Affairs and Another v Ahmed and Others* (1383/2016) [2017] ZASCA 123 (26 September 2017); 2017 (6) SA 554 (SCA).

4 Section 167(6)(b) of the Constitution; Rule 19(2) of the Constitutional Court Rules; *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* (CCT 105/10) [2011] ZACC 30 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC) (17 November 2011) paras 48-49.

8.1. The application has strong prospects of success. This is demonstrated in the later sections of these heads;

8.2. This matter raises an important question—whether asylum seekers' applications under the Immigration Act can be refused simply because they are asylum seekers. Such a determination affects the rights of many (thousands of) particularly vulnerable persons entitled to the assistance of the State, whose potential to contribute meaningfully to our society is one which the Immigration Act enjoins the State to maximise, not to negate.

8.3. This court has acknowledged the vulnerability of refugees:

> *"Refugees are unquestionably a vulnerable group in our society and their plight calls for compassion. As pointed out by the applicants, the fact that persons such as the applicants are refugees is normally due to events over which they have no control. They have been forced to flee their homes as a result of persecution, human rights violations and conflict. Very often they, or those close to them, have been victims of violence on the basis of very personal attributes such as ethnicity or religion. Added to these experiences is the further trauma associated with displacement to a foreign country. ... The condition of being a refugee has thus been described as implying "a special vulnerability, since refugees are by definition persons in flight from the threat of serious human rights abuse."*[5]

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5 *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* (CCT 39/06) [2006] ZACC 23; 2007 (4) BCLR 339 (CC) ; (2007) 28 ILJ 537 (CC); 2007 (4) SA 395 (CC) (12 December 2006) paras 28 and 29.

8.4. Moreover, asylum seekers and refugees are by definition foreigners. The Immigration Act aims to promote economic growth through needed *foreign*, skilled labour.[6] Another is to prevent and counter xenophobia.[7] This application raises the critical issue of whether these aims are being thwarted by Directive 21, and whether Directive 21 infringes on the rights of a vulnerable group of people.

9. Therefore, leave to appeal should be granted.

Brief factual background

10. In September 2003 the Cape Town office of the Legal Resources Centre brought an application in this Court in which they sought relief against the Minister and Director-General of Home Affairs ("the Department") on behalf of thirteen asylum seekers.[8]

11. The application was set down for hearing on 11 November 2003, but it was never heard. Instead, an order was granted by agreement between the parties ("the *Dabone* Order"). It provided that the department would accept Immigration Act applications from asylum seekers, and that the order would be transmitted to all Departmental managers 'immediately'.

12. Five years later, the second respondent issued Circular 10 of 2008 (hereafter "Circular 10"). The text of the *Dabone* Order was included in the Directive. Directive 10 directed all department employees to accept applications for temporary visas and permanent residence permits from asylum seekers and

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6 Preamble para (d) of the Immigration Act.

7 Ibid, para (m).

8 Annexure S to the founding affidavit, pp 53 – 82.

refugees. It confirmed that such applicants did not need to give up their status as asylum seekers in order to make such applications, and it confirmed that valid passports would no longer be required from such applicants.[9]

13. The *Dabone* Order was complied with by the Department for over a decade.

14. On 3 February 2016, the second appellant issued Directive 21.[10]

15. Directive 21 is headed: "*Withdrawal of Circular No 10 of 2008 confirming the 11 November 2003 Dabone Court Order*" and provides in part as follows:

"It is the considered view of the Department that no change of condition or status should be premised on the provisions of the Immigration Act for a holder of an asylum seeker permit whose claim to asylum has not been formally recognized by [the Standing Committee for Refugee Affairs].

Section 27(c) of the Refugees Act stipulates that a refugee is entitled to apply for an Immigration permit after five years' continuous residence in the Republic from the date on which he or she was granted asylum, if the Standing Committee certifies that he or she will remain a refugee indefinitely.

The immigration permit referred to in the Refugees Act is the permanent residence of section 27(d) of the Immigration Act. <u>It therefore follows that a holder of an asylum seeker permit who has not been certified as a Refugee may not apply for a temporary residence visa or permanent residence permit</u>."

16. The Directive ends with the following:

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9 Circular 10, annexure R at p50

10 Annexure Q at p48

"*In view of the above provisions I wish to advise all Immigration Officials that Departmental Circular 10 of 2008 has fallen away since the 26th of May 2014 and is hereby officially withdrawn. ... All applications for change of status from asylum seeker permit to temporary residence visa which are still pending in the system should be processed as per this directive regardless of the date of application*."

17. Importantly, moreover, Directive 21 declares that Directive 10 is deemed to have fallen away since 26 May 2014. Directive 21 was only issued on 3 February 2016. This means that Directive 21 has a retrospective effect for a period of 21 months preceding the issuing of the Directive.

18. Amongst those asylum seekers whose Immigration Act applications were not even accepted for processing were the third and fourth applicants. They had both applied for critical skills visas – the third applicant contends that he is an IT Security Specialist; and the fourth applicant contends that he is a sheep shearer. That is not disputed in this matter. Both are listed critical skills. The rejections were on the following basis:

"*the applicant cannot be granted a temporary residence visa until their asylum application has been finalized and their asylum claims have been proven to be true as currently the application has been referred to* [the Refugees Appeal Board] *as the asylum claims were found to be unfounded and thereby rejected. The applicant has been granted an opportunity to exhaust his or her rights of appeal and sec 26 of the refugees act no 130, 1998 states that the appeal board may after hearing an appeal confirm, set aside or substitute any decision taken by a refugee status determination officer, as an adjudicator in permitting a decision to grant trv* [note: temporary residence visa] *would not*

<u>be correct/premature as the applicant's asylum status has yet to be finalized</u> (which could result in confirmation, setting aside or substitution of the current rejection), such decision will then provide direction in the processing of a trv."[11]

19. Both those applications were already in the system. The second applicant's was not and in her case the Department's agent (VFS) simply refused to accept the application at all. She had applied for a permit permitting her to accompany her spouse while he is in the country on a valid work permit, as she is entitled to do by section 11(1)(b)(iv) of the Immigration Act.[12]

Grounds for unconstitutionality

20. There are two broad reasons, apart from its own self destructive and irrational reasoning, why Directive 21 is unlawful. The first is that it contravenes the Immigration Act and is ultra vires. The second is that it unjustifiably limits the applicants' right to dignity.

Ultra Vires

21. If Directive 21 conflicts with the provisions, purpose and scheme of the Immigration Act, then it is unlawful. The making of a directive is the exercise of public power, and all public power must be exercised lawfully.[13] The Director-General of Home Affairs can only make directives that fall within the

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11 Annexure J, p38 (Swinda); Annexure N, p44 (Ahmed). Underlining supplied.

12 As regards Mrs Fahme: p9 para 19.8, and para 33 of the answering affidavit, p114, where this is not denied.

13 *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/98) [1998] ZACC 17 para 56; *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* (CCT31/99) [2000] ZACC 1 para 79.

four corners of the empowering legislation (in this case, the Immigration Act). To make a directive that contradicts or extends beyond the powers given to the Director General by the Immigration Act is to act without legal authority, and violates the rule of law.[14] The directive would be unlawful, unconstitutional, and invalid for that reason alone.

22. The issue then is whether the Immigration Act envisages a directive that retrospectively prohibits asylum seekers from applying for visas or permits in terms of that Act.

23. A proper interpretation of the Immigration Act demonstrates otherwise. The general rule is that all foreigners are entitled to apply for visas and permits in terms of the Immigration Act. Sections 10(1) and 10(2) of the Immigration Act entitle any foreigner to apply for a temporary visa. These include:

23.1. a study visa (s13);

23.2. a visa permitting the holder to establish a business (s15);

23.3. a visa to stay with a relative (s18);

23.4. a "critical skills visa" (s19(4));

23.5. a retired person's visa (s20); and

23.6. a so-called "spousal visa" (s11(6) of the Act).

24. Section 25(2) is in effect identical vis-à-vis permanent residence permits. These are granted to a foreigner who is:

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[14] It is trite that the rule of law is a founding value of South Africa's constitutional democracy. See s1(c) of the Constitution.

24.1. a holder of a work visa for five years who has an offer of permanent employment, as provided for in section 26(a) and 27(a);

24.2. a spouse of a citizen or permanent resident who has been a spouse of that citizen or permanent resident for five years, as provided in section 26(b);

24.3. a child under the age of 21 of a citizen or permanent resident as provided for in section 26(c) and (d);

24.4. a possessor of extraordinary skills or qualifications, as provided in section 27(b);

24.5. a person who can establish a business here, as provided in section 27(c);

24.6. a retiree, as provided in section 27(e);

24.7. a person possessed of wealth, as provided by section 27(f);

24.8. a relative of a citizen or permanent resident in the first step of kinship, as provided in section 27(g).

25. A foreigner is an individual who is not a citizen. The Immigration Act does not exclude any foreigner from applying for a temporary visa. Instead, the definition of foreigner is broad and contains no exceptions. It simply "means an individual who is not a citizen".[15]

26. The Legislature's omission to limit the scope of the definition of foreigner suggests that it should be interpreted broadly. The legislature must have

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15 Immigration Act, s1 definition of "foreigner".

intended to include all foreigners, along with asylum seekers, when it gave foreigners the ability to apply for visas and permits.

27. Asylum seekers and refugees are - because they are not citizens - by definition foreigners. Ordinarily, they would be able to apply for temporary visas and (if they met the requirements for that visa) they would be entitled to that visa. They are not specifically excluded by any provision in the Immigration Act from doing so. Once again, given the breadth of "foreigner", this suggests that Parliament intended for asylum seekers and refugees to be able to apply for visas in terms of the Immigration Act. If Parliament meant for asylum seekers to be excluded, it would have said so.

28. There is, moreover, nothing to suggest why Parliament would have intended otherwise. There is no reason why, for example, the legislature would have wanted to prevent a spouse from obtaining permanent residence on the basis of her marriage to a South African citizen – just because she happens to be an asylum seeker. Nor is there any reason why it would want to prevent people with critical skills from obtaining critical skills visas – just because they are asylum seekers. Quite the reverse: The preamble to the Immigration Act in fact enjoins the Department to take full advantage of attracting such foreigners, and asylum seekers are not necessarily not such foreigners.

29. Directive 21 argues otherwise by invoking s27(c) of the Refugees Act. Section 27(c) of the Refugees Act provides a further category of permanent residence, available only to refugees. It reads:

"*a refugee … is entitled to apply for an immigration permit in terms of the Aliens Control Act, 1991, after five years' continuous residence in the*

Republic from the date on which he or she was granted asylum, if the Standing Committee certifies that he or she will remain a refugee indefinitely." [16]

30. This is complemented with s27(d) of the Immigration Act, which provides that:

"The Director-General may, subject to any prescribed requirements, issue a permanent residence permit to a foreigner of good and sound character who […] is a refugee referred to in section 27 (c) of the Refugees Act, 1998 (Act 130 of 1998), subject to any prescribed requirement".

31. Directive 21 reasons (irrationally it is contended) that because refugees have this avenue for applying for permanent residency, all other avenues are closed for them, and also asylum seekers. Directive 21 reads:

"Section 27(c) of the Refugees Act stipulates that a refugee is entitled to apply for an Immigration permit after five years' continuous residence in the Republic from the date on which he or she was granted asylum, if the Standing Committee certifies that he or she will remain a refugee indefinitely.

The immigration permit referred to in the Refugees Act is the permanent residence of section 27(d) of the Immigration Act. <u>It therefore follows that a holder of an asylum seeker permit who has not been certified as a Refugee may not apply for a temporary residence visa or permanent residence permit</u>."[17]

32. However, just because there is a specific avenue for *refugees* (not asylum seekers) to apply for visas or permits does not mean asylum seekers cannot use

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[16] The Aliens Control Act is the predecessor legislation of the Immigration Act, which repealed it.
[17] Emphasis added.

all the other avenues to apply for visas or permits. To suggest otherwise is absurd and indeed irrational.

33. For example, it means that spouses, for whom there is also a specific avenue for acquiring a visa, cannot rely on other avenues (like work or special skills) to acquire permits or visas. Instead, they must rely on one avenue, viz. the spousal one.

34. Parliament clearly intended that being eligible for one visa or permit via one avenue does not preclude you from *applying* for a visa or permit through another avenue.

35. In any event, asylum seekers are not eligible to apply for permanent residence permits via s 27(d) of the Immigration Act, because they are not refugees in terms of the Refugees Act.

36. It is wholly unclear how the existence of s 27(d) is of any relevance to asylum seekers at all, let alone how it precludes them from applying for visas or permits, or how it erodes from the general rule (as intended by Parliament) that all foreigners, other than prohibited persons and undesirable persons as defined are eligible to apply for visas or permits.

37. Moreover, one purpose of the Immigration Act is to promote economic growth through needed foreign, skilled labour. Another is to prevent and counter xenophobia, and to issue visas or permits as expeditiously as possible and on the basis of simplified procedures.

38. It is unclear how either of these purposes is achieved (or in fact how *any* legitimate purpose is achieved) if asylum seekers and refugees are *retrospectively* prevented from applying for visas *simply because* they are

asylum seekers or refugees. The effect of this on the limitation of the right to dignity is discussed below. But for now, the point is that Directive 21 does not further (but indeed undermines) the purposes of the Immigration Act.

39. Directive 21 is inconsistent with the Immigration Act. The latter allows all non-citizens to apply for visas. Yet Directive 21 deprives asylum seekers (and refugees) from just administrative action (the lawful processing of their applications) to which they are otherwise entitled. It also runs counter to the stated purposes of the Immigration Act. For these reasons, Directive 21 is unlawful and invalid.

The Right to Dignity

40. The following is trite of the right to dignity:

40.1. Human dignity has no nationality. All those in South Africa, including asylum seekers and refugees, are entitled to the right to dignity.[18]

40.2. The right to dignity includes the ability to form and maintain familial relationships, particularly marriage.[19]

40.3. Any law that interferes with the right to enter into and sustain familial relationships thus limits the right to dignity.[20]

40.4. If any law of general application limits the right to dignity, that limitation must be reasonable and justifiable. Otherwise that law is unconstitutional.[21]

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18 *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (4) SA 326 (SCA) para 25.

19 *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) paras 30-1.

20 Ibid.

41. Directive 21 limits the right to dignity of people such as Mrs Fahme, the second applicant, as a married woman with children. This is because Directive 21 prevents such asylum seekers from applying for a visa or permit, which would afford their familial relations greater protection. Instead, they are expected to remain in the country and with their families on a s22 asylum seeker permit.

42. However, refugee status is an unstable status, in the sense that it may be lost at any time. The circumstances that made a person a refugee may change. Refugee status, if it has been recognized, may then cease (amongst other reasons) if the circumstances in the refugee's own country change such that asylum is no longer required or, as it is put in section 5 of the Refugees Act, when:

"he or she can no longer continue to refuse to avail himself or herself of the protection of the country of his or her nationality because the circumstances in connection with which he or she has been recognized as a refugee have ceased to exist and no other circumstances have arisen which justify his or her continued recognition as a refugee."

43. The change of these circumstances, moreover, is obviously beyond the control of the asylum seeker. In politically volatile countries, this change may also occur rapidly and suddenly. This makes refugee status precarious. And because sans the status of being an asylum seeker or refugee Mrs Fahme may not remain in the Republic, it makes her maintenance of familial relationships in the Republic precarious.

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[21] Section 36 of the Constitution.

44. At best, on the respondent's version, the asylum seekers or refugees would have to return to their country of origin, leaving their families in the Republic, and apply for a visa from there.

45. One remedy for this precariousness is to hold a permit or visa, like a spousal or relative's visa. Such visas or permits allow for a more stable status in the Republic, and thus protect to a greater extent existing familial relationships. Moreover, all things being equal, asylum seekers like Mrs Fahme are entitled to apply to remain in the country with her husband in terms of the Immigration Act if they applied to do so.

46. However, by denying asylum seekers like Mrs Fahme the ability to apply for visas and permits, Directive 21 subjects their familial relationships to the precariousness of an asylum seeker or refugee status. This interferes with genuine efforts to maintain and protect familial relations by securing a visa or permit, and thus limits the right to dignity.

47. The question then becomes whether the limitation of the right to dignity passes the requirements of s36 of the Constitution. The first of these is that the right must be limited by a law of general application.

48. A directive, which has not been officially published, for example in the Government Gazette, or made accessible to the public issued by the Director General of the Department of Home Affairs to all immigration officials as to how they are to operate can hardly be suggested to be a law of general application.

49. If a directive is to be regarded as a law of general application, the court must consider whether the limitation is reasonable and justifiable. This includes

considering, firstly, the nature of the right in question.[22] There is no doubt that the right to dignity is fundamental to South Africa's constitutional dispensation. It is the first and foremost value upon which the Republic is founded.[23]

50. Secondly, the purpose of the limitation must be considered, and whether the limitation is linked to achieving that purpose. This must then be weighed against the extent of the limitation.[24] In casu, Mrs Fahme is seeking a visa to remain with her spouse who is lawfully in the country. She has four children in the country. There is simply no reason for why she should not be able to apply for a visa.

51. Indeed, there is no reason for denying any asylum seekers the ability to apply for visas or permits. As mentioned above, the Immigration Act's purposes include promoting economic growth through needed foreign, skilled labour and preventing and countering xenophobia. It is unclear how Directive 21 contributes to these legitimate aims. Indeed the respondents put up no facts as to the purpose of Directive 21 at all.

52. It might be argued that the purpose is to mitigate administrative inconvenience. This, in casu is not a legitimate purpose. But whatever administrative inconvenience the respondents may experience by accepting visa applications from asylum seekers is outweighed by the severity and extent of the limitation on the right to dignity. Asylum seeker's familial relations should not be at risk just to make bureaucracy run smoothly.

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22 The Constitution, s36(1)(a).

23 The Constitution, s1(a).

24 The Constitution, ss36(1)(b)-(d).

53. Furthermore, on the respondent's account, they would accept asylum seeker's applications from abroad. But the respondents already accept visa applications from inside the country when visa-holding foreigners apply for a change of status under s10(6) of the Immigration Act. It is also unclear how accepting these applications from within the country is more inconvenient than accepting and processing the applications from foreign missions. It appears then, assuming that the purpose is administrative efficiency, that there is no rational link between this chosen means and achieving that purpose.

54. In any event, there are no doubt less restrictive means for ameliorating administrative issues than placing asylum seeker's familial relations at risk.[25]

55. It may be argued that the extent of the limitation is mitigated by s31(1)(c) of the Immigration Act. This section allows any applicant to apply to have any requirement in the Immigration Act (including that asylum seekers cannot apply for visas or that they only can apply from abroad) waived by the Minister.

56. The first difficulty with this argument is that there is no requirement in the Immigration Act that precludes asylum seekers from applying for visas or permits.

57. Directive 21 unconditionally prohibits asylum seekers from doing so—not the Act. It is unclear then whether the Minister is empowered by s31(1)(c) to waive Directive 21.

58. Moreover, were he to do so, the Minister would not be waiving a requirement in the ordinary sense. Rather, he would be overriding Directive 21 in its

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[25] The Constitution, s36(1)(e).

entirety if he allowed asylum seekers to apply for visas or permits. If the respondents are content for the Minister to override Directive 21 in its entirety, then it is unclear why they are opposing this application.

59. However, a response to this may be that the Minister would only override Directive 21 in exceptional circumstances and on good cause shown. This is different from a declaration of invalidity by a court. But this raises further issues. First, asylum seekers and refugees should not be allowed to apply for visas or permits only when the Minister vouchsafes an exemption. They are, in terms of the Immigration Act and their right to dignity, entitled to do so without more. Their applications should be the default, and not the exception.

60. Second, what exactly are those exceptional circumstances under which the Minister would grant the waiver? The Minister has a broad, unfettered discretion in waiving requirements in the Act. This broad discretion, without proper guiding factors, introduces an element of arbitrariness to its exercise that is inconsistent with the constitutional protection of the right to marry and establish a family.[26] This is not to say that s31(1)(c) is unconstitutional. But it is to say that asylum seeker's ability to sustain their familial relations (and subsequently their right to dignity) should not hinge on that provision. Instead, they should be allowed to apply for visas and permits as any other foreigner can.

61. Therefore, Directive 21 unjustifiably limits the applicants' right to dignity, and is unconstitutional.

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[26] *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) para 58.

The Supreme Court of Appeal's Judgment

62. The respondents and the Supreme Court of Appeal posit the following argument in defence of Directive 21:

> Regulation 9(2) of the Immigration Regulations in GNR.413 *GG 37679* of 22 May 2014, read with s10(2) of the Immigration Act, requires asylum seekers to apply for temporary visas from abroad. The applicants did not apply from abroad. Therefore, the applicants' applications were invalid (and lawfully not accepted).

63. This argument misses the point of this application. For that reason, it is dealt in this section, separate from the arguments made above.

64. The SCA's and the respondents' argument concludes that the applicants' visa applications were lawfully not accepted and thereafter processed.

65. But the premises it relies on to reach that conclusion are irrelevant to this matter. They do not show that Directive 21 is a lawful basis for refusing to accept and process the visa applications. Instead, they attempt to find some other basis to justify why the applicants should have been rejected in their visa applications. But just because there may be another reason for the applicants to be rejected does not mean Directive 21 is a lawful reason. And the issue in this case is whether Directive 21 is a lawful basis to reject the processing and consideration of the applicants' visa applications.

66. The reason why Directive 21 is the focus of this application is clear.

67. Directive 21 (and not regulation 9(2) or any other provision) was relied on by the respondents when they refused to process the applicants' visa applications.[27]

68. Directive 21 does not invoke regulation 9(2) on its express terms or at all.

69. Furthermore, an administrator who consciously bases his decision on an unlawful empowering provision cannot later seek refuge in a lawful provision that justifies his decision.[28]

70. Neither can the administrator rely on different, ex post facto reasoning to justify an unlawful decision taken for a particular reason.[29] Therefore, the respondents cannot rely on regulation 9(2) (which may or may not be lawful authority to reject to process the applicants' visa application) when they consciously relied on Directive 21 to reject those applications. They also cannot offer different reasons for their decision at the stage of reviewing the Directive.

71. Moreover, regulation 9(2) and Directive 21 conflict and have differing scopes.

72. Regulation 9(2) does not prevent refugees and asylum seekers to apply for temporary visas from outside South Africa.

73. But Directive 21 prevents asylum seekers from applying for temporary visas or permanent residence permits *at all*.

74. So to even rely on regulation 9(2) to apply for a visa from abroad, Directive 21 must be declared invalid first. In other words, regulation 9(2) does not justify

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27 p44 of the record

28 *Minister of Education v Harris* (CCT13/01) [2001] ZACC 25 par 18; *Howick District Landowners Association v Umngeni Municipality and Others* (423/05) [2006] ZASCA 153 para 22.

29 *National Lotteries Board v South African Education and Environment Project* (788/10) [2011] ZASCA 154 para 28.

the decision to never accept visa or permit applications from asylum seekers (which is the respondents' position). Rather, it requires those applications to be made from abroad.

75. In any event, regulation 9(2) may be unconstitutional for the same reasons that Directive 21 is unconstitutional. Should the respondents in the future invoke regulation 9(2) to reject asylum seekers' visa applications, then an appropriate application to have regulation 9(2) declared unconstitutional may be brought.

76. Also, as pointed above Directive 21 has two further defects.

77. First, its reasoning is nonsensical and irrational. Not one of its explanatory make any legal or factual sense.

78. And secondly, it compels immigration officers to conduct themselves in relation to applications already in the system, and thus apply the instruction contained in the secret Directive 21 retrospectively. Such a secret instruction cannot stand scrutiny in a legal system with a founding value of the rule of law, which includes the principle of legality.

Conclusion

79. It is submitted that:

79.1. Directive 21 is inconsistent with the Constitution because it:

79.1.1. is unlawful for its conflict with the Immigration Act;

79.1.2. violates the rights of all asylum seekers and refugees protected by section 33 of the Constitution;

79.1.3. violates the dignity of persons in the position of the second respondent in particular.

79.2. That being so, the Directive must be declared inconsistent with the Constitution and invalid in terms of s172(1)(a) of the Constitution.

80. As regards the relief to be granted in terms of section 172(1)(b) of the Constitution, it is submitted that the relief granted by the High Court was just and equitable.

81. The respondents pray that leave to appeal against the order of the Supreme Court of Appeal be granted, and that the appeal be upheld, with costs, including those occasioned by the employment of two counsel

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19 March 2018

List of authorities

Legislation

1. The Constitution of the Republic of South Africa, 1996;

2. Immigration Act, 13 of 2002; and

3. Refugees Act, 130 of 1998.

Case law

4. *Ahmed and Others v Minister of Home Affairs and Another* (3096/2016) [2016] ZAWCHC 123 (21 September 2016); 2017 (2) SA 417 (WCC);

5. *Minister of Home Affairs and Another v Ahmed and Others* (1383/2016) [2017] ZASCA 123 (26 September 2017); 2017 (6) SA 554 (SCA);

6. *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* (CCT 105/10) [2011] ZACC 30 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC);

7. *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* (CCT 39/06) [2006] ZACC 23; 2007 (4) BCLR 339 (CC) ; (2007) 28 ILJ 537 (CC); 2007 (4) SA 395 (CC);

8. *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/98) [1998] ZACC 17;

9. *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* (CCT31/99) [2000] ZACC 1;

10. *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (4) SA 326 (SCA);

11. *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);

12. *Minister of Education v Harris* (CCT13/01) [2001] ZACC 25;

13. *Howick District Landowners Association v Umngeni Municipality and Others* (423/05) [2006] ZASCA 153; and

14. *National Lotteries Board v South African Education and Environment Project* (788/10) [2011] ZASCA 154.

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC Case no.: 273/2017
SCA Case no.: 1383/2016
WCHC Case no.: 3096/2016

In the matter between:

TASHRIQ AHMED	First Applicant
ARIFA MUSADDIK FAHME	Second Applicant
KUZIKESA JULES VALERY SWINDA	Third Applicant
JABBAR AHMED	Fourth Applicant
and	
THE MINISTER OF HOME AFFAIRS	First Respondent
THE DIRECTOR-GENERAL OF HOME AFFAIRS	Second Respondent

APPLICANTS' SUPPLEMENTARY HEADS OF ARGUMENT

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1. These supplementary heads of argument are delivered in compliance with a Direction issued by the Chief Justice on 9 May 2018. We have been asked to make submissions on two points:

   "(a) the inter-relationship between relevant provisions of the Refugees Act 130 of 1998 and the Immigration Act 13 of 2002; and

   (b) whether a court order, made by agreement, can be unilaterally withdrawn in terms of a directive by the respondents."

2. We deal with each point in turn below.

The inter-relationship between the relevant provisions of the two acts

3. We submit that the provisions of the two acts complement one another:

3.1. The Refugees Act's purpose, stated in its long title, is to "*give effect within the Republic of South Africa to the relevant international legal instruments, principles and standards relating to refugees; to provide for the reception into South Africa of asylum seekers; to regulate applications for and recognition of refugee status; to provide for the rights and obligations flowing from such status".* Its preamble refers to the relevant international conventions concerning refugees.

3.2. The Immigration Act's purpose, stated in its long title, is to "*provide for the regulation of admission of persons to, their residence in, and their departure from the Republic; and for matters connected therewith*". The preamble refers to the need, *inter alia,* at (*d*) to ensure that "*economic growth is promoted through the employment of needed foreign labour, …the entry of exceptionally skilled or qualified people is enabled, skilled human resources are increased* …" and, at (*h*) to ensure that '*the South African economy may have access at all times to the full measure of needed contributions by foreigners'*.

4. The Immigration Act defines a '*foreigner'* as '*an individual who is not a citizen*'. We have made the point previously that such a definition would

include asylum seekers and refugees, as they are, by their nature, individuals who are not citizens. That being so, in our submission, where the Immigration Act refers to '*foreigners'* it includes within that class foreigners who, in addition to being foreign, happen to be asylum seekers and refugees.

5. The Immigration Act also refers explicitly to asylum seekers and refugees, as a subset of foreigners, as follows:

5.1. Refugees are referred to in the preamble once, at (*p*), in the context of the need to educate the public '*on the rights of foreigners and refugees'*. Otherwise, all references in the preamble are to '*foreigners'*. In the context, we submit that the use of the word refugees at (*p*) is intended to emphasise that the public needs to be educated with respect to the particular rights of refugees not just *qua* foreigners, but also *qua* refugees. It is not an indication that the Act does not intend the word '*foreigner'* to include refugees.

5.2. Section 23 of the Immigration Act provides for short-term visas for asylum seekers:

> *23 Asylum transit visa*
>
> *(1) The Director-General may, subject to the prescribed procedure under which an asylum transit visa may be granted, issue an asylum transit visa to a person who at a port of entry claims to be an asylum seeker, valid for a period of five days only, to travel to the nearest*

Refugee Reception Office in order to apply for asylum.

(2) Despite anything contained in any other law, when the visa contemplated in subsection (1) expires before the holder reports in person at a Refugee Reception Office in order to apply for asylum in terms of section 21 of the Refugees Act, 1998 (Act 130 of 1998), the holder of that visa shall become an illegal foreigner and be dealt with in accordance with this Act.

In our submission, it is clear that the section envisages an asylum seeker being a '*foreigner'* as defined –when the visa expires, the erstwhile asylum seeker becomes an '*illegal foreigner'*.

5.3. Sections 25 to 28 of the Immigration Act regulate applications for permanent residence. Section 27 makes specific provision for the issue of a permanent residence permit to: *"...a foreigner of good and sound character who ... (d) is a refugee referred to in section 27(c) of the Refugees Act ...*". Again, we submit that it is clear that a '*refugee'* falls into the category of '*foreigner'*: *'a foreigner ... who ... is a refugee'*.

6. As set out above, the Refugees Act refers to the Immigration Act at paragraph 27(*c*):

"27 Protection and general rights of refugees

A refugee-

(a) is entitled to a formal written recognition of refugee status in the prescribed form;

(b) enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution and the right to remain in the Republic in accordance with the provisions of this Act;

(c) is entitled to apply for an immigration permit in terms of the Aliens Control Act, 1991, after five years' continuous residence in the Republic from the date on which he or she was granted asylum, if the Standing Committee certifies that he or she will remain a refugee indefinitely;

(d) is entitled to an identity document referred to in section 30;

(e) is entitled to a South African travel document on application as contemplated in section 31;

(f) is entitled to seek employment; and

(g) is entitled to the same basic health services and basic primary education which the inhabitants of the Republic receive from time to time." [1]

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[1] Underlining supplied. The current wording of 27(*c*) is anachronistic – the Aliens Control Act, 1991, is the predecessor legislation of the Immigration Act. The legislature has passed, but not yet brought into effect, no fewer than three acts designed to amend this sub-section.

Initially, Section 21 of the Refugees Amendment Act, 2003, Act 33 of 2008, would have changed 27(*c*) to "*permanent residence in terms of section 27(d) of the Immigration Act after five years of continuous residence in the Republic from the date on which he or she was granted asylum, if the Director-General, after considering all the relevant factors and within a reasonable period of time, certifies that he or she would remain a refugee indefinitely*".

Subsequently, Section 10 of the Refugees Amendment Act, 2011, Act 12 of 2011, would have done the same – except that the Minister had to make the determination, not the Director-General.

Finally, Section 23 of the Refugees Amendment Act, 2017, Act 11 of 2017, will, if it is brought into effect, provide that a refugee may: "*apply for permanent residence in terms of section 27(d) or 31(2)(b) of the Immigration Act after ten years of continuous residence in the Republic from the date on which he or she was granted asylum, if the standing committee, after considering all the relevant factors and within a reasonable period of time, including efforts made to secure peace and stability in the refugee's country of origin, certifies that he or she would remain a refugee indefinitely*".

Given the recent history of attempts to amend the sub-section it is submitted that no store may be placed in the content of any amending act that has not in fact been brought into effect, even were such an interpretative tool to be a valid one, which we do not suggest it is.

7. In our submission, nothing in the Immigration Act suggests that either an asylum seeker or a refugee is not also a '*foreigner'* for the purposes of the Immigration Act.

8. In particular, the mere existence of section 27(*d*) is not such an indication. It is a provision for acquiring permanent residence available to a foreigner who has no other route to permanent residence, but with respect to whom it is accepted that the foreigner's state of being a refugee has become one that will endure '*indefinitely'*. It is an additional route to permanent residence available to a refugee, not the sole one.

9. We have made the point previously that the legislature could easily have defined the class of persons able to avail themselves of the provisions of the Immigration Act more narrowly to exclude foreigners. It could have provided that '*a foreigner is an individual, <u>other than a person afforded asylum in terms of the Refugees Act</u>, who is not a citizen'*. It could also have made this clear in the Refugees Act: '*a refugee is <u>only</u> entitled to apply for an immigration permit in terms of section 26(c) of the Immigration Act".* Neither has been done, or appears to be contemplated.[2]

10. The drafters of the Immigration Act were alive to the rights of refugees and asylum seekers, as the Act makes provision for them. In our submission, the fact that the legislature did not narrow the definition of foreigner in the Immigration Act to exclude asylum seekers and refugees - when it could easily have done so - suggests most strongly that it was

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[2] See footnote 1. We do not wish to be understood to be suggesting that were the two acts to be amended in this way, they would pass constitutional muster. In our submission they would not.

intended to permit them to apply for any visa or permit that they would otherwise as foreigners be entitled to apply for.

11. It is not hard to see why the legislature would have chosen not to narrow the definition. Refugees include amongst them people who may well benefit the economy greatly. The preamble to the Immigration Act requires the State to ensure that "…*the full measure of needed contributions by foreigners*" is accessed by the South African economy. An obvious place to start is to allow those foreigners already in the country to apply for such visas and permits as the Immigration Act provides.

12. The sum of all this is as follows. The Immigration Act regulates the status of all foreigners in the Republic. This includes those foreigners who also happen to be asylum seekers or refugees in terms of the Refugees Act. There is nothing in either Act to suggest that those foreigners who happen to be asylum seekers or refugees in terms of the Refugees Act cannot also apply for the visas in the Immigration Act. On the contrary: the breadth of the definition of "foreigner" demonstrates that they can.

13. The relationship between the two acts is thus one of complementarity — not mutual exclusivity. To be a foreigner under the Immigration Act does not *without more* bar one from being a refugee or asylum seeker under the Refugees Act; to be a refugee or asylum seeker under the Refugees Act does not *without more* bar one from being a foreigner under the Immigration Act.

14. The impugned Directive crosses paths with this position. It prevents foreigners who happen to be asylum seekers from applying for visas under

the Immigration Act. As argued above and in our main heads, this means that the Directive is unlawful.

15. The Regulation invoked by the respondents may be bad for the same reason. However, for the reasons explained in our main heads, the constitutionality of the Regulations is not at issue on these facts.

Can a court order, made by agreement, be unilaterally withdrawn in terms of a directive by the respondents

16. We submit that the rule of law placed into context would clearly be against such a tenet. A party cannot, without following due process, 'withdraw' (that is, indicate that it no longer regards itself to be bound by) an order that affects itself or others. A court order, whether taken by agreement or otherwise, cannot be unilaterally withdrawn in terms of a directive by the respondents. This would be greatly at variance with the jurisprudence of this Honourable Court and furthermore Constitution of South Africa ("the Constitution"), which is the supreme law of the country.

17. Court orders, whether taken by agreement or otherwise, are binding until set aside. Section 165 of the provides, under the heading 'judicial authority', at 165(5), that: "*an order or decision issued by a court binds all persons to whom and organs of state to which it applies*". It is not the continuing agreement of persons affected by orders that give them their binding force.

18. In this case the *Dabone* order applies to the current respondents. It accordingly binds them. Their refusal to be bound by an extant court order

is inconsistent with section 165(5) of the Constitution and falls to be declared so. No organ of state (or, for that matter, any person) can simply choose to opt out of being bound by court orders - that would lead to lawlessness. As the Chief Justice put it in the *EFF* matter:

"public office-bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck. It is against this backdrop that the following remarks must be understood: ... 'Certain values in the Constitution have been designated as foundational to our democracy. This in turn means that as pillar-stones of this democracy, they must be observed scrupulously. If these values are not observed and their precepts not carried out conscientiously, we have a recipe for a constitutional crisis of great magnitude. In a State predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of our democracy.'"[3]

19. It is therefore not for the respondents to decide whether or not they wish to be bound by a court order. The duty to obey lawful authority is fundamental. To further bolster the point the Learned Chief Justice went further to state that "*Our foundational value of the rule of law demands of us, as law abiding people, to obey decisions made by those clothed with*

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[3] *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) at para [1] ("EFF"). The portion quoted by the Learned Chief Justice in *EFF* is from *Nyathi v Member of the Executive Council for the Department of Health Gauteng and Another* [2008] ZACC 8[2008] ZACC 8; 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 (CC) at [80].

the legal authority to make them or else approach courts of law to set them aside, so we may validly escape their binding force." [4]

20. This must include courts of law, who are constitutionally mandated to give binding orders and to ensure that the rule of law is upheld. As Justice Khampepe put it in *Tasima*[5]: "[t]*he duty to obey court orders is the stanchion around which a state founded on the supremacy of the Constitution and the rule of law is built*."

21. Many bases may arise for an order, taken by agreement or otherwise, to be set aside by a person bound by it. It may, for example, be that the person bound by the order agreed to be bound as a result of a circumstance that has changed, and can make out a case for why he or she (or, if it is an organ of state, it) should no longer be bound in the manner provided for in the order. It would still be necessary to approach the Court to have the order set aside on the basis of the changed circumstance however. This would be so even if all parties bound by the order taken by agreement agreed that they did not wish to be bound by the order.

22. Furthermore, there are clear and set procedures set out in the statutes and rules that govern our various courts with respect to how to have orders set aside. They do not provide for self-help, which is what the department has engaged in in this matter.

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4 *EFF*, *supra*, at [75]. Underlining supplied.

5 *Department of Transport and Others v Tasima (Pty) Limited* [2016] ZACC 39, at [150] ("*Tasima*")

23. It is particularly serious matter for the State to decide not to be bound by court orders. The Executive has a particular duty not to flout court orders and more so to ensure that the three branches of government work together in ensuring that the state runs lawfully, and this is fundamental to the separation of powers. Section 165(4) of the Constitution pertinently binds organs of state to '*assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts'*.

24. A direction by a functionary of an organ of state to stop having regard to a binding court order directly undermines the effectiveness of the courts and is inconsistent with section 165 (4) and 165 (5) of the Constitution. Directive 21 has precisely that effect, and this cannot be explained away by merely stating that one should have regard to the statute when there is a clear directive which comes from a place of authority. It is a direction by the second respondent to his delegees not to comply with the *Dabone* order and we submit that such is inconsistent with the Constitution and falls to be declared so, and set aside.

25. If this conduct by the second respondent were to be allowed to stand, the effect would be catastrophic as members of the public could never have any certainty and court orders would have no real effect as they could easily be disregarded. That state of affairs, we submit, cannot be sustained in our hard-earned democracy based on the supremacy of the law.

Conclusion

21. This is not a matter where an illegality can be left to stand, but one in which the Court ought to ensure that members of the Executive are not permitted to thwart people's rights and flout court orders.

22. We submit that the application for leave to appeal, and the appeal itself, should succeed.

Anton Katz SC

Adam Brink

Yanela Ntloko

11 May 2018

THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No.: 273/2017

In the matter between:

TASHRIQ AHMED	First Applicant
ARIFA FAHME	Second Applicant
KUZIKESA SWINDA	Third Applicant
JABBAR AHMED	Fourth Applicant

and

MINISTER OF HOME AFFAIRS	First Respondent
DIRECTOR-GENERAL, HOME AFFAIRS	Second Respondent

RESPONDENTS' SUBMISSIONS

CONTENTS

INTRODUCTION

1. The question in this case is whether asylum seekers in terms of the Refugees Act 130 of 1998 may, while they are here, apply for a visa, that is, a temporary residence permit, in terms of the Immigration Act 13 of 2002.

2. The Supreme Court of Appeal held that they are not entitled to do so. Its *ratio* appears from paragraphs 9 to 14 of its judgment and may be summarised as follows:

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

    2.2. Regulation 9(2) of the Immigration Regulations provides that an application for a visa may only be made abroad, that is, at a South African mission in another country.

    2.3. There are exceptions to this general rule, but they do not apply to asylum seekers.

3. The applicants mischaracterise the issue in this case, attack a phantom argument of their own making and never address the real question or the merits of the SCA's answer to it.

THE FACTS

4. The first applicant is the attorney of the other applicants. The second to fourth applicants are asylum seekers in South Africa[1]; they applied for visas in terms of the Immigration Act. The second applicant, Ms Fahme, applied for a visitor's visa in terms of s 11 but the Department of Home Affairs refused to accept her application.[2] The third respondent, Mr Swinda, and the fourth respondent, Mr Ahmed, applied for work visas in terms of s 19, but the Department rejected their applications.[3]

5. The Department refused and rejected the applicants' applications in line with departmental policy. The policy was set out in an Immigration Policy Directive 21 of 2015 issued by the Director-General of Home Affairs on 3 February 2016.[4] We annex a good copy of the directive because the one in the record is poor. It says that asylum seekers do not qualify for change of status:

> "*It is the considered view of the Department that no change of condition or status should be premised on the provisions of the Immigration Act for a holder of an asylum seeker permit whose claim to asylum has not been formally recognised by SCRA"*.

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1 Founding Affidavit vol 1 p 8 paras 19.2, 20.2 and 21.3

2 Founding Affidavit vol 1 p 9 paras 19.7 to 19.9

3 Founding Affidavit vol 1 p 10 paras 20.4 and 20.5 and p 11 paras 21.4 and 21.5

4 Directive 21 vol 1 p 48

6. The applicants applied to the High Court for urgent relief. The court upheld their application, declared Directive 21 unconstitutional and invalid and granted consequential relief to the applicants.[5]

7. The respondents appealed to the SCA. It upheld their appeal, set aside the High Court's orders and replaced them with an order dismissing the applicants' application.

THE STATUS OF ASYLUM SEEKERS

8. The Refugees Act distinguishes between asylum seekers and refugees.[6] An asylum seeker is someone who has arrived in South Africa and applied for asylum, that is, for recognition as a refugee. A refugee is someone who has been granted asylum. The Refugees Act protects both groups but their rights vary significantly.

9. The regulation of asylum seekers starts, ironically, with s 23 of the Immigration Act and Regulation 22 of the Immigration Regulations. They provide that the DG may issue an asylum transit visa to anybody who arrives at a South African port of entry and claims to be an asylum seeker. The visa is only valid for five days and it permits the asylum seeker only to travel to the nearest Refugee Reception Office to apply for asylum.

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5 High Court Order vol 3 p 343

6 Section 1(1) "*asylum seeker"* and "*refugee"*

10. Once asylum seekers have entered South Africa, they become subject to the following provisions of the Refugees Act:

    10.1. The asylum seeker must apply for asylum at a Refugee Reception Office in terms of s 21. The Refugee Reception Officer must issue an asylum seeker permit to the applicant pending the outcome of his or her application for asylum.

    10.2. If the asylum seeker's transit visa has not already expired, it is in any event rendered "*null and void"* by s 22(2) when an asylum seeker's permit is issued to him or her.

    10.3. The asylum seeker's application for asylum is determined in terms of s 24(3).

    10.4. If the application for asylum succeeds, the applicant becomes entitled to all the rights of refugees described in ss 27 to 34. They include the rights to live and work in South Africa,[7] and to apply for a permanent residence permit.[8]

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7 ss 27(b) and (f)

8 s 27(c)

VISA APPLICATIONS

11. Anybody can apply for a visa. But the general rule is that applications for visas must be made abroad and not in South Africa. There are exceptions to this general rule, but asylum seekers do not qualify for any of them.

12. The Immigration Act distinguishes between visas, that is, temporary residence permits, on the one hand,[9] and permanent residence permits on the other.[10]

13. Section 10(2) says that all visa applications must be made "*in the prescribed manner"*.

14. Regulations 9(1) and (2) prescribe the manner in which most visa applications must be made:

    14.1. Regulation 9(2) lays down a general rule that visa applications must be made at a South African mission abroad:

> "*Any applicant for any visa referred to in subregulation (1) must submit his or her application in person to –*
>
> *(a) any foreign mission of the Republic where the applicant is ordinarily resident or holds citizenship; or*

[9] Sections 10 to 24

[10] Sections 25 to 28

(b) any mission of the Republic that may from time to time be designated by the Director-General to receive applications in respect of any country in which a mission of the Republic has not been established."

14.2. Regulations 9(1) and (2), read together, make it clear that this general rule applied to the respondents' visa applications for a visitor visa in terms of s 11 and a work visa in terms of s 19 of the Immigration Act.

14.3. It follows that the respondents could not lawfully apply for visitor's and work visas whilst in South Africa. Applications for visas of that kind may only be made abroad.

15. The main exception to the general rule, that visa applications must be made abroad, is established by the following provisions of the Immigration Act and Regulations:

15.1. Section 10(6)(a) allows certain foreigners who are in South Africa to apply for changes in their status:

"*Subject to this Act, a foreigner, other than the holder of a visitor's or medical treatment visa, may apply to the Director-General in the prescribed manner to change his or her status or terms and conditions attached to his or her visa, or both such*

status and terms and conditions, as the case may be, while in the Republic."

15.2. Section 1(1) defines "*status"* as, *"the status of the person as determined by the relevant visa or permanent residence permit granted to a person in terms of this Act"*.

15.3. Section 1(1) defines a "*visa"* as visas issued in terms of the Immigration Act.

15.4. Regulation 9(5) elaborates on these provisions as follows:

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

(a) submit his or her application, on Form 9 illustrated in Annexure A, not less than 60 days prior to the expiry date of his or her visa; and

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

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

16. These provisions clearly make an exception to the general rule that visa applications must be made abroad. They also make it clear, however, that the exception only applies to the holders of certain categories of visas issued in terms of the Immigration Act. They do not apply to asylum seekers who do not have any status under the Immigration Act and are here under asylum seeker permits issued in terms of the Refugees Act:

16.1. Section 10(6)(a) provides in the first place for an application for a change in "*status"*. The definition of "*status"* makes it clear that it is confined to someone's status under a visa or permanent residence permit issued in terms of the Immigration Act. It does not include an asylum seeker who has no status under the Immigration Act.

16.2. Section 10(6)(a) secondly allows a foreigner to apply for a change in the "*terms and conditions attached to his or her visa"*. It is by definition confined to those who are here under visas issued in terms of the Immigration Act.

16.3. Both s 10(6)(a) and regulation 9(5) exclude the holders of visitor's and medical treatment visas from this exemption. They may ordinarily not apply for a change of status in South Africa. The general rule, that applications for visas must be made abroad, prevails in their case. It would be most anomalous not to allow them the benefit of the exemption but to extend it to asylum seekers who enjoy no status under the Immigration Act at all.

16.4. We have seen that, when asylum seekers arrive at a South African border post, they are given an asylum transit visa for only five days to allow them to apply for asylum at the nearest Refugee Reception Office. But they thereafter become subject to the Refugees Act and do not enjoy any status under the Immigration Act. Section 22(2) of the Refugees Act puts this beyond doubt. It says that, upon the issue of an asylum seeker permit to an applicant,

> "*any permit issued to the applicant in terms of the Aliens Control Act, 1991 (now the Immigration Act), becomes null and void, and must forthwith be returned to the Director-General for cancellation.*"

This provision militates against any suggestion that an asylum seeker enjoys any status under the Immigration Act.

17. Asylum seekers are thus bound by the general rule laid down by s 10(2) of the Immigration Act read with regulation 9(2) of the Immigration Regulations that applications for visas must be made abroad. The respondents could not lawfully apply for visitor's and work visas within South Africa. The Department of Home Affairs correctly declined their applications.

18. The applicants have never attacked the constitutional validity of this general rule or its application to asylum seekers. It is accordingly not open to them to do so now.

19. It follows that the Department correctly rejected the applicants' visa applications. It had no choice in the matter. It did not have the power to receive, consider and grant their applications.

THE STATUS AND ROLE OF DIRECTIVE 21

20. The applicants argue their case as if it is one about the status and role of Directive 21. But that is not so for the following reasons.

21. Directive 21 is a mere statement of office policy based on the Department's interpretation of the law. It does not have any force of law. It does not confer rights on people nor deprive anybody of rights they might otherwise have.

22. Its reasoning is sometimes obscure but its conclusion is correct. It concludes that "*a holder of an asylum seeker permit … may not apply for a temporary residence visa"*. It obviously means that an asylum seeker may not apply for a visa in South Africa because such a person is only here as "*a holder of an asylum seeker permit"*. The conclusion that such a person may not apply for a visa in South Africa accords with the general rule prescribed by s 10(2) of the Immigration Act and regulation 9(2) of the Immigration Regulations.

23. But it makes no difference even if Directive 21 got it wrong. The fact of the matter is that, on a proper interpretation of s 10(2) of the Immigration Act and regulation 9(2) of the Immigration Regulations, the applicants were not allowed to apply for visas in South Africa and the Department did not have the power to

grant their applications. It accordingly does not matter whether Directive 21 was right or wrong. The Department did not have any choice in the matter. It was bound to refuse the applicants' applications.

24. The applicants argue that the Department in fact based its decision on Directive 21 and accordingly may not, after the event, justify its decisions on any other basis.[11]

25. It is of course correct that a public official who exercises a discretionary power for one reason may not thereafter justify it with a different reason.[12] But, in this case, the Department had no discretion in the matter. It did not have the power to grant the applications. It is accordingly immaterial why it in fact refused the applications. It could not lawfully do otherwise.

PRAYER

26. The respondents ask that the application for leave to appeal be dismissed or, if it is granted, that the appeal be dismissed.

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11 Appellants' Heads of Argument paras 65 to 70

12 Minister of Education v Harris 2001 (4) SA 1297 (CC) para 18; National Lotteries Board v South African Education and Environment Project 2012 (4) SA 504 (SCA) para 28

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4 April 2018

THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No.: 273/2017

In the matter between:

TASHRIQ AHMED	First Applicant
ARIFA FAHME	Second Applicant
KUZIKESA SWINDA	Third Applicant
JABBAR AHMED	Fourth Applicant

and

MINISTER OF HOME AFFAIRS	First Respondent
DIRECTOR-GENERAL, HOME AFFAIRS	Second Respondent

RESPONDENTS' SUPPLEMENTARY SUBMISSIONS

INTRODUCTION

1. The Chief Justice has directed the parties to deliver submissions on:

    1.1. "*the inter-relationship between relevant provisions of the Refugees Act 130 of 1998 and the Immigration Act 13 of 2002"*; and

    1.2. "*whether a court order, made by agreement, can be unilaterally withdrawn in terms of a directive by the respondents"*.

2. These are the respondents' submissions on those issues.

THE REFUGEES ACT AND THE IMMIGRATION ACT

3. We addressed the inter-relationship between the relevant provisions of the Refugees Act and the Immigration Act in paragraphs 8 to 19 of the respondents' main submissions. We attach extracts of the relevant provisions of the Refugees Act, the Immigration Act and the Immigration Regulations for ease of reference.

4. The government published a draft Refugee White Paper by Government Gazette Notice 1122 of 1998. The White Paper states:

    "The government does not consider the refugee protection regime to be an alternative way to obtain permanent immigration into South Africa. It does not consider refugee protection to be the door for those who wish

to enter South Africa by the expectation for opportunities for a better life or a brighter future. It does not agree that it is appropriate to consider as refugees, persons fleeing their countries of origin solely for reasons of poverty or other social, economic or environmental hardships.

…

The government is entitled to treat and decide upon other aspirations to migrate into, remain or reside in South Africa, on the basis of legal, political or other criteria, which it may establish domestically with wide room for discretion. Given these conceptual and categorical differences, the government's protection regime will be established on the basis that while a close and effective relationship will be maintained between the two, refugee matters on the one hand, and migration matters on the other hand will be governed by different legal and decision making principles and criteria, and under different and legislative and institutional arrangements."[1]

THE STATUS OF A COURT ORDER MADE BY AGREEMENT

5. Section 165(5) of the Constitution provides:

"An order or decision issued by a court binds all persons to whom and organs of state to which it applies."

[1] At page 7

6. In Pheko[2] this court held:

> *"[1] The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere, in any manner, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.*
>
> *[2] Courts have the power to ensure that their decisions or orders are complied with by all and sundry, including organs of state. In doing so, courts are not only giving effect to the rights of the successful litigant but also and more importantly, by acting as guardians of the Constitution, asserting their authority in the public interest. It is thus unsurprising that courts may, as is the position in this case, raise the issue of civil contempt of their own accord."*

7. This court held in Eke[3] that, once a settlement agreement has been made an order of court, "*it is an order like any other*".[4] It added that:

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[2] Pheko and Others v Ekurhuleni City 2015 (5) SA 600 (CC) at para 1. See too: Department of Transport and Others v Tasima (Pty) Ltd 2017 (2) SA 622 (CC) at para 183

> "*The effect of a settlement order is to change the status of the rights and obligations between the parties. Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the lis between the parties; the lis becomes res judicata (literally, 'a matter judged'). It changes the terms of a settlement agreement to an enforceable court order.*"[5]

8. This court reiterated in Tsoga[6] that, once a settlement agreement has been made an order of court, "*it is an order like any other*" which "*can only be set aside by means of a legally cognisable process like, for example, rescission.*"[7]

9. The SCA followed and applied Eke and Tsoga in Moraitis.[8] Wallis JA confirmed that,

> "*The fact that it was a consent order is neither here nor there. Such an order has exactly the same standing and qualities as any other court order. It is res judicata as between the parties in regard to the matters covered thereby.*"[9]

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3 Eke v Parsons 2016 (3) SA 37 (CC)

4 para 29

5 para 31

6 Provincial Government: North West Province v Tsoga Developers CC and Others 2016 (5) BCLR 687 (CC)

7 para 52

8 Moraitis Investments (Pty) Ltd and Others v Montic Dairy (Pty) Ltd 2017 (5) SA 508 (SCA) paras 10 and 16

9 para 10

10. The respondents accordingly accept that a court order, made by agreement, cannot be unilaterally withdrawn.

11. We also submit, however, that the respondent's position in this case is not in conflict with the *Dabone* order:

    11.1. The order appears in volume 1 at page 96. Paragraphs 1 to 3 dealt with applications for permanent residence. Only paragraph 4 dealt with applications for temporary residence permits or their amendment as follows:

> "*The Department will henceforth (and in relation to pending applications) process applications by asylum seekers or refugees for temporary residence permits or for the amendment thereof, without requiring the production of a valid passport by any person applying for such permit."*

    11.2. The only issue the order addressed and the only principle it established was that the Department was not entitled to require asylum seekers and refugees to produce a valid passport when they apply for temporary residence permits or their amendment. It did not address any of the other requirements for such an application.

11.3. This interpretation of the order accords with the notice of motion[10] and founding affidavit[11]. Their only attack was on the Department's requirement of a valid passport.

11.4. The *Dabone* order accordingly did not address the issue in this case whether asylum seekers may apply for temporary residence permits in South Africa.

12. The applicants therefore incorrectly contend in their supplementary submissions that the effect of Directive 21 is a direction by an organ of state "*to stop having regard to a binding court order*"[12] and "*not to comply with the Dabone order*".[13] This is manifestly not the case.

13. This case moreover concerns the requirement of regulation 9(2) of the Immigration Regulations that applications for temporary residence permits be made abroad and not in South Africa. This regulation was only promulgated on 22 May 2014, more than a decade after the *Dabone* order was made on 11 November 2003. The regulation and its application are accordingly not constrained by the *Dabone* order.

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10 Dabone Notice of Motion vol 1 p 53 prayer 3

11 Dabone Founding Affidavit vol 1 p 76 para 34

12 Applicants' supplementary submissions at par 24

13 Applicants' supplementary submissions at par 24

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14 May 2018

REFUGEES ACT 130 OF 1998

[ASSENTED TO 20 NOVEMBER 1998] [DATE OF COMMENCEMENT: 1 APRIL 2000]

CHAPTER 1
INTERPRETATION, APPLICATION AND ADMINISTRATION OF ACT (ss 1-7)

1 Definitions

'asylum' means refugee status recognised in terms of this Act;

'**asylum seeker**' means a person who is seeking recognition as a refugee in the Republic;

'**asylum seeker permit**' means a permit contemplated in section 22;

'**refugee**' means any person who has been granted asylum in terms of this Act;

CHAPTER 2
REFUGEE RECEPTION OFFICES, STANDING COMMITTEE FOR REFUGEE AFFAIRS AND REFUGEE APPEAL BOARD (ss 8-20)

8 Refugee Reception Office

(1) The Director-General may establish as many Refugee Reception Offices in the Republic as he or she, after consultation with the Standing Committee, regards as necessary for the purposes of this Act.

CHAPTER 3
APPLICATION FOR ASYLUM (ss 21-24)

21 Application for asylum

(1) An application for asylum must be made in person in accordance with the prescribed procedures to a Refugee Reception Officer at any Refugee Reception Office.

22 Asylum seeker permit

(1) The Refugee Reception Officer must, pending the outcome of an application in terms of section 21 (1), issue to the applicant an asylum seeker permit in the prescribed form allowing the applicant to sojourn in the Republic temporarily, subject to any conditions, determined by the Standing Committee, which are not in conflict with the Constitution or international law and are endorsed by the Refugee Reception Officer on the permit.

(2) Upon the issue of a permit in terms of subsection (1), any permit issued to the applicant in terms of the Aliens Control Act, 1991, becomes null and void, and must forthwith be returned to the Director-General for cancellation.

24 Decision regarding application for asylum

(3) The Refugee Status Determination Officer must at the conclusion of the hearing-

(a) grant asylum; or

(b) reject the application as manifestly unfounded, abusive or fraudulent; or

(c) reject the application as unfounded; or

(d) refer any question of law to the Standing Committee.

CHAPTER 4
REVIEWS AND APPEALS (ss 25-26)

25 Review by Standing Committee

(1) The Standing Committee must review any decision taken by a Refugee Status Determination Officer in terms of section 24 (3) *(b)*.

26 Appeals to Appeal Board

(1) Any asylum seeker may lodge an appeal with the Appeal Board in the manner and within the period provided for in the rules if the Refugee Status Determination Officer has rejected the application in terms of section 24 (3) *(c)*.

CHAPTER 5
RIGHTS AND OBLIGATIONS OF REFUGEES (ss 27-34)

27 Protection and general rights of refugees

A refugee-

(a) is entitled to a formal written recognition of refugee status in the prescribed form;

(b) enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution and the right to remain in the Republic in accordance with the provisions of this Act;

(c) is entitled to apply for an immigration permit in terms of the Aliens Control Act, 1991, after five years' continuous residence in the Republic from the date on which he or she was granted asylum, if the Standing Committee certifies that he or she will remain a refugee indefinitely;

(d) is entitled to an identity document referred to in section 30;

(e) is entitled to a South African travel document on application as contemplated in section 31;

(f) is entitled to seek employment; and

(g) is entitled to the same basic health services and basic primary education which the inhabitants of the Republic receive from time to time.

IMMIGRATION ACT 13 OF 2002

[ASSENTED TO 30 MAY 2002] [DATE OF COMMENCEMENT: 12 MARCH 2003]
(Unless otherwise indicated)

1 Definitions and interpretation

(1) In this Act, unless the context otherwise indicates-

'foreigner' means an individual who is not a citizen;

'illegal foreigner' means a foreigner who is in the Republic in contravention of this Act;

'status' means the status of the person as determined by the relevant visa or permanent residence permit granted to a person in terms of this Act;

[Definition of 'status' substituted by s. 2 *(l)* of Act 13 of 2011 (wef 26 May 2014).]

'visa' means the authority to temporarily sojourn in the Republic for purposes of-

(l) applying for asylum as contemplated in section 23,

whichever is applicable in the circumstances;

[Definition of 'visa' substituted by s. 2 *(n)* of Act 13 of 2011 (wef 26 May 2014).]

TEMPORARY RESIDENCE (ss 10-24)

10 Visas to temporarily sojourn in Republic

[Heading substituted by s. 7 *(a)* of Act 13 of 2011 (wef 26 May 2014).]

(1) Upon admission, a foreigner, who is not a holder of a permanent residence permit, may enter and sojourn in the Republic only if in possession of a visa issued by the Director-General for a prescribed period.

[Sub-s. (1) substituted by s. 7 *(b)* of Act 13 of 2011 (wef 26 May 2014).]

(2) Subject to this Act, upon application in person and in the prescribed manner, a foreigner may be issued one of the following visas for purposes of-

(a) transit through the Republic as contemplated in section 10B;

(b) a visit as contemplated in section 11;

(c) study as contemplated in section 13;

(d) conducting activities in the Republic in terms of an international agreement to which the Republic is a party as contemplated in section 14;

(e) establishing or investing in a business as contemplated in section 15;

(f) working as a crew member of a conveyance in the Republic as contemplated in section 16;

(g) obtaining medical treatment as contemplated in section 17;

(h) staying with a relative as contemplated in section 18;

(i) working as contemplated in section 19 or 21;

(j) retirement as contemplated in section 20;

(k) an exchange programme as contemplated in section 22; or

(l) applying for asylum as contemplated in section 23.

[Sub-s. (2) substituted by s. 2 of Act 3 of 2007 (wef 26 May 2014) and by s. 7 *(c)* of Act 13 of 2011 (wef 26 May 2014).]

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

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

[Sub-s. (6) substituted by s. 7 *(d)* of Act 13 of 2011 (wef 26 May 2014).]

(8) An application for a change in status does not provide a status and does not entitle the applicant to any benefit under the Act, except for those explicitly set out in the Act, or to sojourn in the Republic pending the decision in respect of that application.

10A Port of entry visa

(2) Any person who holds-

(a) a valid visa for purposes of-

(x) applying for asylum as contemplated in section 23; or

shall, upon his or her entry into the Republic and after having been issued with that visa or permanent residence permit, be deemed to be in possession of a valid port of entry visa for the purposes of this section.

[Sub-s. (2) substituted by s. 8 *(b)* of Act 13 of 2011 (wef 26 May 2014).]

11 Visitor's visa

(1) A visitor's visa may be issued for any purpose other than those provided for in sections 13 to 24, and subject to subsection (2), by the Director-General in respect of a foreigner who complies with section 10A and provides the financial or other guarantees prescribed in respect of his or her departure: Provided that such visa-

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

13 Study visa

14 Treaty visa

15 Business visa

16 Crew visa

17 Medical treatment visa

18 Relative's visa

19 Work visa

20 Retired person visa

21 Corporate visa

22 Exchange visa

23 Asylum transit visa

(1) The Director-General may, subject to the prescribed procedure under which an asylum transit visa may be granted, issue an asylum transit visa to a person who at a port of entry claims to be an asylum seeker, valid for a period of five days only, to travel to the nearest Refugee Reception Office in order to apply for asylum.

(2) Despite anything contained in any other law, when the visa contemplated in subsection (1) expires before the holder reports in person at a Refugee Reception Office in order to apply for asylum in terms of section 21 of the Refugees Act, 1998 (Act 130 of 1998), the holder of that visa shall become an illegal foreigner and be dealt with in accordance with this Act.

[S. 23 substituted by s. 24 of Act 19 of 2004 (wef 1 July 2005) and by s. 15 of Act 13 of 2011 (wef 26 May 2014).]

PERMANENT RESIDENCE (ss 25-28)

25 Permanent residence

(1) The holder of a permanent residence permit has all the rights, privileges, duties and obligations of a citizen, save for those rights, privileges, duties and obligations which a law or the Constitution explicitly ascribes to citizenship.

(2) Subject to this Act, upon application, one of the permanent residence permits set out in sections 26 and 27 may be issued to a foreigner.

26 Direct residence

Subject to section 25 and any prescribed requirements, the Director-General may issue a permanent residence permit to a foreigner who-

(a) has been the holder of a work visa in terms of this Act for five years and has proven to the satisfaction of the Director-General that he or she has received an offer for permanent employment;

[Para. *(a)* substituted by s. 17 *(b)* of Act 13 of 2011 (wef 26 May 2014).]

(b) has been the spouse of a citizen or permanent resident for five years and the Director-General is satisfied that a good faith spousal relationship exists: Provided that such permanent residence permit shall lapse if at any time within two years from the issuing of that permanent residence permit the good faith spousal relationship no longer subsists, save for the case of death;

[Para. *(b)* substituted by s. 17 *(b)* of Act 13 of 2011 (wef 26 May 2014).]

(c) is a child under the age of 21 of a citizen or permanent resident, provided that such visa shall lapse if such foreigner does not submit an application for its confirmation within two years of his or her having turned 18 years of age; or

(d) is a child of a citizen.

[S. 26 substituted by s. 27 of Act 19 of 2004 (wef 1 July 2005) and amended by s. 17 *(a)* of Act 13 of 2011 (wef 26 May 2014).]

27 Residence on other grounds

The Director-General may, subject to any prescribed requirements, issue a permanent residence permit to a foreigner of good and sound character who-

(d) is a refugee referred to in section 27 *(c)* of the Refugees Act, 1998 (Act 130 of 1998), subject to any prescribed requirement;

[S. 27 substituted by s. 28 of Act 19 of 2004 (wef 1 July 2005) and amended by s. 18 *(a)* of Act 13 of 2011 (wef 26 May 2014).]

EXCLUSIONS AND EXEMPTIONS (ss 29-31)

31 Exemptions

(2) Upon application, the Minister may under terms and conditions determined by him or her-

(c) for good cause, waive any prescribed requirement or form; and

ENFORCEMENT AND MONITORING (ss 32-36)

32 Illegal foreigners

(1) Any illegal foreigner shall depart, unless authorised by the Director-General in the prescribed manner to remain in the Republic pending his or her application for a status.

[Sub-s. (1) substituted by s. 33 of Act 19 of 2004 (wef 1 July 2005).]

(2) Any illegal foreigner shall be deported.

DUTIES AND OBLIGATIONS (ss 38-45)

43 Obligation of foreigners

A foreigner shall-

(b) depart upon expiry of his or her status.

Immigration Regulations, 2014

Published under

GN R413 in *GG* 37679 of 22 May 2014
[with effect from 26 May 2014]

The Minister of Home Affairs has, in terms of section 7 of the Immigration Act, 2002 (Act 13 of 2002), after consultation with the Immigration Advisory Board, made the regulations in the Schedule.

9 Visas to temporarily sojourn in Republic

(1) An application for any visa referred to in section 11 up to and including sections 20 and 22 of the Act shall be made on Form 8 illustrated in Annexure A together with all supporting documents and accompanied by-

(a) a valid passport in respect of each applicant;

(2) Any applicant for any visa referred to in subregulation (1) must submit his or her application in person to-

(a) any foreign mission of the Republic where the applicant is ordinarily resident or holds citizenship; or

(b) any mission of the Republic that may from time to time be designated by the Director-General to receive applications in respect of any country in which a mission of the Republic has not been established.

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

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

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

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

(6) Any visa contemplated in section 10 of the Act issued at a foreign mission of the Republic, shall-

(a) be affixed to the passport of the applicant; and

(b) only be valid if an entry stamp has been affixed thereto at the port of entry and the date of such entry stamp shall be the effective date.

10 Port of entry visas and transit visa

11 Visitor's visa

(1) An application for a visitor's visa not exceeding a period of three months shall be accompanied by-

(a) a statement or documentation detailing the purpose and duration of the visit;

(b) a valid return air flight ticket or proof of reservation thereof; and

(c) proof of sufficient financial means contemplated in subregulation (3).

(4) An activity contemplated in section 11(1)*(b)*(iv) of the Act shall be work conducted for a foreign employer pursuant to a contract which partially requires conducting of certain activities in the Republic and relates to-

(a) the spouse or dependant child of the holder of a visa issued in terms of section 11, 13, 14, 15, 17, 18, 19, 20 or 22;

12 Study visa

13 Treaty visa

14 Business visa

15 Crew visa

16 Medical treatment visa

17 Relative's visa

18 Work visa

19 Retired person visa

20 Corporate visa

21 Exchange visa

22 Asylum transit visa

(1) A person claiming to be an asylum seeker contemplated in section 23(1) of the Act shall apply, in person at a port of entry, for an asylum transit visa on Form 17 illustrated in Annexure A and have his or her biometrics taken.

(2) An asylum transit visa may not be issued to a person who-

(a) has not completed Form 17 as contemplated in subregulation (1);

(b) already has refugee status in another country; or

(c) is a fugitive from justice.

23 Permanent residence

29 Waiver of prescribed requirements

An application contemplated in section 31(2)*(c)* of the Act shall be made to the Minister on Form 48 illustrated in Annexure A, supported by reasons for the application.

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: CCT 273/2017
SCA CASE NO.: 1383 / 2016
WCHC CASE NO.: 3096 / 2016

In the application to be admitted as an *amicus curiae* of:

LAWYERS FOR HUMAN RIGHTS	Applicant

In the matter between:

TASHRIQ AHMED	First Applicant
ARIFA MUSADDIK FAHME	Second Applicant
KUZIKESA JULES VALERY SWINDA	Third Applicant
JABBAR AHMED	Fourth Applicant

and

THE MINISTER OF HOME AFFAIRS	First Respondent
THE DIRECTOR-GENERAL, HOME AFFAIRS	Second Respondent

LAWYERS FOR HUMAN RIGHTS'
WRITTEN SUBMISSIONS

CONTENTS

INTRODUCTION

1 The question to be determined is whether it is permissible to exclude all asylum seekers from applying for visas and permanent residence under the Immigration Act 13 of 2002.

2 Immigration Directive 21 of 2015 ("Directive 21") imposes this blanket exclusion. It states, in no uncertain terms, that "*a holder of an asylum seeker permit who has not been certified as a Refugee may not apply for a temporary residence visa or permanent residence permit*."

3 Lawyers for Human Rights ("LHR") supports the applicants' argument that Directive 21 is unlawful and invalid. Given the time constraints, LHR has submitted these written submissions together with its application to be admitted as an *amicus curiae*. This is to ensure that if this Court grants leave it will have an opportunity to consider these submissions before the hearing on 15 May 2018.

4 LHR's contribution is to highlight the systemic backlogs in the refugee status determination process[1] and the need to interpret the Immigration Act and the Refugees Act 130 of 1998 in light of this reality.

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[1] The process established under the Refugees Act to determine whether asylum seekers qualify for asylum.

4.1 In Parliament, the Minister of Home Affairs has confirmed that there is a persistent backlog in this system due to institutional incapacity.[2]

4.2 As a result, most asylum seekers will have to wait many years for a final decision on their asylum applications.

4.3 While waiting, they are left in a vulnerable position. They face the risk that they may be refused asylum at any time; they are reliant on temporary asylum seeker permits, which must be frequently renewed in person at the few remaining Refugee Reception Offices in the country; and they face the risk of being turned away due to incapacity at these Refugee Reception Offices.

4.4 In these circumstances, asylum seekers require the certainty and assurance that could be provided by visas and permanent residence under the Immigration Act.

5 Given these realities, the Immigration Act and the Refugees Act should be interpreted in a way that best promotes and protects the rights of asylum seekers. Asylum seekers should not be denied the opportunity to regularise their status under the Immigration Act merely because they

[2] LHR's affidavit, paras 23 – 24; Annexures LHR 2 and LHR 3.

are asylum seekers. The blanket exclusion mandated by Directive 21 is in conflict with this interpretation.

6 In what follows, we address the following issues in turn:

6.1 The systemic delays in the refugee status determination process and the resulting prejudice to asylum seekers.

6.2 The proper interpretation of the Immigration Act and the Refugees Act in light of this reality.

6.3 The individual applicants' entitlement to the visas they seek.

6.4 The just and equitable remedy.

6.5 Condonation, the grounds for admitting LHR as an *amicus curiae,* and the admission of evidence under Rule 31.

7 At the outset, we make three observations:

7.1 First, the respondents seek to defend Directive 21 by arguing that the three individual applicants do not qualify for specific visas. That is no answer to the applicants' challenge to Directive 21. The validity of Directive 21 must be assessed objectively, considering the circumstances of all asylum seekers who are likely to be

affected.[3] It cannot be valid in respect of some asylum seekers and invalid in respect of others.

7.2 Second, on the respondents' own interpretation of the legislation, Directive 21 is unsustainable. The respondents no longer defend the blanket exclusion of all asylum seekers, in contrast with the position they adopted in the High Court.[4] Instead, the respondents merely contend that asylum seekers cannot apply for visas within South Africa, unless they obtain a waiver from the Minister.[5]

7.3 Third, the *Dabone* order stands and Directive 21 is in conflict with that order, for the reasons set out by the applicants.[6] As this Court held in *Eke v Parsons*,[7] orders granted by consent are court orders in every respect and must be given effect. The state cannot choose to ignore such orders.

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[3] *Ferreira v Levin N.O. and Others; Vryenhoek and Others v Powell N.O. and Others* 1996 (1) SA 984 (CC) at paragraph 26; *Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd and Another* 2015 (5) SA 370 (CC) at para 13.

[4] Respondents' Answering Affidavit in the Constitutional Court ("AA"), para 18. Compare with the Respondents' Answering Affidavit in the High Court, Record vol 1, p 108, para 16 and p 118, para 41.1.

[5] AA para 35.2.

[6] See the Applicant's supplementary written submissions, filed on 11 May 2018.

[7] *Eke v Parsons* 2016 (3) SA 37 (CC) at paras 31 – 32, 53.

SYSTEMIC DELAYS IN THE REFUGEE STATUS DETERMINATION PROCESS

8 Why would an asylum seeker who holds a valid asylum seeker permit want to apply for visas or permanent residence under the Immigration Act?

9 The answer is that the refugee status determination process is slow and uncertain due to substantial backlogs in the system. Asylum seekers wait for years to receive a final decision on asylum. As a result, they are placed in a vulnerable position.[8]

10 The delays in the system are illustrated by the crisis at the Refugee Appeal Board, the body responsible for deciding internal appeals against the refusal of asylum.[9] The Minister of Home Affairs publicly acknowledged this crisis in his answers to questions in Parliament in December 2016 and March 2017.[10]

10.1 The Minister confirmed that the Refugee Appeal Board had a backlog of over 145,000 cases in December 2016,[11] growing to 258,232 cases by March 2017.[12]

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[8] LHR's affidavit, para 21.

[9] Refugees Act, section 26.

[10] LHR's affidavit, paras 23 – 24; Annexures LHR 2 and LHR 3.

[11] Annexure LHR 2, page 2.

[12] Annexure LHR 3, page 4.

10.2 There is no reason to believe that this backlog has been reduced in the last year. The Minister explained that the Refugee Appeal Board hears only five to ten cases a day.[13]

10.3 On the most generous estimate, assuming that the Refugee Appeal Board were to decide ten cases a day, every day of the year, it would take over 68 years to clear the existing backlog.[14]

10.4 In the Minister's own words "*[t]he institutional incapacity in this regard is evident and multifaceted*".[15]

11 In these proceedings, the Minister could hardly deny his own evidence before Parliament. As a result, this evidence is either common cause or otherwise incontrovertible and stands to be admitted in terms of Rule 31.

12 The systemic delays in the system are also evident from the record in this appeal. The three individual applicants were all awaiting hearings before the Refugee Appeal Board when this application was launched in 2016. Their asylum seeker permits reveal the following:

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[13] Annexure LHR 3, page 4.

[14] LHR's affidavit, para 26.

[15] Annexure LHR 3, page 4.

12.1 Mrs Fahme applied for asylum on 3 June 2009. She has waited for almost nine years for a final decision.[16]

12.2 Mr Swinda applied for asylum on 19 April 2010 and has waited for over eight years.[17]

12.3 Mr Ahmed applied on 26 September 2014 and has waited almost four years.[18]

13 The courts have also repeatedly acknowledged the systemic incapacity and delays in the handling of asylum seekers' applications.[19] This Court is entitled to take judicial notice of these facts.

14 Given these delays, asylum seekers are in an acutely vulnerable position while waiting for a final decision. The fact that they are issued with asylum seeker permits under section 22 does not remove this vulnerability. This is for several reasons:

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[16] Record vol 1, p 30.

[17] Record vol 1, p 37.

[18] Record vol 1, 43.

[19] See, for example, *Kiliko and Others v Minister of Home Affairs and Others* 2006 (4) SA 114 (C), particularly at paras 10 and 25; *Intercape Ferreira Mainliner (Pty) Ltd and Others v Minister of Home Affairs and Others* 2010 (5) SA 367 (WCC) at paras 21 – 24; *410 Voortrekker Road Property Holdings CC v Minister of Home Affairs and Others* 2010 (8) BCLR 785 (WCC); [2010] 4 All SA 414 (WCC) at paras 71 – 72; *Minister of Home Affairs and Others v Somali Association of South Africa and Another* 2015 (3) SA 545 (SCA) at paras 25 and 29; *Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others* [2017] ZASCA 126; [2017] 4 All SA 686 (SCA) at paras 45 – 46.

14.1 First, asylum seekers face uncertainty over their status, as their asylum applications may be refused at any time, placing their asylum seeker permits at risk. The conditions in their countries of origin may also change at any time, which may result in their asylum claims falling away in terms of section 5 of the Refugees Act.[20]

14.2 Second, in terms of the legislation, asylum seeker permits may only be issued for limited periods of time and must be renewed in person at a Refugee Reception Office.[21] The applicants' permits reflect this reality: Mrs Fahme's permit had been renewed 12 times,[22] Mr Swinda's permit had been renewed 13 times,[23] and Mr Ahmed's permit had been renewed two times.[24]

14.3 Third, there are only three functional Refugee Reception Offices in the country, in Durban, Pretoria and Musina.[25] This forces many

[20] Applicants' written submissions, paras 42 – 43.

[21] Section 22(3) of the Refugees Act, read with Regulation 7 of the Refugee Regulations.

[22] Record vol 1, p 30.

[23] Record vol 1, p 37.

[24] Record vol 1, 43.

[25] The closure of Refugee Reception Offices across the country has been the subject of extensive litigation. See *Minister of Home Affairs and Others v Scalabrini Centre and Others* 2013 (6) SA 421 (SCA); *Minister of Home Affairs and Others v Somali Association of South Africa Eastern Cape (SASA EC) and Another* 2015 (3) SA 545 (SCA); *Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others* [2017] ZASCA 126; [2017] 4 All SA 686 (SCA)

asylum seekers to travel great distances, at great personal cost, to renew their permits.[26]

14.3.1 In *Minister of Home Affairs v Somali Association of South Africa*,[27] the SCA described the plight of asylum-seekers following the closure of the Port Elizabeth Refugee Reception Office:

> *The consequence is that such asylum seeker will now have to repeatedly and perhaps frequently travel a considerable distance to one of the three remaining RROs over a period of many months or years. For those who live and work in Port Elizabeth the closest RRO will now be the one in Durban, some 900km away. Travelling and accommodation costs are likely to be substantial – for many, resources that they simply do not have. Throw into the mix the elderly or infirm and parents of small children (who would probably have to make alternative child-care arrangements), for whom undertaking an extended journey to an RRO situated far away from the support structures of their communities and families may prove well-nigh impossible. Repeated visits to a distant RRO also have the potential to jeopardise the employment and job security of an asylum seeker. And given the admitted backlogs and failing systems at the remaining RROs, even those asylum seekers who manage to attend are at risk of not obtaining the assistance and protection that they require.*

[26] LHR's affidavit, para 29.4.

[27] *Minister of Home Affairs and Others v Somali Association of South Africa and Another* 2015 (3) SA 545 (SCA) at para 29.

14.3.2 As the SCA noted, the backlogs mean that asylum seekers are often turned away without being able to renew their permits.[28]

14.3.3 In its September 2017 judgment in *Scalabrini Centre v Minister of Home Affairs*,[29] the SCA confirmed that the remaining Refugee Reception Offices "*are inadequate*" for the task.

14.4 Finally, the rights afforded by a section 22 permit are tenuous. The rights to work and study in South Africa are contingent on the discretion of the Standing Committee for Refugee Affairs in terms of section 11(h) of the Refugees Act. In *Watchenuka v Minister of Home Affairs*,[30] the SCA held that while the Standing Committee may not prohibit all asylum seekers from working and studying, the Standing Committee still has a discretion in individual cases to refuse these rights.

15 Faced with these realities, it is clear why many asylum seekers would want to seek the additional protection and certainty of visas or permanent residence under the Immigration Act. For example:

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[28] Ibid at paras 25 and 29.

[29] *Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others* [2017] ZASCA 126; [2017] 4 All SA 686 (SCA) at para 46.

[30] *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (4) SA 326 (SCA) at paras 36 – 37.

15.1 A spouse, such as Mrs Fahme, may want to apply for a spousal visa or permanent residence to protect herself against the risk of being separated from her family if her asylum application is refused.

15.2 A student beginning a university degree may wish to apply for a study visa to guard against the risk of being unable to complete her studies if she is refused asylum.

15.3 An asylum-seeker who has invested time and effort in building a career in South Africa may wish to apply for a five-year work visa or permanent residence to avoid being deported if her asylum claim fails.

16 As the courts have acknowledged, a stable family life, work and education are central to the right to human dignity.[31] Barring all asylum seekers from applying for visas or permanent residence under the Immigration Act, merely because they are asylum seekers, would fail to protect and promote this right.

[31] *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) para 37; *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (4) SA 326 (SCA) at paras 25, 27, 32, 36.

THE PROPER INTERPRETATION OF THE REFUGEES ACT AND THE IMMIGRATION ACT

17 This context is relevant to the proper interpretation of the Immigration Act and the Refugees Act in two respects:

17.1 First, as this Court recently re-affirmed in *Saidi v Minister of Home Affairs*,[32] statutes must be interpreted in a manner that best protects and promotes rights, to the extent that such an interpretation is reasonably possible.

17.2 Second, this Court has acknowledged that statutory interpretation requires a proper understanding of social context and institutional realities. In *South African Police Service v Public Servants Association*,[33] Sachs J said the following:

> *"Interpreting statutes within the context of the Constitution will not require the distortion of language so as to extract meaning beyond that which the words can reasonably bear. It does, however, require that the language used be interpreted as far as possible, and without undue strain, so as to favour compliance with the Constitution. This in turn will often necessitate close attention to the socio-economic and institutional context in which a provision under examination functions. In addition it will be important to pay attention to the specific factual context that triggers the problem requiring the solution".*

[32] *Saidi and Others v Minister of Home Affairs and Others* [2018] ZACC 9 (24 April 2018) at paras 38 – 41. Citing *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) at para 87.

[33] *South African Police Service v Public Servants Association* 2007 (3) SA 521 (CC) at para 20.

18 Faced with the reality of systemic backlogs and the vulnerable position of asylum seekers, this Court should be slow to accept an interpretation of the Immigration Act and the Refugees Act that would deprive asylum seekers of any opportunity to obtain visas or permanent residence under the Immigration Act.

19 In addition, statutes regulating similar subject matter should be interpreted in a harmonious manner, to the extent possible.[34] In *Arse v Minister of Home Affairs*[35] the SCA applied this principle in interpreting the interaction between the Immigration Act and the Refugees Act. It held that *"[w]here two enactments are not repugnant to each other, they should be construed as forming one system and as re-enforcing one another."*[36]

20 These principles bolster the interpretation put forward by the applicants:

20.1 The Immigration Act provides that all "*foreigners*" may apply for visas and permanent residence, provided that they satisfy the criteria and follow the prescribed procedures. Asylum seekers under the Refugees Act are, by definition, foreigners.[37]

[34] *Kent NO v South African Railways* 1946 AD 398 at 405.

[35] *Arse v Minister of Home* Affairs 2012 (4) SA 544 (SCA).

[36] Ibid at para 19.

[37] Section 1 of the Immigration Act read with sections 3 and 5(c) of the Refugees Act.

20.2 As a result, there is nothing in the Immigration Act to suggest that all asylum seekers are absolutely barred from applying for visas or permanent residence in all cases. The fact that section 27(d) of the Immigration Act makes specific provision for recognised refugees to obtain permanent residence does not mean that asylum seekers, who have not yet received asylum, cannot apply for visas or permanent residence on other grounds.

20.3 There is also nothing in the Refugees Act that bars asylum seekers from applying for visas or permanent residence under the Immigration Act.

20.3.1 Section 22(2) of the Refugees Act merely provides that, when an asylum seeker is issued with a section 22 permit, any permit issued under the Immigration Act is revoked. It applies only in one direction. It does not prohibit an asylum seeker from obtaining a visa or permanent residence <u>after</u> obtaining a section 22 permit.

20.3.2 There is nothing in section 22(6) of the Refugees Act to suggest that an asylum seeker permit may be withdrawn if an asylum seeker subsequently obtains a visa or permanent residence.

20.3.3 Moreover, section 5(c) of the Refugees Act provides that a person will cease to be a refugee if they obtain South African citizenship. Obtaining a visa or permanent residence is not a ground for cessation.

21 As noted above, the respondents now accept that asylum seekers are not absolutely barred from regularising their status under the Immigration Act.

21.1 The respondents accept that asylum seekers would be able to obtain visas provided that they apply for these visas while abroad in terms of regulation 9(2). Alternatively, they may apply to the Minister in terms of section 31(2)(c) of the Immigration Act, read with regulation 29, for a waiver of this requirement.[38]

21.2 The respondents further accept that asylum seekers who meet the criteria for permanent residence under the Immigration Act would be eligible to apply.[39] Accordingly, asylum seekers would be able to apply for permanent residence under the various categories reflected in sections 26, 27 and 31(2)(b) of the Immigration Act.

[38] Respondents' answering affidavit, para 35.2.

[39] Respondents' answering affidavit, para 18.

22 Therefore, even if the respondents' interpretation of the legislation is accepted, Directive 21 is in conflict with the scheme of the Immigration Act and the Refugees Act. Accordingly, it must be declared unlawful and invalid.

THE APPLICANTS' VISA APPLICATIONS

23 The invalidity of Directive 21 must be determined separately from the question whether the three applicants are eligible for the specific visas they seek. Irrespective of whether the applicants are individually eligible, the blanket exclusion of all asylum seekers from applying for visas or permanent residence cannot stand.

24 The respondents argue that the applicants are not entitled to these visas on the basis that regulation 9(2) of the Immigration Regulations requires all application to be made from abroad.

25 The respondents' interpretation threatens the rights of asylum seekers, for the reasons developed more fully in PASSOP's written submissions.[40]

[40] PASSOP's written submissions, paragraphs 26 – 38.

25.1 Requiring asylum seekers to return to their countries of origin to apply for visas would place them at great risk and would breach South Africa's duties of non-refoulement.

25.2 Most asylum seekers are also unable to travel outside of the country as many lack travel documents. In addition, section 22(5) of the Refugees Act provides that an asylum seeker permit lapses if a person travels outside the country without obtaining the Minister's permission.

26 Accordingly, regulation 9(2) and the associated provisions in the Immigration Act should be interpreted in favour of asylum seekers, to the extent that these provisions are capable of such an interpretation.

27 If the respondents' interpretation is accepted, Regulation 9(2) is vulnerable to constitutional challenge. While the validity of regulation 9(2) has not been directly challenged in these proceedings, this case should not foreclose the possibility of a future constitutional challenge.

THE JUST AND EQUITABLE REMEDY

28 The just and equitable remedy is to reinstate the High Court's declaration of invalidity in respect of Directive 21.

29 In respect of the individual applicants, if it is found that they are eligible to submit visa applications from within South Africa, it would be just and equitable to direct the Director-General of Home Affairs to:

29.1 Permit the second applicant to submit an application for a visitor's visa, within 15 days; and

29.2 Consider the third and fourth applicants' appeals against the refusal of their applications for critical skills visas, within 15 days of this order.

30 If it is found that regulation 9(2) does bar the applicants from applying for visas from within South Africa, it would be just and equitable to afford the applicants the opportunity to apply to the Minister in terms of section 32(1)(c) of the Act for a waiver of the requirements of regulation 9(2).

30.1 Simply dismissing their application, without any remedy, would leave them in a precarious position.

30.2 The applicants may be directed to submit waiver applications to the Minister, with the further direction to the Minister to make a decision within 15 days.

30.3 If the waivers are granted, the Director General should be directed to make a decision on the applicants' visa application and appeals within 15 days.

CONDONATION, LHR'S ADMISSION AS AN *AMICUS CURIAE* AND LEAVE TO INTRODUCE EVIDENCE IN TERMS OF RULE 31

31 LHR seeks condonation for the failure to comply with the time periods specified in Rule 10(4) of this Court's rules.

31.1 LHR acted swiftly to prepare and file it application as soon as it became aware of the Chief Justice's directions, dated 9 May 2018.[41]

31.2 An electronic copy of the application was served on the other parties via email on the evening of Friday, 11 May 2018 and an electronic copy of these written submissions was delivered on Sunday, 13 May 2018.

32 We submit that LHR has satisfied the requirements for admission as an *amicus curiae* in these proceedings, in terms of Rule 10(4).[42]

32.1 LHR has a clear interest in these proceedings, given its role in providing free legal assistance to asylum-seekers and migrants.[43]

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[41] LHR's affidavit, paras 6, 54.

[42] On 11 May 2018, LHR wrote to the other parties to secure their written consent in terms of Rule 10(1). The applicants responded with their consent but the respondents' attorneys were unable to secure instructions in time. See Annexures LHR 4 – 6. We have subsequently been informed via email that the respondents intend to consent to LHR's admission as an *amicus curiae* and to making written submissions and oral argument.

[43] LHR's affidavit, paras 12 – 16.

32.2 LHR's submissions on the backlog in the refugee status determination system and the resultant vulnerability of asylum seekers are of clear relevance to the interpretation of the Refugees Act and the Immigration Act.

32.3 These submissions are novel, have not been addressed in any detail by the other parties, and, we submit, will assist this Court to better understand the social context to this appeal.

33 In terms of Rule 31, LHR wishes to introduce new evidence in these proceedings, consisting of the Minister's responses to questions in Parliament. These appear as Annexures LHR 2 and 3 to LHR's affidavit.

33.1 As indicated, the Minister could hardly deny the evidence that he has placed before Parliament. Accordingly, this evidence is likely to be common cause or otherwise incontrovertible.

33.2 This evidence has clear relevance to the issues raised in this appeal, for the reasons set out in detail above.

33.3 To the extent that other parties may wish to respond to this evidence, an appropriate direction could be made to allow the parties to file further affidavits after the hearing.

34 For the reasons set out above, LHR seeks admission as an *amicus curiae* in these proceedings and supports the relief sought by the applicants.

CHRIS McCONNACHIE

CINGASHE TABATA

Counsel for Lawyers for Human Rights

Chambers, Johannesburg

13 May 2018

LIST OF AUTHORITIES

Arse v Minister of Home Affairs 2012 (4) SA 544 (SCA)

Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd and Another 2015 (5) SA 370 (CC)

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)

Eke v Parsons 2016 (3) SA 37 (CC)

Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC)

Intercape Ferreira Mainliner (Pty) Ltd and Others v Minister of Home Affairs and Others 2010 (5) SA 367 (WCC)

Kent NO v South African Railways 1946 AD 398 at 405

Kiliko and Others v Minister of Home Affairs and Others 2006 (4) SA 114 (C)

Makate v Vodacom (Pty) Ltd 2016 (4) SA 121 (CC)

Minister of Home Affairs and Others v Scalabrini Centre and Others 2013 (6) SA 421 (SCA)

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Saidi and Others v Minister of Home Affairs and Others [2018] ZACC 9 (24 April 2018)

Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others [2017] ZASCA 126; [2017] 4 All SA 686 (SCA)

South African Police Service v Public Servants Association 2007 (3) SA 521 (CC)

410 Voortrekker Road Property Holdings CC v Minister of Home Affairs and Others 2010 (8) BCLR 785 (WCC); [2010] 4 All SA 414 (WCC)

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case no.: CCT 273/17

In the application to be admitted as *amicus curiae* of:

PEOPLE AGAINST SUFFERING, OPPRESSION AND POVERTY Applicant for admission as *amicus curiae*

In re:

The matter between:

TASHRIQ AHMED First Applicant

ARIFA MUSADDIK FAHME Second Applicant

KUZIKESA JULES VALERY SWINDA Third Applicant

JABBAR AHMED Fourth Applicant

and

THE MINISTER OF HOME AFFAIRS First Respondent

THE DIRECTOR-GENERAL OF HOME AFFAIRS Second Respondent

PASSOP'S WRITTEN SUBMISSIONS

TABLE OF CONTENTS

I INTRODUCTION

1. This appeal concerns the constitutionality of Directive 21 of 2015, which was issued by the Department of Home Affairs on 3 February 2016 (**the Directive**). The High Court declared the Directive to be inconsistent with the Constitution and set it aside. The Supreme Court of Appeal overturned the High Court's ruling and dismissed the application. The applicants have appealed to this Court, seeking the re-instatement of the High Court's order.

2. People against Suffering, Oppression and Poverty (**PASSOP**) supports the re-instatement the High Court's declaration of constitutional invalidity regarding Directive 21. On both a narrow and broad interpretation, the Directive unjustifiably limits asylum seekers' constitutional rights.

3. Under section 10 of the Immigration Act, all foreigners are permitted to apply for temporary residence visas for South Africa.[1] The term "foreigner" is broadly defined as "*an individual who is not a citizen*". Asylum seekers fall under this definition of foreigners.

4. Directive 21 states that the "*holder of an asylum seeker permit who has not been certified as a Refugee may not apply for a temporary residence visa or*

[1] Section 10 of that Act, headed 'Visas to temporarily sojourn in Republic', provides:

> "(1) Upon admission, a foreigner, who is not a holder of a permanent residence permit, may enter and sojourn in the Republic only if in possession of a visa issued by the Director-General for a prescribed period.
>
> (2) Subject to this Act, upon application in person and in the prescribed manner, a foreigner may be issued one of the following visas…"

permanent residence permit". On its plain meaning, the Directive creates an absolute bar against asylum seekers applying for a temporary visa for South Africa. It states that an asylum seeker may only apply for a temporary visa once his or her application for asylum has been finally granted.

5. On this interpretation, Directive 21 is patently unlawful. It denies asylum seekers their statutory right under section 10 of the Immigration Act to apply for a visa to temporarily reside in South Africa. This, in turn, infringes upon their constitutional right to human dignity and family life. The applicants deal with this argument at length in their submissions.

6. The Department defends Directive 21 by arguing that it must be narrowly interpreted. In particular, it contends that Directive 21 (and section 10 of the Immigration Act) must be interpreted in accordance with regulation 9(2),[2] such that asylum seekers are permitted to apply for temporary or permanent residence in South Africa but must do so in their country of origin.[3]

7. This interpretation does not save Directive 21. It requires that, in order to apply for a visa to reside in South Africa, an asylum seeker must return to the country

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[2] Regulation 9(2) reads as follows:

> *"Any application for any visa referred to in sub-regulation (1) must submit his or her application in person to-*
>
> *(a) Any foreign mission of the Republic where the applicant is ordinarily resident or holds citizenship;*
>
> *(b) Any mission of the Republic that may from time to time be designated by the Director-General to receive applications in respect of any country in which a mission of the Republic has not been established."*

[3] Respondents' Heads of Argument, paragraph 22.

where they are ordinarily resident or hold citizenship. This interpretation does not pass constitutional muster for three reasons:

7.1. First, it requires the asylum seeker to return to the country from which they have fled. Many asylum seekers have fled their country of nationality or residence because they have a well-grounded fear that they will be persecuted in that country or there have been serious disruptions to the public order in that country, compelling the individual to flee and seek refuge. An interpretation of the Immigration Act and Directive 21 that requires individuals to return to their countries in such circumstances would, in effect, contravene the international law principle of *non-refoulement*, enshrined in s 2 of the Refugees Act. The latter provides that States have a duty to give refuge to persons who are fleeing from persecution and not to return them to countries where their life or freedom are in danger on account of their race, religion, political affiliation or nationality.[4]

7.2. Second, the practical effect of such an interpretation is to deny the asylum seeker his or her right to apply for a temporary visa under the Immigration Act (which, in turn, violates his or her right to dignity and family life). Most asylum seekers cannot return to their country of residence or origin. There are a number of reasons for this:

[4] This principle is reflected in section 2 of the Refugees Act.

7.2.1. In PASSOP's experience, most asylum seekers are not in an economic position to travel to and return from their countries of origin. Of those who have any means to travel, most would have to use road transportation to reach their home country, and then wait there until they raise the necessary funds to return.

7.2.2. In addition, as is explained above, many asylum seekers do not have the option of returning to their country of residence or nationality due to fears of persecution.

7.3. Third, the practical and legal effect of this interpretation may be that the asylum seeker loses her right to asylum under the Refugees Act. If the individual returns to her country of origin, this may be considered as an act of voluntarily re-availing herself of the protection of that country or of re-establishing herself in that country. In such circumstances, section 5(1) of the Refugees Act stipulates that the person would cease to qualify for refugee status. This places the asylum seeker in an impossible position – if they attempt to exercise their rights under the Immigration Act, they will lose their rights under the Refugees Act.

8. The statutory right to apply for asylum (and the State's duty not to return an asylum seeker to his country of residence or nationality) gives effect to a number of constitutional rights. It protects the asylum seeker's rights to dignity (section

10), freedom and security of the person (section 12) and the right to life (section 11).[5]

9. The Department's interpretation of section 10 of the Immigration Act and Directive 21 (which requires that asylum seekers apply for temporary visas from abroad) frustrates the asylum seeker's rights under the Refugee Act and the Immigration Act. This, in turn, infringes upon the asylum seekers' constitutional rights. Whether interpreted broadly or narrowly, the Directive is unconstitutional and ultra vires the Immigration Act.

10. The Department cannot rely on the fact that its interpretation of Directive 21 and section 10 of the Act reflects the 'general rule' established by Regulation 9(2) that foreigners must apply for visas abroad. There are two reasons for this:

    10.1. First, the content of a regulation cannot be used to interpret the scope of a right in a statute. This principle is well established in the law. The Department impermissibly uses the requirement in Regulation 9(2) that the applications for temporary visas be made abroad to limit the scope of the right of foreigners, in terms of section 10 of the Immigration Act, to apply for such visas. The Directive – and decisions made in terms of the Act – must comply with the Constitution, the Act, and the Regulations.

    10.2. Second, Regulation 9(2) is plainly ultra vires and unconstitutional. The requirement that an asylum seeker to return to his or her country of

[5] See *Saidi and Others v Minister of Home Affairs and Others* [2018] ZACC 9 at para 40.

residence or nationality in order to apply for a temporary visa or permanent residence in South Africa is inconsistent with the asylum seeker's constitutional rights to dignity and family, life, and freedom and security of the person. It also violates the requirement in s 10 of the Immigration Act that all foreigners – including asylum seekers and refugees – must be able to apply for visas. That must not only be legally possible, but practically possible.

11. PASSOP acknowledges that the validity of Regulation 9(2) is not before this Court in this matter and that no relief is sought in relation to it. However, that does not mean that this Court should adopt an interpretation of section 10 of the Act and Directive 21 which endorses or confirms the legal validity of Regulation 9(2). The validity of the Directive must be tested against the Act and the Constitution, not a plainly unlawful regulation. PASSOP intends to launch proceedings to challenge the constitutionality of the Regulation in the near future. The constitutional validity of the Regulation will be settled in the course of those proceedings.

12. In the High Court, the parties agreed that if Directive 21 is unconstitutional, the second to fourth applicants' applications would fall to be dealt with in terms of the previous dispensation, which permitted asylum seekers to apply for the visas contemplated in the Immigration Act.[6] PASSOP submits that the Directive is unconstitutional and the agreement in the High Court should be enforced.

[6] High Court judgment, at para 68.

13. In what follows, we address the following issues in turn:

13.1. First, the principles of interpretation.

13.2. Second, how those principles apply to the Directive.

13.3. Third, why Directive 21 should be reviewed and set aside.

13.4. Fourth, PASSOP should be admitted as an amicus curiae.

II APPLICABLE PRINCIPLES OF INTERPRETATION

14. The courts have repeatedly stated the principles applicable to the interpretation of statues and other documents. Four of these principles are central to the determination of this case:

15. First, regulations made in terms of legislation cannot be used as an aid to interpret that legislation.[7] In particular, regulations cannot be used to unreasonably limit the scope of a statutory or constitutional right.

15.1. In *Moodley v Minister of Education*,[8] the Appellate Division explained this principle. It held that:

> *"although regulations have the force of law, they are not drafted by Parliament. ... It is not permissible to treat the Act and the*

[7] *Islamic Unity Convention v Minister of Telecommunications and Others* 2008 (3) SA 383 (CC) at para 57.

[8] *Moodley and Others v Minister of Education and Culture, House of Delegates and Another* (539/87) [1989] ZASCA 45 (31 March 1989).

regulations made thereunder as a single piece of legislation; and to use the latter as an aid to the interpretation of the former." [9]

15.2. In *Dotcom Trading v Hobbs Sinclair Advisory*,[10] the High Court reiterated that one must be circumspect about interpreting a statute with the aid of the regulations made under it. However, it held that there was nothing in the regulation in question that was inconsistent with the import of the section of the statute from which it derived.[11] Regulation 9(2) does not fall within this exception. The Regulation's requirement that an asylum seeker must apply for a temporary visa abroad is inconsistent with section 10. As we demonstrate below, the requirement frustrates the statutory right of asylum seekers to apply for temporary visas under section 10, and reg 9(2) is therefore ultra vires and unlawful.

15.3. It is an established principle that the rules and procedures that are created in order to give effect to a right must facilitate rather than frustrate the exercise of that right. As this Court pointed out in *New National Party*

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[9] *Moodley* at para 34. See also *National Lotteries Board v Bruss and Others* [2008] ZASCA 167; 2009 (4) SA 362 (SCA) at para 37. See also *Islamic Unity Convention v Minister of Telecommunications and Others* [2007] ZACC 26; 2008 (3) SA 383 (CC); 2008 (4) BCLR 384 (CC) at para 57 ("*regulations made in terms of legislation cannot be used as an aid to interpret that legislation*"); *Rossouw and Another v First Rand Bank Ltd t/a FNB Homeloans* [2010] ZASCA 130; 2010 (6) SA 439 (SCA); [2011] 2 All SA 56 (SCA) at para 24*; University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others; Mavava Trading 279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others* 2016 (6) SA 596 (CC) ("*University of Stellenbosch Legal Aid Clinic")* at paras 150 -151.

[10] *Dotcom Trading 118 (Pty) Ltd v Hobbs Sinclair Advisory (Pty) Ltd* [2017] ZAWCHC 144 (*"Dotcom Trading")*.

[11] *Dotcom Trading* at para 25.

with regard to election regulations: "*[T]he mere existence of the right to vote without proper arrangements for its effective exercise does nothing for a democracy; it is both empty and useless.*"[12] Rules and procedures for voting will inevitably restrict the ability of some people to vote. They are a necessary form of regulation to facilitate the right to vote. However, where the right to vote is restricted because the government introduces an unreasonable regulation, this breaches the right. Likewise, the requirement that an asylum seeker must apply in his or her country of residence or nationality does not facilitate his or her right to apply for a temporary visa under section 10. Rather, it makes the exercise of that right practically impossible.

16. Second, if a statutory provision is reasonably capable of two interpretations and one interpretation would render it unconstitutional and the other not, the courts are required to adopt the interpretation that would render the provision compatible with the Constitution.[13]

17. Third, if a provision is reasonably capable of two interpretations, the court must adopt the interpretation that "better" promotes the spirit, purport and objects of the Bill of Rights.[14] This principle applies even if neither interpretation would render the provision unconstitutional. Similarly, if the provision is capable of

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[12] *New National Party v Government of the Republic of South Africa and Others* [1999] ZACC 5; 1999 (3) SA 191 (CC) at para 11. See also ibid at paras 123-124 (O'Regan J, dissenting).

[13] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) at paras 22-23

[14] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC) at paras 46, 84 and 107.

two interpretations – one that limits constitutional rights and another that does not – the court must prefer the interpretation that does not limit fundamental rights.[15]

18. Fourth, section 233 of the Constitution provides that when interpreting legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any other interpretation that is inconsistent with international law.

III INTERPRETING THE DIRECTIVE

19. The Department's interpretation of Directive 21 and section 10 of the Immigration Act – which requires that all foreigners, including asylum seekers, must apply in person for temporary visas in their country of residence or nationality – runs contrary to the above principles in that:

    19.1. The Department uses a regulation to interpret the provisions of the legislation under which it was passed.

    19.2. The requirement that asylum seekers apply abroad makes it practically impossible for them to exercise their right to apply for a visa under section 10 of the Act.

[15] *National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd and Another* 2003 (3) SA 513 (CC) at para 37.

19.3. It also frustrates or threatens the asylum seeker's rights under the Refugees Act[16] and the Constitution.

19.4. The requirement is inconsistent with the international law rule of non-refoulement.

20. We deal with these issues in turn.

Uses Regulation to Interpret Act

21. The Department's primary defence of the Directive is that it merely repeats regulation 9(2). Leaving aside the textual impossibility of that approach, compliance with the regulation is inadequate. The Directive must also be constituent with the Act and the Constitution.

22. The Department seeks to avoid this result by relying on the principle of subsidiarity. The argument seems to be that the Act need only comply with the Constitution, the regulation with the Act, and the Directive with the Regulation. The Directive need not comply with the Act or the Constitution. Subsidiarity, on this approach, means compliance only with the next higher norm. This approach is flawed.

[16] Act 130 of 1998.

23. The principle of subsidiarity applies where legislation is enacted to codify or give effect to a constitutional right,[17] such as the right to fair labour practices,[18] equality,[19] or water.[20] It has no application in this context where the Immigration Act does not give effect to constitutional rights, but may limit them. As Cameron J has explained, the justifications for the principle "*do not apply where the litigant relies on the restricted ambit of the legislation.*"[21]

24. We are also not aware of any comparable principle of subsidiarity in administrative law that holds that administrative decisions and policies need only comply with subordinate regulations, and not with the primary empowering statute, or the Constitution. Indeed, PAJA expressly provides that administrative decisions must be consistent with the empowering statute, and must not be "*otherwise unconstitutional or unlawful*".[22]

25. Put simply, the Department's interpretation of Directive 21 may be consistent with regulation 9(2), but it must also be consistent with the Immigration Act and the Constitution. It is not.

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[17] *My Vote Counts NPC v Speaker of the National Assembly and Others* [2015] ZACC 31; 2016 (1) SA 132 (CC).
[18] *South African National Defence Union v Minister of Defence and Others* [2007] ZACC 10; 2007 (5) SA 400; 2007 (8) BCLR 863 (CC).
[19] *MEC for Education, Kwa-Zulu Natal and Others v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC).
[20] *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28; 2010 (4) SA 1 (CC).
[21] *My Vote Counts* at para 72. Although Cameron J was in the minority, the majority agreed with the general statement that the principle of subsidiarity only applies where legislation has been enacted to give effect to a constitutional right, not to all legislation that affects constitutional rights. Ibid at paras 160-166.
[22] PAJA s 6(2)(i).

Frustration of Asylum Seekers' Rights

Inability to apply abroad

26. The Department relies on the wording of Regulation 9(2), which requires a visa application to be made in person from the country where the applicant is a citizen or ordinarily resident (there is a very limited exception that applies when there is no foreign mission in such country).

27. For asylum seekers (and refugees), this requirement renders it impossible to enjoy right under section 10 of the Immigration Act moot. The reasons are as follows:

    27.1. Legitimate asylum seekers cannot return to their country of residence or nationality due to fears that they will be persecuted or endangered. They have fled their country for good reason and will not take the risk of returning. As a consequence, they are unable to exercise their right to apply for a temporary visa for South Africa.

    27.2. Many asylum seekers do not have the resources to leave South Africa. Of those who have the means to leave, most can only afford to use road transportation to reach their home country. Having arrived, many would not have the resources to return. They would have to wait in that country until they were able to raise the funds needed to return to South Africa.

28. On the Department's interpretation, the Directive indirectly discriminates against asylum seekers. Like regulation 9(2) is purports to treat all foreigners

equally. But it has a disparate impact on asylum seekers. Other foreigners can apply for visas in their country of origin without risking persecution, or giving up other statutory rights.

Eligibility for refugee status

29. If an asylum seeker decides to return to their country of residence or nationality, they will become ineligible for refugee status under the Refugees Act.

30. Section 5 of the Refugees Act provides that a person ceases to qualify for refugee status under that Act if the following occurs:

30.1. He or she voluntarily re-avails himself or herself of the protection of the country of his or her nationality (section 5(1)(a)); or

30.2. He or she voluntarily re-establishes himself or herself in the country which he or she has left (section 5(1)(d)).

31. If an asylum seeker returns to their country of residence or nationality, they will be found to have re-availed themselves of the protection of that country or have re-established themselves there. In such circumstances, they will become ineligible for refugee status under the Refugee Act.

32. The loss of eligibility for refugee status would impact upon a number of that asylum seeker's constitutional rights. This Court held in *Saidi* that requiring asylum seekers to return to their country of origin in order to exercise a statutory

right is inconstant with their constitutional rights to life, freedom and security of the person and human dignity.[23] Therefore, the Department's interpretation of Directive 21 and section 10 of the Immigration Act imperils asylum seekers' enjoyment of these rights.

Principle of non-refoulement

33. Many asylum seekers are persons who have fled from their country of residence or nationality because they fear persecution or have been compelled to leave and seek refuge elsewhere due to severe disruptions in the public order (caused by external aggression, occupation, foreign domination or similar events). They apply for refugee status on this basis.[24]

34. If the Department's interpretation of section 10 and Directive 21 is adopted, it would mean that – in order to exercise his or her right to apply for a temporary visa – an asylum seeker would be compelled to return to the country from which they have fled. This would violate the State's obligations under the international law principle of non-*refoulement*. This principle (which is captured in section 2 of the Refugees Act) stipulates that no person may be subjected to any measure that results in that person being compelled to return to or remain in a country where he or she may be persecuted on account of his or her race, nationality,

[23] *Saidi* at para 40.
[24] See the grounds for the grant of refugee status in section 3(a) and (b) of the Refugees Act.

religion or political affiliation or where his or her life, physical safety or freedom will be threatened on account of specified events.[25]

35. This Court has underscored the importance of this principle. In its recent judgment in *Saidi*, this Court stated that:

> "*At the heart of international refugee law is the principle of non-refoulement (non-return). This is not about non-return for the sake of it; it is about not returning asylum seekers to the very ills – recognised as bases for seeking asylum – that were the reason for their escape from their countries of origin. This principle is captured in section 2 of the Refugees Act.*"[26]

Madlanga J noted that the paramount importance of the principle of non-*refoulement* is highlighted in the introduction of the Refugee Convention. This states that the principle is so fundamental that no reservations or derogations are to be made from it. It provides that no one shall return a refugee, *in any manner whatsoever*, to a territory where he or she fears threats to life or freedom. Section 6(1)(a) of the Refugees Act provides that the Act must be interpreted in accordance with the Convention.[27]

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[25] Section 2 of the Refugees Act provides:

"Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where—

(a) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or

(b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country." (Emphasis added.)

[26] *Saidi* at para 27.

[27] *Saidi* at para 29.

36. Hence, the principle of non-*refoulement* is binding on the State in both international and domestic law.

37. Having considered these principles, this Court in *Saidi* rejected the government's interpretation of the Refugees Act that asylum seekers were not entitled to remain in the country while they reviewed the refusal to grant them refugee status. It did so partly on the ground that return to their country of origin to exercise their statutory right under PAJA would expose asylum seekers to the real risk of *refoulement*.[28]

38. This Court should reject the Department's interpretation of section 10 of the Immigration Act on the same basis – the Department's interpretation of section 10 limits the right to apply for a temporary visa by requiring that such application be made abroad and exposes asylum seekers to the real risk of *refoulement* in order to exercise a statutory right.

Conclusion

39. The Department appears to acknowledge that the ordinary meaning of Directive 21 would render it unlawful. It seeks to adopt an alternative interpretation that Directive 21 merely repeats regulation 9(2). But that interpretation too is ultra vires the Immigration Act and unconstitutional. It does in effect what the plain meaning of the Directive 21 does expressly. Both interpretations make it

[28] *Saidi* at para 30.

impossible for asylum seekers to apply for visas as they are entitled to do under s 10 of the Immigration Act. Directive 10 cannot be saved by interpretation. It must be declared invalid.

IV REVIEW AND REMEDY

40. The promulgation of Directive 21 constitutes an exercise of public power by the Department. As such, the Directive is subject to review (at the very least) in terms of the Constitution and the principle of legality. As is demonstrated above, the Directive unjustifiably limits (or wholly frustrates) asylum seekers' rights under the Immigration Act and the Refugee Act and contravenes the principle of non-refoulement. This in turn violates a number of asylum seekers' constitutional rights, including the right to dignity, freedom and security of the person and life.

41. The Directive is inconsistent with the Constitution and "*must*" be declared invalid in terms of section 172(1)(a) of the Constitution. PASSOP submits that a just and equitable remedy under section 172(1)(b) of the Constitution would be to re-instate the High Court's order declaring the Directive unconstitutional and setting it aside.

42. In the High Court, the parties agreed that if Directive 21 is declared unconstitutional, the second to fourth applicants' applications would be dealt with under the dispensation regulated by Circular 10 of 2008. Under this

dispensation, asylum seekers were permitted to apply for visas under the Immigration Act from within South Africa. This is the only approach that is consistent with the Immigration Act and the Constitution.

43. However, if the Court declines to deal with the second to fourth applicants' applications in this manner, PASSOP respectfully submits that the Department's decisions in relation to those applications should be reviewed and set aside.

44. The Department argues that, regardless of the constitutional validity of Directive 21, the relief relating to the individual applicants cannot succeed. Its reason is that Regulation 9(2) would prevent the individual applications being granted. PASSOP acknowledges that, until Regulation 9(2) is reviewed and set aside, there is a barrier to the grant of the second to fourth respondents' applications. However, this does not prevent the review and setting aside of the Department's decision to refuse to accept or grant the individual applications.

45. The Department's decisions regarding the individual applications were based on Directive 21, not on Regulation 9(2). This renders it invalid irrespective of reg 9(2):

45.1. In *Westinghouse v Eskom,*[29] the SCA re-stated the well-established principle that if an administrative body takes into account any reason for

[29] *Westinghouse Electric Belgium Societe Anonyme v Eskom Holdings (Soc) Ltd and Another* (476/2015) 2016 (3) SA 1 (SCA).

its decision which is bad or irrelevant, then the whole decision, even if there are other good reasons for it, is vitiated.[30]

45.2. This Court and the SCA have consistently held that "*administrative functions performed in terms of incorrect provisions are invalid, even if the functionary is empowered to perform the function concerned by another provision.*"[31]

46. In this case, the Department relied on Directive 21 which is unconstitutional (on either a narrow or broad interpretation of the Directive). As a consequence, the decision with regard to the applications should be reviewed and set aside on the basis of section 6(2)(e)(iii) of PAJA and the principle of legality.[32]

47. Having determined that the decisions relating to the individuals applicants should be reviewed and set aside, the Court may grant an order that is just and equitable, in terms of section 8(1) of PAJA. With regard to the applications submitted by the second to fourth applicants, PASSOP submits that the following order would constitute just and equitable relief:

47.1. The Department is directed to re-consider the Third and Fourth Applicants' applications for critical skills visas.

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[30] *Westinghouse* at para 44.

[31] Liebenberg NO and Others v Bergrivier Municipality (CCT 104/12) [2013] ZACC 16; 2013 (5) SA 246 (CC) at para 93 (Jafta J, dissenting), citing *Minister of Education v Harris* [2001] ZACC 25; 2001 (4) SA 1297 (CC); 2001 (11) BCLR 1157 (CC). Both judgments cited with approval in *Zuma v Democratic Alliance and Others* [2017] ZASCA 146; [2017] 4 All SA 726 (SCA); 2018 (1) SA 200 (SCA) at para 58.

[32] See *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC) ("*Democratic Alliance*") at para 39.

47.2. The Department's re-consideration of the Second to Fourth Applicants' visa applications are stayed pending the following:

47.2.1. A reasonable period during which the Applicants must be permitted to make application in terms of section 31(2)(c) of the Immigration Act for exemption to apply for a temporary visa from within South Africa; or

47.2.2. The finalization of PASSOP's constitutional challenge to Regulation 9(2), which will be launched forthwith.

48. The above order would allow the second to fourth applicants to exercise their right to apply for a temporary visa under section 10 of the Immigration Act, without risking *refoulement* or the loss of their eligibility for refugee status. It will safeguard the applicants' rights under the immigration and refugee legislation, as well as their Constitutional rights.

V ADMISSION AS AMICUS CURIAE

49. Rule 10 of the Constitutional Court's rules provides that parties interested in the matter before Court may, with written consent of the parties in the matter, be admitted as an amicus curiae. Given the restricted timeframes for the filing of papers in this matter, PASSOP did not have adequate time to obtain written

consent from the parties. As such, PASSOP applies for permission to intervene from the Chief Justice in terms of Rule 10(4).[33]

50. PASSOP respectfully submits that it has met the substantive requirements for admission as an amicus curiae. In this respect:

50.1. PASSOP has the requisite interest in this matter. It is a community-based, grassroots non-profit organisation devoted to protecting and promoting the rights of asylum seekers, refugees and immigrants in South Africa. It works to protect and promote the rights of all refugees, asylum seekers and immigrants in South Africa. As a consequence, the issues raised in this case fall squarely within PASSOP's mandate.[34]

50.2. PASSOP's legal submissions are novel, relevant to the issues in this matter and are useful to this Court. PASSOP's submissions consider, in depth, the legal and practical implications of the Department's narrow interpretation of section 10 of the Immigration Act and Directive 21. They show that this interpretation (even if textually plausible) cannot save the Directive from invalidity. These implications are plainly relevant to the issues before this Court. In addition, the arguments are novel – the applicants have not dealt in full with the Department's interpretation of

[33] PASSOP notes that, subsequent to the filing of its application for admission, PASSOP has received the written consent of the Department to intervene as an amicus curiae.
[34] PASSOP's interest in this matter is set out in full in paragraphs 5 to 12 of the founding affidavit in its application for admission as amicus curiae.

Directive 21 and section 10 of the Immigration Act or its full implications for the statutory and constitutional rights of asylum seeks.

51. In the circumstances, PASSOP prays for its admission as an amicus curiae in this matter.

TEMBEKA NGCUKAITOBI

MICHAEL BISHOP

EMMA WEBBER

PHUMZILE MDAKANE

Counsel for PASSOP

13 May 2018

Chambers, Sandton; Legal Resources Centre

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: CCT 273/2017
SCA CASE NO.: 1383 / 2016
WCHC CASE NO.: 3096 / 2016

In the application to be admitted as an *amicus curiae* of:

LAWYERS FOR HUMAN RIGHTS	Applicant

In the matter between:

TASHRIQ AHMED	First Applicant
ARIFA MUSADDIK FAHME	Second Applicant
KUZIKESA JULES VALERY SWINDA	Third Applicant
JABBAR AHMED	Fourth Applicant

and

THE MINISTER OF HOME AFFAIRS	First Respondent
THE DIRECTOR-GENERAL, HOME AFFAIRS	Second Respondent

LAWYERS FOR HUMAN RIGHTS' PRACTICE NOTE

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1 NATURE OF APPEAL

1.1 This is an appeal against the judgment and order of the Supreme Court of Appeal in *Minister of Home Affairs and Another v Ahmed and Others*, Case No 1383/2016; [2017] ZASCA 123.

1.2 Lawyers for Human Rights ("LHR") seeks leave to be admitted as an *amicus curiae* in this matter.

1.3 LHR's application is brought in response to the directions issued by the Chief Justice, dated 9 May 2018, directing the Registrar of this Court to forward the papers in this application to various organisations, including LHR. LHR became aware of these directions on 10 May 2018.

1.4 LHR seeks leave to file written submissions and to make brief oral submissions at the hearing of this matter. LHR also seeks leave in terms of Rule 31 to introduce evidence of the Minister's responses to questions in Parliament, detailing the backlogs in the refugee status determination process.

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2 ISSUE TO BE DETERMINED

2.1 The central issue to be determined is whether Immigration Directive 21 of 2015 is unlawful and invalid.

2.1.1 Immigration Directive 21 of 2015 purports to exclude all asylum seekers from applying for visas and permanent residence under the Immigration Act 13 of 2002.

2.1.2 Its validity primarily turns on the proper interpretation of the Immigration Act and the Refugees Act 130 of 1998.

2.2 The second issue is whether the individual applicants are eligible to apply for the specific visas that they seek under the Immigration Act.

2.3 The third issue is the just and equitable remedy.

3 SUMMARY OF LHR'S ARGUMENT

3.1 LHR supports the applicants' position that Directive 21 is unlawful and invalid as it is in conflict with the scheme of the Immigration Act and the Refugees Act 130 of 1998.

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3.2 LHR's primary contribution is to draw attention to the backlogs and delays in the refugee status determination system and the vulnerable position of asylum seekers as a result of these delays. It submits that the relevant provisions of the Immigration Act and the Refugees Act must be interpreted in light of this reality.

3.2.1 In Parliament, the Minister of Home Affairs has confirmed that there is a persistent backlog in the refugee status determination system due to institutional incapacity.[1]

3.2.2 As a result, most asylum seekers will have to wait many years for a final decision on their asylum applications.

3.2.3 While waiting, they are left in a vulnerable position. They face the risk that they may be refused asylum at any time; they are reliant on temporary asylum seeker permits, which must be frequently renewed in person at the few remaining Refugee Reception Offices in the country; and they face the risk of being turned away due to incapacity at these Refugee Reception Offices.

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[1] LHR's affidavit, paras 23 – 24; Annexures LHR 2 and LHR 3.

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3.2.4 In these circumstances, many asylum seekers require the certainty and assurance that could be provided by visas and permanent residence under the Immigration Act.

3.2.5 Given these realities, the Immigration Act and the Refugees Act should be interpreted in a way that best promotes and protects the rights of asylum seekers.

3.2.6 Asylum seekers should not be denied the opportunity to apply to regularise their status under the Immigration Act merely because they are asylum seekers.

3.3 The blanket exclusion mandated by Directive 21 is in conflict with the proper interpretation of the Immigration Act and the Refugees Act. Accordingly, it must be declared unlawful and invalid.

4 ESTIMATED DURATION OF ARGUMENT

4.1 LHR seeks leave to present oral submissions for 15 to 20 minutes.

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5 PORTIONS OF THE RECORD NECESSARY FOR THE DETERMINATION OF THE MATTER

5.1 LHR defers to the parties' assessment of the relevant portions of the record.

5.2 LHR will place particular reliance on the following portions of the record:

5.2.1 Vol 1, pp 30, 37, 43 (the applicants' section 22 asylum seeker permits).

5.2.2 Respondents' Answering Affidavit in the High Court, Vol 1, pp 108, para 16; pp 118, para 41.1.

6 AUTHORITIES ON WHICH PARTICULAR RELIANCE WILL BE PLACED

6.1 Statutes:

6.1.1 Immigration Act 13 of 2002;

6.1.2 Immigration Regulations 2014, Government Notice R413 in Government Gazette 37679 of 22 May 2014;

6.1.3 Refugees Act 130 of 1998;

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6.1.4 Refugee Regulations (Forms and Procedure) 2000, Government Notice R366 in *Government Gazette* 21075 of 6 April 2000.

6.2 Case law:

6.2.1 *Arse v Minister of Home* Affairs 2012 (4) SA 544 (SCA) at para 19;

6.2.2 *Minister of Home Affairs and Others v Somali Association of South Africa and Another* 2015 (3) SA 545 (SCA) at paras 25 and 29;

6.2.3 *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (4) SA 326 (SCA) at paras 25, 27, 32, 36 – 37;

6.2.4 *Saidi and Others v Minister of Home Affairs and Others* [2018] ZACC 9 (24 April 2018) at paras 38 – 41;

6.2.5 *Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others* [2017] ZASCA 126; [2017] 4 All SA 686 (SCA) at para 46.

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6.2.6 *South African Police Service v Public Servants Association* 2007 (3) SA 521 (CC) at para 20.

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Counsel for Lawyers for Human Rights

Chambers, Johannesburg

13 May 2018

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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case no.: CCT 273/17

In the application to be admitted as *amicus curiae* of:

PEOPLE AGAINST SUFFERING, OPPRESSION

AND POVERTY Applicant for admission as *amicus curiae*

In re:

The matter between:

TASHRIQ AHMED First Applicant

ARIFA MUSADDIK FAHME Second Applicant

KUZIKESA JULES VALERY SWINDA Third Applicant

JABBAR AHMED Fourth Applicant

and

THE MINISTER OF HOME AFFAIRS First Respondent

THE DIRECTOR-GENERAL OF HOME AFFAIRS Second Respondent

PASSOP'S PRACTICE NOTE

NATURE OF THE PROCEEDINGS

1. The main application before this Court is an application for leave to appeal against the judgment of the Supreme Court of Appeal ('**the SCA**') in the matter of *Ahmed and*

Others v Minister of Home Affairs and Another (3096/2016) [2016] ZAWCHC 123 (21 September 2016). The matter concerns the constitutionality of Directive 21 of 2015, which was issued by the Department of Home Affairs on 3 February 2016 (**the Directive**) and the Department's decision to refuse to accept or to reject the visa applications made by the second to fourth applicants.

2. In addition, PASSOP seeks leave to intervene as an amicus curiae in this matter, in order to submit written submissions and to advance oral argument at the hearing.

THE ISSUES THAT WILL BE ARGUED

3. The appeal concerns the proper interpretation of section 10 of the Immigration Act and the Directive. The question that arises is whether, properly interpreted, section 10 and the Directive require asylum seekers to return to their country of origin or residence in order to apply for a visa contemplated in the Immigration Act.

4. With regard to PASSOP's application for admission as amicus curiae, the issue to be determined is whether PASSOP has the requisite interest in this matter, and whether its written and oral submissions will be relevant to the issues before the Court, novel and useful.

ESTIMATED DURATION OF THE ARGUMENT

5. 25 minutes.

RELEVANT PORTIONS OF RECORD

6. PASSOP's application for admission as amicus curiae.

SUMMARY OF PASSOP'S ARGUMENT

7. PASSOP supports the re-instatement the High Court's declaration of constitutional invalidity regarding Directive 21. On both a narrow and broad interpretation, the Directive unjustifiably limits asylum seekers' constitutional rights.

8. On its plain meaning, the Directive creates an absolute bar against asylum seekers applying for a temporary visa for South Africa. It states that an asylum seeker may only apply for a temporary visa once his or her application for asylum has been finally granted. On this interpretation, Directive 21 is patently unlawful. It denies asylum seekers their statutory right under section 10 of the Immigration Act to apply for a visa to temporarily reside in South Africa. This, in turn, infringes upon their constitutional right to human dignity and family life.

9. The Department defends Directive 21 by arguing that it must be narrowly interpreted. In particular, it contends that Directive 21 (and section 10 of the Immigration Act) must be interpreted in accordance with regulation 9(2), such that asylum seekers are permitted to apply for temporary or permanent residence in South Africa but must do so in their country of origin.

10. This narrow interpretation does not pass constitutional muster for the following reasons:

    10.1 First, it requires the asylum seeker to return to the country from which they have fled as a result of a well-founded fear that they will be persecuted in that country or there have been serious disruptions to the public order in that country, compelling the individual to flee and seek refuge. Such interpretation

contravenes the international law principle of *non-refoulement* enshrined in s 2 of the Refugees Act.

10.2 Second, it denies asylum seekers of the right to apply in terms of section 10 of the Immigration Act in that most asylum seekers cannot return to their country of residence or origin. In most instances, the asylum seeker lacks the financial means to travel to their country of origin or simply cannot return to their country of residence or nationality due to fears of persecution.

10.3 Third, the practical and legal effect is that the asylum seeker loses his or her right to asylum under section 5(1) of the Refugees Act in that the asylum seeker would cease to qualify for refugee status if he or she voluntarily re-avails himself or herself of the protection of the country of his or her nationality; or he or she voluntarily re-establishes himself or herself in the country which he or she left.

11 It is further submitted that the statutory right to apply for asylum gives effect to the asylum seeker's constitutional rights to dignity, freedom and security of the person (section 12) and the right to life (section 11). As such, the Department's interpretation of section 10 of the Immigration Act and Directive 10 frustrates the asylum seeker's rights under the Refugee Act and the Immigration Act, in turn, infringing upon the asylum seekers' constitutional rights.

12 With regard to PASSOP's application for admission as amicus curiae, it will subit the following:

12.1 PASSOP has the requisite interest in this matter. It is a community-based, grassroots non-profit organisation devoted to protecting and promoting the rights of asylum seekers, refugees and immigrants in South Africa.

12.2 PASSOP's submissions consider, in depth, the legal and practical implications of the Department's narrow interpretation of section 10 of the Immigration Act and Directive 21. They show that this interpretation (even if textually plausible) cannot save the Directive from invalidity. These implications are plainly relevant to the issues before this Court. In addition, the arguments are novel – the applicants have not dealt in full with the Department's interpretation of Directive 21 and section 10 of the Immigration Act or its full implications for the statutory and constitutional rights of asylum seeks.

LIST OF AUTHORITIES RELIED ON

11. PASSOP will make particular reference to the following authorities:

Legislation

8.1. The Constitution of the Republic of South Africa, 1996;

8.2. Immigration Act, 13 of 2002;

8.3. Refugees Act, 130 of 1998.

Case Law

8.4. *Ahmed and Others v Minister of Home Affairs and Another* (3096/2016) [2016] ZAWCHC 123 (21 September 2016); 2017 (2) SA 417 (WCC);

8.5. *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC);

8.6. *Dotcom Trading 118 (Pty) Ltd v Hobbs Sinclair Advisory (Pty) Ltd* [2017] ZAWCHC 144;

8.7. *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* NO 2001 (1) SA 545 (CC);

8.8. *Islamic Unity Convention v Minister of Telecommunications and Others* 2008 (3) SA 383 (CC);

8.9. *Liebenberg NO and Others v Bergrivier Municipality* (CCT 104/12) [2013] ZACC 16; 2013 (5) SA 246 (CC);

8.10. *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28; 2010 (4) SA 1 (CC);

8.11. *MEC for Education, Kwa-Zulu Natal and Others v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC);

8.12. *Minister of Education v Harris* [2001] ZACC 25; 2001 (4) SA 1297 (CC); 2001 (11) BCLR 1157 (CC);

8.13. *Minister of Home Affairs and Another v Ahmed and Others* (1383/2016) [2017] ZASCA 123 (26 September 2017); 2017 (6) SA 554 (SCA);

8.14. *Moodley and Others v Minister of Education and Culture, House of Delegates and Another* (539/87) [1989] ZASCA 45 (31 March 1989);

8.15. *My Vote Counts NPC v Speaker of the National Assembly and Others* [2015] ZACC 31; 2016 (1) SA 132 (CC);

8.16. *National Lotteries Board v Bruss and Others* [2008] ZASCA 167; 2009 (4) SA 362 (SCA);

8.17. *National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd and Another* 2003 (3) SA 513 (CC);

8.18. *New National Party v Government of the Republic of South Africa and Others* [1999] ZACC 5; 1999 (3) SA 191 (CC);

8.19. *Rossouw and Another v First Rand Bank Ltd t/a FNB Homeloans* [2010] ZASCA 130; 2010 (6) SA 439 (SCA); [2011] 2 All SA 56 (SCA);

8.20. *Saidi and Others v Minister of Home Affairs and Others* [2018] ZACC 9;

8.21. *South African National Defence Union v Minister of Defence and Others* [2007] ZACC 10; 2007 (5) SA 400; 2007 (8) BCLR 863 (CC);

8.22. *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others; Mavava Trading 279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others* 2016 (6) SA 596 (CC) ("*University of Stellenbosch Legal Aid Clinic"*).

8.23. *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC);

8.24. ***Westinghouse Electric Belgium Societe Anonyme v Eskom Holdings (Soc) Ltd and Another*** **(476/2015) 2016 (3) SA 1 (SCA);**

8.25. ***Zuma v Democratic Alliance and Others*** **[2017] ZASCA 146; [2017] 4 All SA 726 (SCA); 2018 (1) SA 200 (SCA).**

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14 May 2018

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