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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 41897/2021

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
.....
SIGNATURE	DATE

In the matter between:

CHARL MILTON TIMMS	First Applicant
DIMA SAAD HAMID AJEEL	Second Applicant
DIMA SAAD HAMID AJEEL NO	Third Applicant

(In her capacity as guardian and parent of T[....] F[....] A[....] H[....])

And

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

JUDGMENT

BALOYI-MERE AJ

1. This application was brought on an urgent basis seeking the following prayers:

1.1 That the First Respondent, in terms of section 31(2)(c) of the Immigration Act 13 of 2002 ("the Immigration Act"), waive the requirement set out in regulation 9(2)(b) of the regulations passed in terms of section 7 of the said Immigration Act, in so far as such may pertain to any or all visas which the Second Applicant may wish to bring in terms of the Immigration Act;

1.2 That the First and Second Respondents issue, through the offices of the SA Embassy/Consular offices in Berne, Switzerland, a visitor's visa to the Second Applicant in terms of section 11(1) of the Immigration Act valid for a period of ninety (90) days from the date of issue permitting the Second Applicant entry into the Republic of South Africa, such visa to be issued within ten (10) calendar days of the date of this order;

1.3 That the Second Applicant thereafter be entitled to apply for whatever further visas she may be entitled to, whether in her personal or in her representative capacity, within the ninety (90) day period referred to in the preceding paragraph, failing which the Respondents shall be entitled to deport the Second Applicant;

1.4 In the event of the Second Applicant complying timeously with the provisions of the preceding paragraph, interdicting the Respondents from

arresting and/or deporting the Second Applicant until all the processes associated with such visa application(s) have been exhausted; and

1.5 All travel by the Second Applicant shall be subject to the Covid-19 restrictions from time to time applicable to entry into the Republic of South Africa.

2. After the launch of the initial application, the Applicants launched further three (3) interlocutory applications within that application. The first one was the joinder of the Third Applicant in her capacity as the guardian and parent of T[....] F[....] A[....] H[....]. The second one was to amend the notice of motion to cater for the inclusion of the minor child as an Applicant and the third was an amendment to allow the Second and Third Applicants to be permitted to apply to the First Respondent for a waiver of the requirements of regulation 9(2)(a) of the regulations passed under section 1 of the Immigration Act 13 of 2002 in terms of the First Respondent's powers under section 31(2)(c) of the Immigration Act within three (3) days of date of this order.
3. The Respondent appeared on the 07th September 2021 in the urgent court and indicated that his instructions are to oppose the Applicant's application. To that end, the matter was stood down to Thursday the 09th September 2021 at 14h00 with the undertaking from the two Counsel that they are going to talk to one another and try to settle the matter amicably.
4. On the 09th September 2021 when the matter was re-called, the parties indicated that they could not reach a settlement. What has transpired in the meantime is that the Second Applicant has been called by the South African

Embassy in Switzerland to come and apply in terms of regulation 9(2)(a) of the regulations passed in terms of the Immigration Act. The Second Respondent had indicated that she will only be able to go and apply on the 09th September 2021. On that basis, the Applicants' Counsel requested that the matter stand down further to the 10th September 2021 for a response to the Second Applicant's application. This request was refused as the court had already allocated other matters to be heard on the 10th September 2021. The matter was then argued fully in court on the 09th September 2021.

Summary of the Facts

5. The First and Second Applicant have been in a permanent life partner relationship for almost three (3) years and have recorded an agreement of co-habitation which was entered into between the First and the Second Applicant in Pretoria on the 14th April 2021 and such agreement has been notarily certified. The Second Applicant was married and lived in Dubai, in the United Arab Emirates ("UAE"). The Second Applicant was also employed in the UAE as the holder of a passport issued by the Common Wealth of Dominica.
6. The First Applicant relocated from Dubai in November 2020 and came to South Africa to take up a newly promoted position as National Sales Director of a major Japanese motor vehicle manufacturer. The Second Applicant was divorced from her ex-husband in 2018 but she was still employed by a company (Bilfinger SE) in Dubai until June 2021. The Second Applicant's employment with Bilfinger SE came to an end during March 2021. The

Second Applicant's entitlement to the Commonwealth of Dominica Passport was based on her being employed in the UAE. In the meantime, the Second Applicant had a valid visitor's visa to South Africa which she had intended to use to come back to South Africa after the finalization of a pending litigation wherein judgment was expected to be handed down on 22nd June 2021. Unfortunately the judgment was delayed and handed down on the 29th June 2021, a week after the lapse of the Second Applicant's South African visitor's visa.

7. The Second Applicant had to hastily leave the UAE and visited her sister in Switzerland where she is currently residing temporarily. The Second Applicant's entitlement to temporarily reside in Switzerland is premised upon a European Union Visitor's Visa, which is valid for three months and such period expires at the end of September 2021.
8. The Second Applicant is desirous of entering the Republic of South Africa with the view to resuming the co-habitation with the First Applicant. To that end the First Applicant has already added the Second Applicant in his Discovery Medical Aid Policy and they intend to get married as soon as possible.
9. In terms of regulation 9(2)(a) of the regulation, an applicant for any visa should submit his or her application in person to any foreign embassy of the Republic situated where the applicant is an ordinarily resident or holds citizenship. The Second Applicant is in Switzerland where she is not ordinarily resident and does not hold any citizenship.

10. The Applicant submits that based on the summary of facts as contained in the preceding paragraphs, the matter is urgent and should be treated as one of urgency.
11. On the other hand, the Respondents oppose the relief sought by the Applicant. The Respondents in their opposition filed a short affidavit dealing only in points *in limine*. The Respondent chose not to deal with the further interlocutory applications that were brought by the applicants.
12. The first point *in limine* is that an inappropriate cause of action was followed and even the relief sought is inappropriate. In support of that, the Respondents submit that section 31(2)(c) of the Act only confers the powers to the Minister and such powers constitute administrative action and therefore binding until set aside on judicial review. According to the Respondents, a court cannot compel the Minister to waive his discretionary legislative power and they contend that such an order is contrary to the principle of separation of powers and not warranted in the particular facts before the court. I do not agree with this contention.
13. The next point that the Respondents took was that, in terms of prayer 3 that is sought by the Applicant, there was insufficient information on the founding papers to grant such prayer. The Respondents argued that the financial position of the second Applicant is not pleaded and therefore the court cannot make an order where inadequate information has been put before the court. It is clear from the papers that the second and third Applicants want to come to South Africa to live and for the second Applicant to get married to the first applicant.

14. The respondent further took issue with the urgency of the matter and submitted that this is a classic case of self-created urgency where the Respondents submit that the Second Applicant was divorced already in 2018 and she had full knowledge that her visitor's visa to South Africa will lapse but she failed to approach the South African Embassy in UAE to renew or apply for a visa, instead she elected to travel to Switzerland. The Respondents further submit that the Second Applicant only approached the South African Embassy in Switzerland after the lapse of twenty-three (23) days after the judgment in the UAE.
15. It needs to be noted that the Respondent submitted that they are trying to settle this matter amicably by talking to the Applicants' legal representatives and the Second Applicant in Switzerland. The Respondents have been communicating with the Second Applicant who is currently in Switzerland and have advised her to come and make the necessary application in terms of regulation 9(2)(a).
16. What was peculiar about the situation of the Respondent is that they did not want to commit on paper that they are trying to resolve this matter amicably and also refused to give an undertaking that they will assist the Second Applicant. It appeared that the efforts by the Second Respondents are just made to be seen to be helping the Second Applicant while it is just an exercise of ticking the right boxes.
17. The only opposition mounted by the Respondents is on urgency, because on all other issues that the Respondents are opposing, they only indicate that the court cannot grant that order because discretion is given only to the Minister

without taking the issue any further. This type of arguing does not assist the court in any way.

18. I am persuaded that this matter is urgent and I thus enrol it as an urgent matter. I further find that the joinder and the notice to amend were necessary to these papers and therefore they are admitted.

19. I was also promised by the Applicant's legal representatives that they will keep me informed of the outcome of the application submitted by the Applicant on Thursday the 09th September 2021. Up until the writing of this judgment, I have not received any update on whether the Embassy has finally issued a visa to the Second and Third Applicants or have declined. I therefore make this order without knowing the status of the application as submitted by the Second and Third Applicants in the South African Embassy in Switzerland.

20. In the premise I make the following order:

1. That the Second and Third Applicants be permitted to apply to the First Respondent for a waiver of the requirements of regulation 9(2)(a) of the regulations passed under section 1 of the Immigration Act 13 of 2002 ("the Immigration Act") in terms of the First Respondent's powers under section 31(2)(c) of the Immigration Act within three (3) days of the date of this order.
2. The First Respondent is ordered to accept such waiver application at email address MaMokolo.Sethosa@dha.gov.za.

3. The First Respondent is to consider and decide upon the aforesaid waiver application within three (3) days of receipt thereof and that such decision forthwith be conveyed to the Applicants' attorneys of records at email address Lucy@coetzeeinc.biz or manuel@coetzeeinc.biz or Bianca@coetzeeinc.biz or admin@coetzeeinc.biz.

4. In the event of the First Respondent refusing the Applicants' waiver application:
 - 4.1 The First Respondent shall provide comprehensive reasons for such refusal, to be forwarded simultaneously with the first Respondent's decision to refuse such a waiver; and
 - 4.2 The Applicants shall be entitled to lodge an urgent review application against such waiver application on the same papers, duly amplified.

5. In the event of the First Respondent upholding the Applicants' waiver application:
 - 5.1 The Applicants are ordered to file their section 11(1) visa applications within three (3) days of receipt of the First Respondent's decision, such application to be lodged with Mr M Maluleke (Third secretary, Administration, at the offices of Dirco at Alpenstrasse 29, 3000 Bern 6, which visa application the said Mr Maluleke is ordered to accept; and
 - 5.2 The Second Respondent shall issue/refuse to issue a visa to the Applicants within three (3) days of receipt of the visa application, as set out in paragraph 5.1 above;

6. In the event of the refusal to issue the visas as aforesaid, the Second Respondent is ordered to:

6.1 Provide comprehensive reasons for such refusal, such reasons to be furnished simultaneously with the Second Respondent's decision refusing such visa applications, both such decision and reasons to be conveyed to the Applicants' attorney of record at email address Lucy@coetzeeinc.biz or manuel@coetzeeinc.biz or Bianca@coetzeeinc.biz or admin@coetzeeinc.biz; and

6.2 The Applicants shall be entitled to lodge an urgent review application against such visa refusal on the same papers duly amplified.

7. The Respondents are ordered to pay the costs of this application on attorney and client scale.

EM BALOYI-MERE AJ

This judgment is handed down electronically due to the current pandemic. It will be circulated to the parties by way of electronic mail and by uploading it to the electronic files of this matter on Caselines.

Date of hearing 09th September 2021

Judgment granted on the 14th September 2021

Appearances

Counsel of the Applicants: M Bofilatos SC

Counsel for the Respondents: Adv Lebohang Sefudi