



CONSTITUTIONAL COURT OF SOUTH AFRICA

*Rayment and Others v Minister of Home Affairs and Others; Anderson and Others v
Minister of Home Affairs and Others*

CCT 176/22

Date of Judgment: 4 December 2023

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today the Constitutional Court handed down its unanimous judgment in two matters which were consolidated. For convenience the one will be referred to as the Tereza Rayment matter or application and the other the Richard Anderson matter or application. The judgment is penned by the Chief Justice and agreed by Kollapen J, Madlanga J, Majiedt J, Makgoka AJ, Mathopo J, Potterill AJ, Rogers J and Theron J. In both matters the applicants are adults who apply to this Court, firstly in their personal capacities and, secondly, in their representative capacities as the parents and guardians of their minor children. In each matter the respondents are the Minister of Home Affairs, two officials of the Department of Home Affairs and the Department of Home Affairs. One of the applicants in the Tereza Rayment matter is Mr Tapiwo Tembo.

What was common among the applicants is that they are all foreign nationals who either married to or got involved in good faith spousal relationship with a South African citizen out of which relationship or marriage either a child was born or children were born. It is common cause that their relationships with, or, marriage to, the South African citizens subsequently came to an end or they divorced. The applicants challenged the constitutional validity of a number of provisions of the Immigration Act.

Some of the provisions of the Immigration Act, 2002 the constitutionality of which was challenged in these matters were:

Section 10(6) and (b) which read:

- “(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 status¹ 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. (Emphasis added.)*

In terms of section 11(1) a visitor’s visa was given only to a foreigner.

Section 11(2) which read:

- “(2) *The holder of a visitor’s visa may not conduct work: Provided that the holder of a visitor’s visa issued in terms of subsection (1)(a) or (b)(iv) may be authorised by the Director-General in the prescribed manner and subject to the prescribed requirements and conditions to conduct work.*” (Emphasis added.)

Section 18(2) which read:

- “(2) *The holder of a relative’s visa may not conduct work.*” (Emphasis added.)

Regulation 9(9) which read:

“The exceptional circumstances contemplated in section 10(6)(b) of Immigration Act shall—

- (a) in respect of a holder of a visitor’s visa, be that the applicant—
- (i) is in need of emergency lifesaving medical treatment for longer than three months;

¹ “Status” is defined in section 1 of the Immigration Act as meaning “the status of a person as determined by the relevant visa or permanent residence permit granted to a person in terms of this Act”.

- (ii) is an accompanying spouse or child of a holder of the business or work visa, who wishes to apply for a study or work visa.”

The Immigration Act was to the effect that, when a marriage between a foreign national and a South African comes to an end or when a good faith spousal relationship between a foreign national and a South African comes to an end, the foreign national’s visa lapses. The Act required that such foreign national should cease to work in South Africa and leave the country and apply for a new visa status from outside the country.

The requirement that the foreign national must leave the country and apply for change of his or her visa status from outside South Africa meant that, if he or she was working or carrying on a business, he or she had to leave his or her job and go outside the country and apply from outside the country. This could take many months and, if he or she is not granted another visa status, it might mean that he or she would not be back in South Africa for a long time or permanently. If that foreign national had a child with the South African citizen, it meant that he or she is put in an invidious position where he or she had to either take his child with him or leave the child behind and be separated from the child for a long time. It also meant that a foreign national who is a parent to a minor child who is a South African citizen would no longer be able to support his minor child because he or she would have lost his or her job.

Both in the High Court and in this Court the applicants contended that the Immigration Act infringed their right to dignity in so far as it obliged a foreign national to leave South Africa and apply from outside the country. They also argued that it infringed the right to human dignity as well as the provisions of section 28(2) of the Constitution. The Act also infringed the foreign national’s right to human dignity in so far as it precluded him or her from working. The High Court concluded that, among others, the Act unjustifiably and unreasonably limited the right to human dignity, the right to family life and the child’s right under section 28(2) of the Constitution.

This Court upheld the contentions by the applicants that the Immigration Act was inconsistent with the Constitution and, therefore, invalid to the extent that it precluded a person in the applicants’ position from working in South Africa or carrying on business in South Africa upon the termination of a marriage to or of a good faith spousal relationship with, a South Africa citizen. In reaching this conclusion, this Court followed established precedents existing in this Court such as *Dawood* and *Nandutu*. This Court could not find any justification for the limitation or infringement of these fundamental rights. Accordingly, a declaratory order was to be made.

Mr Tapiwo Tembo

Mr Tapiwo Tembo is a Zimbabwean who had entered and left South Africa illegally many times. When he came to South Africa for the first time, he entered South Africa illegally. He had been declared an undesirable person in terms of section 30 of the Act. He got into a romantic relationship with a South African citizen and they got a child. Mr Tembo also brought an application in his representative capacity as a parent and guardian of the child. Mr Tembo brought a review application in the High Court to have the Director-General's decision to declare him an undesirable person reviewed and set aside on the basis that the Director-General had not considered the interests of Mr Tembo's minor child in declaring him an undesirable person and that for that reason the decision should be reviewed and set aside.

The High Court dismissed Mr Tembo's application on the basis that he approached the Court with dirty hands, given his illegal conduct on many occasions when entering and leaving the country. This Court has also concluded that Mr Tembo's application for leave to appeal against the decision of the High Court dismissing this application should be refused with costs on two grounds. The first ground is the "dirty hands principle". The second is that Mr Tembo did not exhaust his internal remedies before approaching the High Court. He could have appealed to the Minister against the decision of the Director-General but he failed to do so. His explanation as to why he did not do so was not sound.

In the circumstances Mr Tembo's application for leave to appeal was refused with costs. The order that the Chief Justice read was largely an order that has been agreed to between the parties even though the Chief Justice has amended or altered it here, and there, to align it with this judgment and his conclusions on certain aspects of the matter. The Chief Justice was not able to confirm the order that was made by the High Court because that order was seriously flawed. Nevertheless the Chief Justice made an order that he believed the High Court should have made. There were some aspects of the High Court order against which some of the applicants appealed. Their appeals succeeded to the extent reflected in the order of this Court. The provisions of the Act that limit the rights mentioned earlier are not reasonable or justifiable. The Chief Justice made an order of constitutional invalidity which is to be suspended for two years. A reading-in was also made.