CASE REVIEW

The Implications of Nandutu and Others v Minister of Home Affairs and Others

Obdiah Mawodza

On 28 June 2019, South Africa's Constitutional Court handed down a judgment that nullified a decision of the Western Cape High Court and declared regulation 9(9)(a) of the Immigration Regulations constitutionally invalid as it discriminates against a foreign spouse and/or a child of a South African citizen or permanent resident. The decision of Nandutu and Others v Minister of Home Affairs and Others [2019] ZACC 24 (Nandutu case) is ground-breaking in protecting, respecting and fulfilling the rights of a foreign spouse and/or a child of a South African citizen or permanent resident to dignity and family life.

The migration crisis in South Africa

Migration remains one of South Africa's most contentious issues. The 2016 Community Survey by StatsSA reveals that almost 1.6 million immigrants are living in South Africa, a decline from 2.2 million in 2011. StatsSA also reveals that the decline was unexpected but could be due to foreign migrants not disclosing their true nationalities for safety reasons, given the resurgence of xenophobic attacks since 2008. Almost 75 per cent of foreigners in South Africa come from Africa, with the Southern African Development Community accounting for 68 per cent of those migrants. Many of the foreigners come from poor, war-torn or politically unstable countries and migrate to South Africa to seek refuge, better standards of living, employment opportunities, and the survival and development of their loved ones.

The search for greener pastures in South Africa has its own challenges, however. The local host communities have become hostile towards foreign nationals, as evidenced by the resurgence of xenophobic attacks since 2008. Why do South Africans attack foreign nationals? A 2017 cross-sectional survey by the Human Sciences Research Council (2018) revealed that locals believe foreigners (i) pose a threat to the labour market, (ii) use up resources such as housing, and (iii) have unfair business practices in their shops and small business.

These are economic reasons; however, political leaders are fuelling xenophobia by blaming migrants for the problems that confront South Africans. This anti-immigrant political rhetoric is now a political tool to maintain political power and relevance. For example, the 2015 xenophobic attacks came after Zulu King Goodwill Zwelithini called for 'those who come from outside to please go back to their countries', on the grounds that locals cannot compete with foreigners for the few economic opportunities available (Sibanda 2019).

Similarly, in November 2018, former Minister of Health Aaron Motsoaledi urged the government to re-look at its immigration policies because 'our hospitals are full, we can't control them … and when they get admitted in large numbers, they cause overcrowding, infection control starts failing' (Mbhele 2018). On the presidential campaign trail in April 2019, President Ramaphosa bemoaned that foreigners arrive in the country and set up businesses without valid licenses

and permits.

Kunene (2019) argues that these inflammatory comments breed anger among locals, which is then unleashed by attacking foreigners out of frustration at their lack of jobs, housing, health services, and employment. According to the Human Sciences Research Council (2018), there is no evidence to support the belief that foreigners are the cause of crime, that they unduly benefit from the government, or that they cause unemployment in the country. Contrary to this popular belief, a former Home Affairs minister, Malusi Gigaba, acknowledged foreigners for their positive contribution to South Africa's economy. The political scapegoating of foreigners shifts the blame onto foreigners for governmental failures to provide basic services, curb unemployment and close the inequality gap, as evidenced the Human Sciences Research Council's survey.

The reality is that, even after 25 years of democracy, the inequality gap persists and the dream of a rainbow nation remains a far-fetched prospect for many ordinary black South Africans. Corruption, nepotism, and lack of political will continue to marginalise them, in addition to the fact that white people own the means of production. As a result, the government has resorted to taking a regressive stance on asylum-seekers by adopting and implementing anti-immigrant laws and regulations such as regulation 9(9)(a).

Facts and judgment

The first applicant, Ms Nandutu, was a Ugandan citizen married to and resident with the second applicant, Mr Tomlinson, a South African permanent resident. Similarly, the third applicant, Mr Demerlis, a Greek citizen, was in a life partnership with the fourth applicant, Mr Ttofalli, a South African citizen.

Ms Nandutu entered South Africa on a temporary visitor's visa while pregnant with Mr Tomlinson's child. While in the Republic, Ms Nandutu applied for a spousal visa to remain in the country with her husband and son. The Department of Home Affairs rejected her spousal visa application, stating that section 10(6) of the Act does not allow temporary visa-holders, such as Ms Nandutu, to apply for a change in visa status from within South Africa – instead they have to return to their home countries to make such application.

Mr Demerlis' application for a spousal visa was also unsuccessful for similar reasons. The applicants could not invoke regulation 9(9)(a) of the immigration regulations, which exempts visitor's visa-holders from applying for a change in visa status from within South Africa. Regulation 9(9)(a) gives such exemptions to visitors who are either in need of emergency lifesaving medical treatment for longer than three months; or spouses or children who accompany business or work visa-holders and who wish to apply for a study or work visa. The regulation excludes spouses, life partners and children of a South African citizen or permanent resident from applying for a change in visa status while in the Republic.

Aggrieved by the outcome of their visa applications, the applicants approached the Western Cape High Court (High Court) to have regulation 9(9)(a) declared inconsistent with the Constitution. The applicants argued that the lack of an exception that catered for holders of visitor's visas who are spouses or children of South African citizens or permanent residents limited their constitutional right to dignity. The High Court dismissed the application and held that regulation 9(9)(a) did not infringe the right to dignity and was capable of passing constitutional muster. Unconvinced about the decision of the High Court, the applicants applied for leave to appeal directly to the Constitutional Court for relief.

The issues for determination were:

- Should leave to appeal directly to the Constitutional Court be allowed, given that it entails bypassing the Supreme Court of Appeal?
- Is regulation 9(9)(a) of the immigration regulations constitutionally invalid to the extent that it does not extend 'exceptional circumstances' to include those where an applicant is the spouse or child of a citizen or permanent resident?
- What is the appropriate remedy in this case?

The majority judgment was written by Mhlantla J and concurred with by Cameron J, Jafta J, Khampepe J, Madlanga J, Nicholls AJ and Theron J. In it, Mhlantla J granted applicants leave to appeal directly to the Constitutional Court. In delivering its judgment,

the Constitutional Court held regulation 9(9)(a) as constitutionally invalid because it unjustifiably limited the applicants' constitutional right to dignity and the right to consider the best interests of a child paramount in every matter concerning him or her. It held, furthermore, that an order suspending the constitutional invalidity of the regulation, coupled with an interim reading-in, was appropriate in order for the legislature to cure the invalidity.

Accordingly, the majority judgment (i) declared regulation 9(9)(a) constitutionally invalid, (ii) suspended the declaration of invalidity for 24 months, and (iii) ordered a reading-in on an interim basis of words that have the effect of adding to the exceptions under the regulation spouses or children of South African citizens or permanent residents. This ensures that spouses or children of South African citizens or permanent residents on a visitor's visa can apply for a change in visa status while in the Republic.

The minority judgment – written by Froneman J and concurred with by Mogoeng CJ and Ledwaba AJ – would not have granted applicants leave to appeal directly to the Constitutional Court. It held that section 21(3) of the Constitution only gives citizens the right to enter, to remain in and to reside anywhere in the country. Accordingly, visitors cannot legitimately expect to be granted section 21(3) rights in the absence of cogent information that they may be endangered or prejudiced by a policy requiring them to return home.

Implications of the judgment

This case is significant for a number of reasons. The first is that it is an example of litigation instituted in the public interest both of South African citizens and of their foreign spouses. Walia (2009) describes public interest litigation as 'expression for the sufferers of silence' as well as 'a blessing to the downtrodden, oppressed sections of society'. Accordingly, the applicants sought to engage the jurisdiction of the Constitutional Court because they firmly believed they were the sufferers of other foreign spouses' silence, and that they were oppressed by regulation 9(9)(a) as it infringed their right to dignity and the rights of children enshrined in sections 10 and 28 of the Constitution, respectively. The respondents argued that the matter did not warrant a direct leave to appeal, but rather adjudication by the Supreme Court of Appeal.

After considering all the facts, the Constitutional Court held that the matter before it raised an important constitutional issue the outcome of which impacts on other families in a similar position as the applicants. Section 167(3)(b) of the Constitution also empowers the Constitutional Court to grant a leave to appeal if the matter before it raises a contentious point of law of general public importance. Indeed, the matter before the Court was whether it is constitutionally permissible to compel all foreign spouses and children of South African citizens or permanent residents holding visitor's visas to leave South Africa to apply for a change of visa status. The Court appositely held that it was in the interests of the public to grant the appeal and adjudicate the matter. The decision bodes particularly well in furthering the interests of vulnerable groups, such as foreign spouses and children, and protecting their human rights.

Secondly, the ruling exposed the discriminatory scope of regulation 9(9)(a) against foreign spouses and children of South Africans. Before this ruling, regulation 9(9)(a) provided:

> The exceptional circumstances contemplated in section 10(6)(b) of the 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;
>
> (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 respondents had argued that the omission of a foreign spouse or child of a South African citizen or permanent resident served to prevent fraudulent marriages and undesirable persons from entering the country. Similarly, the High Court had also held that regulation 9(9)(a) prevents a marriage to a foreigner within South Africa 'from becoming a loophole for criminals to circumvent the immigration restrictions, health risk or a compromise to the welfare of the people of the Republic'.

Questions that arise from this short-sighted premise include why an accompanying spouse or child of a holder of the business or work visa is not subjected to the same requirements if it is really about circumventing fraudulent marriages and undesirable persons. Why does the regulation allow the spouses

of foreign holders business and work visas to change status from within South Africa, but require spouses of South African citizens to apply outside of South Africa?

Arguably, foreign spouses and children of South African spouses were treated less favourably than those of holders of business and work visa for economic reasons. It is submitted that the differential treatment existed because the holder of the business or work visa brought investment or contributed to economic growth, whereas spouses of South Africans residing in the Republic were associated with overstaying or bogus asylum-seekers who seek to acquire legal status through marriages of convenience or acquire identity documents fraudulently.

In support of this view, the Constitutional Court held that the respondents had failed to show how the requirement imposed upon spouses and children of citizens or permanent residents was proportionate in preventing fraudulent marriages. Of concern was the existence of this limitation despite respondents' acknowledging witnessing a decline of fraudulent marriages as well as having processes in place that detect fraudulent marriages when visa applicants are within the country. Therefore, the Constitutional Court rightly held the respondents had less restrictive means than regulation 9(9)(a) to prevent fraudulent marriages and/or protect the interests of South Africa. Rightly so, regulation 9(9)(a) was found constitutionally invalid to the extent that it did not extend the rights accorded by means of the exceptional circumstances contemplated in section 10(6)(b) of the Immigration Act to the foreign spouse or child of a South African citizen or permanent resident.

The third seminal impact of the Constitutional Court's decision to expand the scope of regulation 9(9)(a) to include ***'(iii) … the spouse or child of a South African citizen or permanent resident'***. The Constitutional Court took consideration of striking a balance on (i) the need to afford appropriate relief to successful litigants and (ii) the need to respect the separation of powers. The Constitutional Court rightly struck the balance by, first, granting applicants' interim reading-in relief, which now enables foreign spouses on a visitor's visa to apply for a change of status while in South Africa. Secondly, it gave the legislature two years to rectify regulation 9(9)(a). Had the Constitutional Court not intervened, these foreign spouses would have remained marginalised by the immigration rules, which would also violate the right of their South African spouses to family life and dignity.

Finally, the decision ensures that others who were or are in a similar position no longer have to incur unwarranted travel expenses in going back to their home countries to apply for a change of status. The double jeopardy of applying in the home country was that applicants would have been required to submit their passports as part of the application for a change of status. This has the negative effect of separating foreign spouses from their South African counterparts and/or children. Where their South African spouses cannot leave the country with their spouses, regulation 9(9)(a) still causes separation of family, whose reunion was dependent on the expediency of the other country in giving a decision on the application. In Zimbabwe, for example, visa applications can take up to eight months before a decision is finalised. Thus, this ruling is a blessing to the downtrodden – foreign spouses in this case – who would have had to endure long spells of separation from their South African spouses.

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