



## **Response**

**8th December 2023**

### **The Foreign Parents Battle**

On 4<sup>th</sup> December the Constitutional Court handed down a unanimous judgement in what has colloquially become known as the 'foreign parents battle'. The apex court delivered its judgment in a dispute over sections of the Immigration Act and its regulations that prevented foreign parents from remaining in South Africa to care for their children after separating from a South African spouse. This judgement has been keenly anticipated for some time. In essence the court declared sections 10(6), 11(6), and 18(2) of the Immigration Act 13 of 2002, and regulation 9(9)(a) of the Immigration Regulations, 2014, published under GN R413 in the Government Gazette, inconsistent with the Constitution and therefore invalid.

A brief background note. In June 2022, the Western Cape High Court declared the Act invalid on the basis that the law violated various constitutional rights of divorced foreign parents, where the foreign spouse had been in South Africa on a spousal visa. The Immigration Act required that, since the spousal relationship no longer existed, such parents should cease to work in South Africa, leave the country, and apply for a new visa status from outside the country. This requirement meant that a foreign parent would, amongst other disadvantages, be put in an invidious position where they had to either take their child with them or leave the child behind and be separated from the child for a long time while awaiting authorisation to apply for status, which could take many months. Indeed, the length of time required for the processing of such documents could reportedly run into years. The bottom line was that a foreign national who was a parent to a child who was a South African citizen, would no longer be able to support their off-spring because they would have lost their job.

The High Court, therefore, suspended the law's declaration of invalidity for two years and ordered the Department of Home Affairs to 'consider' allowing the applicants to remain in South Africa under section 32(1) of the Immigration Act. The matter was then brought before the Constitutional Court for confirmation, and arguments were heard in February this year.

Delivering the unanimous judgement, Chief Justice Raymond Zondo confirmed that the Act was inconsistent with the Constitution and was, therefore, invalid to the extent of the inconsistency. He went on to say that the court's declaration of invalidity would be suspended for 24 months to enable the competent authorities to correct the constitutional defects in the Immigration Act and regulations as identified in the judgment.

Justice Zondo found as follows: "There can be no doubt that the provision in the Immigration Act that precludes from working or conducting a business a foreign national whose spousal visitor's visa has expired because the spousal relationship has ended quite clearly limits not only the child's right to human dignity but also the right to human dignity of the parents. Indeed this provision also constitutes a limitation of the foreign national's right to human dignity."

He went on to add, "should Parliament fail to correct the constitutional defects in the Immigration Act within 24 months from the date of this judgment, and should the first respondent fail to correct the constitutional defects in the regulations within 24 months from the date of this judgment, the reading-in of the Immigration Act and the regulations in this order shall become final." The respondents, including the Minister and the Director-General, were ordered to pay the costs of the applications.

One cannot but note that in October, less than two months before this judgement, the Constitutional Court also had reason to castigate – in very strong terms – Parliament, the DHA, the Minister and the DG for failing to act on another of its judgements relating to the same Immigration Act. They had not effected the changes required by that judgement within the prescribed period. In that instance the changes, which were due to be completed within two years, were still not done six years later. It is absolutely imperative that these changes, which affect so many people’s lives, and which place unnecessary burdens on already difficult situations, be completed timeously.

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