CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 15/03

MINISTER OF HOME AFFAIRS	Applicant
versus	
EISENBERG & ASSOCIATES	Respondent
In re:	
EISENBERG & ASSOCIATES	Applicant
and	
MINISTER OF HOME AFFAIRS	First Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Second Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Third Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Fourth Respondent
DEPUTY PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Fifth Respondent

Heard on : 20 May 2003

Decided on : 27 June 2003

JUDGMENT

CHASKALSON CJ:

Introduction

[1] On 25 February 2003, the respondent launched an urgent application in the Cape High Court asking for an order declaring the immigration regulations made on 21 February 2003 in terms of the Immigration Act[1] ("the Act") to be unlawful, inconsistent with the Constitution and invalid.

[2] On 11 March 2003, the High Court granted the order sought by the respondent. The High Court refused to suspend the order of invalidity. It held that the Aliens Control Regulations made under the Aliens Control Act[2] would operate in conjunction with the Immigration Act and would fill the gap adequately until regulations were made lawfully in terms of the Immigration Act. The reasons for the order were provided later in a judgment delivered on 27 March 2003.[3]

[3] The Minister applied for a certificate in terms of rule 18 of the rules of the Constitutional Court and at the same time for conditional leave to appeal against the order made to the Supreme Court of Appeal. The High Court issued a negative certificate, stating that there was no reasonable prospect that this Court would reverse or materially alter the orders made by the High Court and that it was therefore not in

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[1] Act 13 of 2002.

[2] Act 96 of 1991. These regulations remained in force by virtue of section 52(2) of the Act which provides:

> "Subject to this Act, any regulations adopted under the previous Act shall remain in force and effect until repealed or amended."

[3] *Eisenberg & Associates v Minister of Home Affairs and Others*, unreported judgment of the Cape High Court, case no. 1301/03.

the interests of justice for an appeal to be brought directly this Court. It also refused leave to appeal to the Supreme Court of Appeal.

[4] An application for leave to appeal to this Court was lodged on 9 April 2003. The application was set down for hearing on 20 May 2003 and the parties were directed that the written argument must be sufficient to enable the Court to dispose of the application without having to hear further argument, should leave to appeal be granted.

The issues in the High Court

[5] The substantive relief claimed by the respondent in its notice of motion in the High Court was in the following terms:

(a) Declaring the Immigration Regulations made by the Minister on 21 February 2003 published in Government Gazette No. 24952 (Notice 487 of 2003) to be unlawful and inconsistent with the Constitution of the Republic of South Africa, Act 108 of 1996 and invalid.

(b) Declaring that before the Minister is empowered to make immigration regulations he is required to comply with the provisions of section 7 of the Immigration Act 13 of 2002.

[6] During the course of the proceedings in the High Court, the respondent sought to amend the relief claimed by him to include an order invalidating in part the Proclamation made by the Deputy President which brought the Act into operation in

stages.[4] The High Court refused to make such an order, holding that the issue had not been properly raised in the papers and that in any event, such relief was not justified in the circumstances of the case. No appeal has been noted against that decision and the matter must therefore be dealt with on the basis that the Proclamation is valid and the various provisions of the Act came into force on the dates determined by the Deputy President.

[7] Section 7 of the Act empowers the Minister to make regulations and deals in some detail with the procedures to be followed when this is done. The procedures involve a consultative process in which the public and the Immigration Advisory Board ("the Board") have an important role. Section 52 provides for regulations to be made before the Board is constituted.

[8] The principal issue between the parties was whether the public consultative process required by section 7 has any application to regulations made under section 52. The High Court held that it did and that the immigration regulations were invalid because this procedure had not been followed. It made an order in terms of the two prayers of the notice of motion referred to in paragraph [5] above.

The legislative framework

[4] Id at paras 2-3. What the respondent in effect sought to place in issue was the decision to bring the operative provisions of the Act into force on 12 March 2003.

[9] It will be convenient to refer first to sections 7 and 52 and certain related provisions of the Act relevant to the interpretation of these two sections. Other issues raised in the High Court are dealt with later in this judgment.

[10] Section 7 provides:

> "**7 Regulation making**
>
> (1) The Minister shall have the power to make regulations called for, or conducive to, the implementation of this Act and in making regulations in terms of this Act, the Minister shall−
>
> (a) publish and table in Parliament his or her intention of adopting regulations specifying their subject matter and soliciting public comments during a period not shorter than 21 calendar days;
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> (b) having considered public comments received, publish and table in Parliament draft regulations soliciting further comments during a period not shorter than 21 calendar days; and
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> (c) publish the final regulations together with a summary of comments which have not been accommodated and the reasons for their rejection.
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> (2) Only subsection (1)(b) and (c) shall apply in respect of any regulations which this Act requires to be prescribed from time to time.
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> (3) The Board may request the Minister to−
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> (a) reconsider any intended regulations prior to their promulgation; or
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> (b) consider the need to adopt, repeal or amend regulations.
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> (4) Regulations shall be consistent with this Act, and shall not disregard the advice of the Board and public comments in an arbitrary or capricious manner: Provided that any regulation made in terms of this section shall be tabled within 30 days after its promulgation if Parliament is in session and if Parliament is in recess when the regulation is published, within 12 days after the resumption of the session."

[11] This section must be read with the definitions in section 1 which include the following:

> "'Board' means the Immigration Advisory Board contemplated in section 4 of this Act;
>
> . . .
>
> 'prescribed' means provided for by regulation, the verb 'to prescribe' has a corresponding meaning and 'prescribed from time to time' refers to section 7(2);
>
> . . .
>
> 'publish' means publish by notice in the Government Gazette and, to the extent possible and feasible under the circumstances, convey by mail or email to parties or stakeholders who have requested their inclusion or have been included in mailing lists to be maintained by the Department in respect of subject matters in respect of which public input is called for by this Act, prescribed, advisable and expedient;
>
> 'regulations' means general rules adopted by the Minister after consultation with the Board in terms of this Act and published;".

[12] Read in the light of these definitions the regulations referred to in section 7 are regulations made after consultation with the Board. The power vested in the Minister by this section is a power to make such regulations. In so doing the Minister is obliged to follow the consultative process set out in section 7 and to publish the regulations in the manner required by the definition of "publish".

[13] Section 7 distinguishes between regulations that the Act requires to be prescribed from time to time, and other "regulations called for, or conducive to, the

implementation of this Act". In the case of regulations that are not required to be prescribed from time to time, the Minister must adopt the following procedure:

(a) Give notice in the Government Gazette and by e-mail or mail to persons on a mailing list to be maintained by the Department of Home Affairs of the intention to make such regulations.[5]

(b) Consider comments received following the publication of the notice of intention to make the regulations.

(c) Prepare draft regulations. Once again notice must be published in the gazette and circulated to people on the mailing list. The notice must solicit further comment and allow at least twenty one days for this purpose.[6]

(d) Adopt final regulations after consultation with the Board. The regulations must be published by notice in the gazette and by e-mail to persons on the mailing list, together with a summary of the comments that have not been accommodated and the reasons for their rejection.[7]

(e) The regulations must be consistent with the Act and shall not disregard the advice of the board and public comments "in an arbitrary or capricious manner".[8]

(f) The final regulations must be tabled in Parliament within 30 days of their promulgation.[9]

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[5] Section 7(1)(a) read with the definition of "regulations" and "publish" in section 1.

[6] Section 7(1)(b) read with the definitions of "regulations and "publish" in section 1.

[7] Section 7(1)(c) read with the definition of "publish" and "regulations" in section 1.

[8] Section 7(4).

[9] Id

[14] Where regulations are required by the Act the procedures set out in paragraph [13] (a) and (b) above are not applicable. The process starts with the preparation of draft regulations which is done after consultation with the Board. The procedures set out in paragraph [13] (c), (d) (e) and (f) above are, however, applicable.[10]

[15] These protracted procedures deal with regulations made in terms of section 7. I have already drawn attention to the fact that the regulations which the Minister is empowered to make in terms of this section are defined in section 1 as being regulations made after consultation with the Board. Section 7 contemplates that the Board has been constituted and does not deal with the making of regulations before that has happened. This is dealt with in section 52 to which the special definitions in section 51 are applicable.

[16] Section 52 is in the last chapter of the Act which bears the heading "Transitional Provisions." Section 51, which is the first section of this chapter, makes provision for the special definitions to be applicable to the interpretation of sections 52 and 53. Under the heading "transitional definitions" this section provides:

> "In respect of sections 52 and 53 the following additional or different definitions shall apply, unless the context requires otherwise:
> (i) 'prescribe' means to provide through regulations and 'prescribed' has a correspondent meaning;
> (ii) 'previous Act' means the Aliens Control Act, 1991 (Act 96 of 1991);

[10] Section 7(2) read with the definition of "prescribed".

(iii) 'published' means published in the Government Gazette; and

(iv) 'regulations' means both general and specific rules adopted by the Minister and published."

[17] The provisions of sections 52 and 53 are as follows:

"**52. Functions of Department and Board**

(1) Until the Board is duly constituted and operational, any regulation required in terms of this Act shall be prescribed.

. . .

53. Existing Permits

(1) Any permanent residence permit validly issued in terms of the previous Act shall be deemed to have been issued in terms of, and in compliance with, this Act.

(2) Any permit issued in terms of the previous Act for a determined period shall continue in force and effect in accordance with the terms and conditions under which it was issued, but may only be renewed in terms of this Act, provided that-

(i) the Department may waive the requirement to submit a new application , and

(ii) for good cause the Department may authorise a permit to be renewed in terms of the previous Act.

(3) Any exemptions for an undetermined period granted in terms of section 28(2) of the previous Act shall be deemed a permanent residence permit for the purposes of *this* Act, and any exemption granted for a determined period shall continue in force and effect in accordance with the terms and conditions under which it was issued.

(4) Permits issued under section 41 of the previous Act shall continue in force and effect in accordance with the terms and conditions under which they were issued, but may not be renewed.

The coming into force of the Act

[18] The Act was promulgated on 31 May 2002. At that time immigration control was regulated by the Aliens Control Act. The Act, which repeals the Aliens Control Act, was to come into force "on a date determined by the President by Proclamation in the Government Gazette".[11] Once that happened immigration control would be regulated by the Act and save for certain of its regulations that might continue to be relevant, the provisions of the Aliens Control Act would cease to have effect.[12]

[19] Almost a year after the Act had been promulgated the process of bringing it into operation was commenced. This was done in stages.[13] On 19 February 2003 a notice was published in the Gazette dealing with how this was to happen.[14] The Proclamation was made by the Deputy President who was then acting as President because of the absence of the President from the Republic.[15] The Proclamation provided that sections 7 and 52 would come into force on 20 February 2003; section 4,

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[11] Section 55(1) of the Act.

[12] In terms of Section 52(2) of the Act, regulations adopted under the Aliens Control Act would remain in force until repealed. This is referred to more fully in para [57] below.

[13] This is sanctioned by section 13(3) of the Interpretation Act 33 of 1957 which provides:

> "If any Act provides that that Act shall come into operation on a date fixed by the President or the Premier of a province by proclamation in the Gazette, it shall be deemed that different dates may be so fixed in respect of different provisions of that Act."

[14] R13 of 2003, RGN 7589 in GG 24951.

[15] Sections 90(1) and (2) of the Constitution provide:

> "**90. Acting President**
> (1) When the President is absent from the Republic or otherwise unable to fulfil the duties of President, or during a vacancy in the office of President, an office-bearer in the order below acts as President:
> (a) The Deputy President.
> (b) A Minister designated by the President.
> (c) A Minister designated by the other members of the Cabinet.
> (d) The Speaker, until the National Assembly designates one of its other members.
> (2) An Acting President has the responsibilities, powers and functions of the President."

which establishes the Board, would come into force on 26 February 2003, and the remainder of the Act, save for section 37, would come into force on 12 March 2003.[16] Section 37 makes provision for the establishment of immigration courts and is not relevant to the issues raised in this appeal.

[20] The regulations that are in dispute in this appeal were promulgated on 21 February 2003. That was the day after sections 7 and 52 of the Act had come into force, five days before section 4, establishing the Board, was brought into force, and nineteen days before the rest of the Act came into force. The timing of these steps seems to have been deliberate and to have had the purpose of ensuring that the regulations were promulgated before the Board had been established.

The proceedings in the High Court

[21] The matter was dealt with in the High Court on the basis that the Proclamation was valid, and that the various sections of the Act had come into force on the dates fixed by the Deputy President.

[22] The notice of 21 February 2003 in terms of which the regulations were promulgated stated that they had been made by the Minister "in terms of section 52 read with section 51" of the Act. At that time section 51 had not yet formally been

[16] The respondent applied for an amendment to enable him to challenge the validity of the Proclamation in so far as it fixed 12 March 2003 as the date of commencement of the operative provisions of the Act. This application was refused. See paragraph [6] above.

brought into force and this was one of the factors relied on by the respondent in the High Court in challenging the validity of the regulations.

[23] In addition, the respondent contended that the Minister had failed to comply with the procedures prescribed by section 7 of the Act. The Minister disputed that section 7 was applicable to regulations made in terms of section 52, and contended that he was therefore not under any obligation to follow such procedures.

[24] The Minister also challenged the respondent's standing to bring the application. He contended that the respondent was not affected by any of the provisions of the regulations and had no interest in having them set aside.

The judgment of the High Court

[25] The High Court held that the respondent had standing to bring the application. It is a firm of attorneys whose practice is mainly concerned with immigration law. It would have been entitled to receive notice and to comment on the regulations if the section 7 procedures were applicable and had been followed. The issues raised by it were not academic or hypothetical. If it had been denied standing there would have been no way in which anyone could have brought these issues before the Court. In the circumstances, so the Court held, the respondent was entitled to bring the application both in its own interest and in the public interest.[17]

[17] High Court judgment, above n 3 at paras 25-6

[26] On the merits of the dispute the Court held that the only difference between regulations made under section 7(1) and section 52(1) was that the Board had a role in the former but not the latter. It rejected the argument that the provisions of section 7 were not applicable to regulations made under section 52, holding that Parliament could not have contemplated that the Minister would have unfettered power to make regulations pending the coming into operation of the Board.[18]

[27] Despite being requested to do so by the Minister, the High Court refused to exercise its powers under section 172(1)(b)(ii)[19] of the Constitution to suspend the order of invalidity, holding that the regulations under the old Act, kept in force by section 52(2) of the Act, would fill the gap adequately until new regulations were made lawfully.[20]

Standing

[28] In their argument to this Court counsel for the Minister accepted that the respondent has standing to challenge the constitutionality of the regulations. I agree. I do so because the constitutional challenge is based on the failure by the respondent

[18] Id at para 47.

[19] Section 172(1) of the Constitution provides as follows:

> "When deciding a constitutional matter within its power, a court—
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
> (b) may make any order that is just and equitable, including—
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[20] High Court judgment, above n 3 at paras 61-3.

to comply with the notice and comment provisions of section 7 of the Act. The crisp issue is whether the section 7 procedures were applicable to the regulations made by the Minister. The respondent would have had a right to comment on the draft regulations if section 7 were applicable. It had an interest as a member of the public in asserting the right that it claimed to have and had standing to raise that issue in its own interests. I base my decision on that ground. It is not necessary therefore to say anything about the public interest standing asserted by the respondent.

The principal issues in the appeal

[29] The Minister contended that section 7 is designed to deal with the making of regulations after the Board is operational and that section 52 is designed to deal with the making of regulations before the Board is operational. They are separate and distinct provisions and should not be conflated.

[30] In developing this argument, counsel for the Minister contended that section 52 empowers the Minister to make regulations during the "transition". It must be read with the special definitions in section 51 that are applicable to its provisions. Thus read the section contemplates that the initial regulatory regime will be established by the Minister without consultation and without any obligation to table draft regulations in Parliament or to give notice to persons on the departmental mailing list. This flows from the specific wording of the sections, and the fact that the procedure involving notice and consultation required by section 7 and the section 1 definitions, are not repeated in sections 51 and 52.

[31] The respondent's argument proceeded along the following lines. Section 7(1) vests the power to make regulations in the Minister and prescribes the procedure to be followed "in making regulations in terms of this Act". This prima facie applies to regulations made under section 52 as well as regulations made under section 7.

[32] The respondent contended that the considerations that call for notice to be given to Parliament and for the public to be consulted on draft regulations prior to the making of final regulations are equally applicable to regulations made before the Board is constituted. In fact there may even be greater need for such consultation when the Board is not in existence than would be the case after it is operational.

[33] The respondent further contended that if the Minister's construction of the Act is adopted he would be able to make comprehensive regulations under section 52. There is no provision of the Act that would require such regulations to be reviewed or replaced after the Board is constituted and operational which means that section 52 regulations could remain in place indefinitely. The basic immigration regime will then have been established by the Minister without consultation, and the elaborate provisions for consultation made in section 7 will have application only to amendments to the regulations.

The interpretation of section 52

[34] Section 52 is in a chapter that deals with transitional provisions. It makes provision for regulations to be made prior to the Board being in a position to perform the functions assigned to it under the Act. Once the Board is constituted and becomes operational section 52 ceases to be applicable. In terms of section 52(3) the Board must be convened within 90 days of the Act coming into force. Section 52(1) provides that:

> "Until the Board is duly constituted and operational, any regulation required in terms of this Act shall be prescribed."

If the section is construed in accordance with the special definitions of "prescribe", "published" and "regulations" that are applicable, it would read as follows:

> Until the Board is duly constituted and operational any regulation required in terms of this Act shall be prescribed through general and specific rules adopted by the Minister and published in the Government Gazette.

Read thus, the section does not require consultation with the Board or compliance with the extensive notice provisions demanded by section 7 read with section 1.

[35] This is consistent with section 7 and the definitions applicable to it. If the definition of "regulations" in section 1 is taken into account in construing section 7, the power vested in the Minister by this section is a power to make those regulations that are adopted after consultation with the Board. The Minister is not empowered by this section to make regulations before the Board is constituted. It is precisely for this reason that the transitional provisions of section 52 are necessary.

[36] The decision of the High Court, and the respondent's argument in this Court, requires the section 51 definitions, and not the section 1 definitions, to be applied to section 7 and the rest of the Act during the pre-board period. In effect section 51 would then have to be read as if it said:

> Until the Board is duly constituted and operational the definitions in section 51 shall apply in place of the corresponding definitions in section 1.

But this is not what section 51 says. It makes provision for special definitions for the purposes only of sections 52 and 53, and is not reasonably capable of being construed in any other way.

[37] It is also not possible to read into section 7 a stipulation to the effect that until the Board is constituted the provisions pertaining to the Board's role in the regulation making process shall have no application. That would not only be contrary to the clear language of the section read with the definition of regulations applicable to it, but would also be inconsistent with section 52 which deals specifically with how regulations are to be made during the pre-Board period. What is more, on that construction, the whole of section 51 and section 52(1) would be unnecessary.

[38] In its judgment the High Court suggests, incorrectly, that absent a process of public comment, the Minister would have had "unfettered power" to make interim regulations of whatever nature. In such circumstances members of the public

> "might simply be confronted with arbitrary, capricious or even oppressive regulations as a *fait acompli* and would be compelled to bide their time until new or amended

> regulations are duly made in terms of section 7. By the time the so-called 'interim' regulations have been supplanted by such new regulations, untold damage might already have been caused and suffered. Such a situation could never have been envisaged by the legislature when formulating and finalising the new Immigration Act. It would be in conflict with the most basic of the fundamental and eternal values underlying our Constitution and, indeed, required by the Rule of Law and the precepts of legality."[21]

[39] The Minister's powers are not unfettered. The making of regulations is an exercise of public power and as such is subject to constitutional control.[22] The proposition asserted by the High Court in the passage that I have cited is not only inconsistent with the Constitution, but is also inconsistent with the provisions of section 52 which, read with the section 51 definitions, empowers the Minister only to adopt regulations "required in terms of the Act". I would add that no suggestion has been made that any of the regulations in the present case are oppressive, arbitrary, capricious or inconsistent with the rights protected by the Constitution. If such an assertion had been made and established the regulations concerned would have been struck down on those grounds. Indeed one of the reasons for passing the Immigration Act seems to have been to adopt a system of immigration control more consistent with the Constitution than that which previously existed and had been the subject of several successful court challenges.[23]

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[21] Id at para 47.

[22] *Pharmaceutical Manufacturers Association of SA: in Re Ex Parte President of the Republic of South Africa* and Others 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 20.

[23] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (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); 2000 (8) BCLR 837 (CC); *Booysen and Others v Minister of Home Affairs and Another* 2001 (4) SA 485 (CC); 2001 (7) BCLR 645 (CC).

[40] I appreciate, however, the force of the respondent's argument that on the construction contended for by the Minister he was able to establish the initial regulatory regime without consultation with the Board and without the public participation contemplated by the Act for the making of regulations.

[41] Counsel for the Minister sought to counter this argument by contending that it is implicit in the Act that regulations made under section 52 will be of an interim nature and will be replaced by "permanent" regulations once that is possible. They contended that the use of the section 52 power for any other purpose would be an abuse of power and invalid.

[42] That question need not be decided now and may never arise. In his answering affidavit the Minister describes the regulations as the bare minimum necessary to bring into operation the new system of immigration control contemplated by the Act. He says that regulations running to hundreds of pages are necessary and these regulations will be made in terms of section 7. In his application to this Court for leave to appeal the Minister says that the regulations that are in dispute are of a temporary nature and that he has already started the process of making new regulations in terms of section 7. He attached to his application a notice in terms of section 7(1) calling for comment on his proposal. That may be so. I am not persuaded, however, that the contention that regulations made in terms of section 52 are no more than interim regulations is necessarily correct. The Act provides that

section 52 has only a limited life. But it does not provide that regulations made under section 52 are to endure only until new regulations can be made under section 7.

[43] To some extent the criticism of the construction asserted by the Minister is met by the fact that the regulations are subject to review by the Board and recommendations it might make once it becomes operational. The Board had to be convened within 90 days of the Act coming into force. It is an expert body which has an important consultative role under the Act. Members of the public can bring any concerns they may have with the Minister's regulations to the attention of the Board. One of its first tasks will be to consider the regulations put in place by the Minister during the interim period. If the Board has concerns relating to the regulations it will be under a duty to advise the Minister to amend the regulations and the Minister would be obliged to give serious consideration to such advice. Whilst this is not equivalent to the participatory process required for the making of section 7 regulations, it allows for the regulations to be brought under scrutiny once the Board is operational. The Minister would not necessarily have to comply with recommendations made to him by the Board in respect of these regulations, but that is also true of recommendations made pursuant to the section 7 procedures. The section 7 procedures call, however, for a more rigorous process of public participation than would follow from any representations that might be made by the public or the Board after regulations have been made in terms of section 51.

[44] I accept the force of the argument addressed to us on this issue by counsel for the respondent and accept also for the purposes of this judgment that the regulations survive the appointment of the Board and are not for a limited period only. I am, however, not able to construe section 52 as requiring the Minister to follow the procedures prescribed for making regulations after the Board has been constituted and is operational. Such a construction would be contrary to the clear language of sections 51 and 52.

[45] I am not unmindful of the fact that the Proclamation brought sections 7 and 52 into force without specifically referring to the definitions in section 1 and section 51. Sections 7 and 52 must, however, be read in the context of the Act as a whole including the definition sections. The Act cannot be construed as having one meaning when it was promulgated, a different meaning on 20 February 2003 when the two sections came into force, and then revert to the original meaning on 12 March 2003 when all the provisions save for section 37 were brought into operation.

[46] The power vested in the President by section 55 of the Act is to determine the date of commencement of the Act. Although he has the power to bring different sections into force on different dates the President does not have the power to amend the Act by giving sections different meanings to those that they have in the Act. The sections can have only one meaning and that must be determined by reading them with the applicable definitions.

[47] I have also considered whether section 52 should be construed narrowly so as to authorize only the making of regulations necessary for the Board to be constituted and to become operational, and to provide for other matters that might call for attention prior to the operative provisions of the Act being brought into force. Section 52, read with the definitions in section 51, empowers the Minister to adopt any regulation "required in terms of this Act". The Deputy President determined the dates on which the various provisions of the Act would come into force. The validity of that Proclamation is not disputed in these proceedings. Once the Act was in force it is beyond doubt that regulations making provision for its implementation were required. Thus, even if a narrow construction is given to section 52, regulations necessary for the implementation of the operative provisions of the Act which were about to come into force, fell within the purview of the section at the time the regulations were made. There was no challenge to any specific regulation on the grounds that it was not authorised by section 52.

The Promotion of Administrative Justice Act

[48] Counsel for the respondent relied on section 33 of the Constitution[24] read with section 1 of the Constitution[25] and the provisions of the Promotion of Administrative Justice Act ("PAJA")[26] to support their construction of section 52. They contended

[24] Section 33(1) of the Constitution provides that:

> "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair."

[25] Section 1(d) sets out that one of the founding values of the Constitution is a ". . . multi-party system of democratic government, to ensure accountability, responsiveness and openness".

[26] Act 3 of 2000.

that the Constitution and PAJA contemplate that administrative action should be consistent with a "culture of accountability, openness and transparency . . . in the exercise of a public power",[27] and referred in particular to section 4 of PAJA which deals with administrative action affecting the public.

[49] Counsel for the respondent did not contend that section 52, construed as I have suggested in this judgment, would be inconsistent with the Constitution. As no challenge had been made in the application to the constitutionality of section 52, that argument was not open to them. Their argument was advanced on the basis that if the section could reasonably be construed in the manner contended for by them, that construction should be adopted for it would give effect to the founding values of the Constitution, the requirements of section 33 of the Constitution that administrative action be procedurally fair[28] and to the requirements of PAJA in that regard.

[50] Although the respondent did not rely directly on PAJA in its founding affidavit, it sought to do so indirectly, by using the provisions of PAJA to support its construction of the Act. It is not at all clear that using PAJA as an interpretive tool to assist in interpreting other legislation, as the respondent contends, is appropriate. PAJA regulates the manner in which certain powers are to be exercised. If the power under question is one within the scope of PAJA it must be exercised consistently with

[27] Preamble to PAJA.

[28] It is also relevant to have regard to section 39(2) of the Constitution which provides:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

PAJA. If it is not such a power, PAJA has no application. Questions may arise as to whether legislation may by necessary implication oust the requirements of PAJA, but they do not arise here. Be that as it may, I shall nevertheless consider whether section 4 of PAJA can assist the respondent. In developing this argument, counsel for the respondent relied on section 4(1) of PAJA which provides:

> "In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether—
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> (a) to hold a public inquiry in terms of subsection (2);
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> (b) to follow a notice and comment procedure in terms of subsection (3);
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> (c) to follow the procedures in both subsections (2) and (3);
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> (d) where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure; or
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> (e) to follow another appropriate procedure which gives effect to section 3."

It was contended that section 52 must be read with section 4 of PAJA and that reading the two together, the Minister should have made provision for comment on the proposed regulations before promulgating them. Although this was not the case made in the founding affidavit, argument was addressed to us by both parties on the question whether PAJA was applicable to the making of regulations under the Act. I deal briefly with that argument.

[51] Section 4 of PAJA makes provision for notice and comment procedures to be followed or public inquiries to be held where administrative action "materially and adversely affects the rights of the public". "Administrative action" is defined in section 1 of PAJA as meaning "any decision taken, or any failure to take a decision"

by particular functionaries identified in the definition. "Decision" is defined in the same section as meaning:

> "any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to—
>
> (a) making, suspending, revoking or refusing to make an order, award or determination;
>
> (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
>
> (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
>
> (d) imposing a condition or restriction;
>
> (e) making a declaration, demand or requirement;
>
> (f) retaining, or refusing to deliver up, an article; or
>
> (g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly."

[52] The definition of "decision" does not refer to the making of regulations and it is not clear whether this constitutes administrative action for the purposes of PAJA. Moreover, the definition of "administrative action" specifically excludes "any decision taken, or a failure to take a decision, in terms of section 4(1)".[29] It may be open to doubt, therefore, whether reliance could be placed on PAJA in the circumstances of this case.

[29] Paragraph b(ii) of the definition of administrative action in section 1 of PAJA.

[53] It is not necessary, however to decide this issue in the present case,[30] nor to decide whether the immigration regulations materially and adversely affect the rights of the public. Even if the Minister's power to make regulations in terms of section 52 is subject to the provisions of section 4 of PAJA, I am satisfied that the Minister acted within the scope of section 4 for the reasons that follow.

[54] Section 4(4) of PAJA authorises a departure from the section 4(1) procedures. It provides:

> "(a) If it is reasonable and justifiable in the circumstances, an administrator may depart from the requirements referred to in subsections (1) (a) to (e), (2) and (3).
>
> (b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including—
>
> (i) the objects of the empowering provision;
>
> (ii) the nature and purpose of, and the need to take, the administrative action;
>
> (iii) the likely effect of the administrative action;
>
> (iv) the urgency of taking the administrative action or the urgency of the matter; and
>
> (v) the need to promote an efficient administration and good governance."

[55] The Act establishes a framework for immigration control but leaves the details of implementation to regulations made by the Minister. In terms of the Proclamation, the Act was due to come into force on 12 March 2003. If the section 7 procedures had

[30] It raises complex issues including the question whether a construction of PAJA that excludes the making of regulations from the ambit of administrative action would be consistent with the Constitution.

to be followed, the Act would have come into force without the necessary regulations being in place. Without regulations the Act could not have been implemented.

[56] The judgment of the High Court declaring the regulations to be invalid does not address this problem. The Court seems to have assumed that the regulations made under the Aliens Control Act would have been sufficient to enable immigration control to be maintained pending compliance with the protracted regulation making process prescribed by section 7. This is what it held in its reasons for refusing to suspend the order of invalidity that it had made.[31]

[57] This, however, is not correct. Section 52(2) of the Act provides that "subject to this Act" the regulations under the Aliens Control Act are to remain in force until repealed or amended. That had the effect of preserving the old system until 12 March 2003 when the operative provisions of the Act were brought into force. Once that happened, it was common cause that the old regulations would not have been an effective means of exercising immigration control. This is so because the Act introduces an entirely different system of immigration control to that which previously existed, calling for different types of permits to be issued to potential immigrants seeking admission to the Republic. Wrenched from their empowering statute which had been repealed, the existing regulations if they continued to remain in force might still have served certain purposes, but the core provisions of the Act involving the

[31] High Court judgment, above n 3 at paras 61-3.

granting of special permits could not have been applied without specific regulations dealing with this.

[58] Counsel for the respondent correctly accepted that the Act would be unworkable without its own regulations and that the old regulations could not fill that void. They also accepted that the section 7 process is a time consuming process which could not possibly have been complied with prior to 12 March when the operative provisions of the Act came into force. The validity of the Proclamation was not challenged. Thus, even if section 4(1) of PAJA is applicable to the making of regulations and it is open to the respondent to challenge the Minister's failure to comply with its provisions, it would in the light of these facts have been reasonable and justifiable for the Minister to depart from the notice and comment provisions when he made the regulations.

[59] In each case it is a question of construction whether a statute making provision for administrative action requires special procedures to be followed before the action is taken. In addition, whether or not such provisions are made, the administrative action must ordinarily be carried out consistently with PAJA.[32] In the present case the Act does not require special procedures to be followed for the making of regulations in terms of section 52. And even if PAJA is applicable to the making of regulations

[32] It is not necessary to consider whether a statute can specifically exclude or limit the application of such provisions without contravening the Constitution. That issue does not arise in the present case and I therefore refrain from dealing with it.

and a failure to comply with section 4(1) is subject to review, in the circumstances of the present case, the Minister was not obliged to comply with section 4(1).

[60] That also disposes of the submission by counsel for the respondent that the provisions of the Constitution and PAJA lend force to their contention that the notice and comment provisions of section 7 should be treated as being applicable to section 52 of the Act. Section 52 has been drafted in language that makes it clear that that the section 7 provisions are not applicable to it. If, as I have held, the respondent cannot rely directly on the provisions of PAJA, there is no room for those provisions to be applied indirectly.

Conclusion

[61] I conclude, therefore, that High Court erred in construing the Act as it did. It ought to have held that the notice and comment provisions of section 7 are not applicable to regulations made under section 52 and that no other grounds had been established for the relief claimed by the respondent. The application for leave to appeal must therefore be granted and the appeal must be upheld.

Events in the High Court

[62] The High Court's order declaring the regulations invalid was made on 11 March 2003, the day before the bulk of the Act was due to come into force. Because of what it considered to be the urgency of the matter, the Court made the order without giving its reasons, indicating that those would be provided later. After the

order had been handed down, the Minister delivered a notice supported by an affidavit expressing his intention of applying for a rule 18 certificate in order to appeal to this Court and, conditionally, for leave to appeal to the Supreme Court of Appeal.[33] The effect of the application for leave to appeal was to suspend the operation of the orders of the High Court, pending the decision on the application.[34] The respondent opposed these applications and requested the High Court to rule, in terms of Rule 49(11), that the automatic suspension of the High Court's order would itself be suspended.[35]

[63] The High Court declined to deal with the Minister's application taking the view that it should only be heard after the Court had handed down its full reasons. The operative provisions of the Act were due to come into force on the next day. The Judge dealing with the matter suggested to counsel for the Minister that the Minister should consider suspending the operation of those sections of the Act due to come into force the following day for a period of six months to "enable the Department of Home Affairs to get its house in order and apply its mind to promulgating new regulations".[36] The Minister was not prepared to do so. [37]

[64] Later that night, and pursuant to the request by the respondent, the same Judge made an order in terms of Rule 49(11), that until 18h00 on 17 March 2003:

[33] High Court judgment, above n 3 at para 7.

[34] See rule 49(11) of the Uniform Rules of Court.

[35] High Court judgment, above n 3 at para 7.

[36] Id at para 8.

[37] Id at para 9.

a) the automatic suspension under Rule 49(11) of the order of the High Court would itself be suspended; and

b) only sections 4, 7 and 52 of the Act would have any force and effect.

On 17 March 2003, the High Court extended the operation of this order until 7 April 2003, when the application for leave to appeal was heard.[38]

[65] I consider it appropriate to comment on these events because of their importance to the practice of the courts in constitutional matters.

[66] It was wrong to suggest to the Minister that he should consider suspending the implementation of the Act until the application for leave to appeal had been considered. The High Court had dismissed the application for leave to amend the notice of motion to challenge the validity of the Proclamation in so far as it provided that the Act would come into force on 12 March 2003, holding that grounds had not been established for the making of such an order.[39] That being so the Proclamation had to be treated as being valid. The Minister had no power to suspend the operative provisions of the Act which was due to come into force within a few hours. It would have been unlawful for the Minister to instruct his department to ignore the law when it came into force and to apply the law that had been repealed by Parliament. He correctly declined to do so.

[38] Id at paras 9-10

[39] See para [6] above.

[67] When the Minister declined to follow the Judge's proposal, the Judge then made an order which in effect achieved the same purpose, declaring that only sections 4, 7 and 52 of the Act would have any force until 17 March 2003. This order was later extended until 7 April 2003. The High Court does not indicate what it considered to be the source of its power to make such an order. The only reasons given are that this would prevent the chaotic situation envisaged by the Minister from developing, enable the Court to furnish a fully reasoned judgment, and would facilitate the formulation of grounds of appeal, should the Minister be disposed to continue with his application for leave to appeal. [40] Presumably the court considered this to be a just and equitable order[41] in the light of the declaration of invalidity that had been made.

[68] The grant or refusal of the application for leave to appeal could have had no bearing on the validity of the Act. Section 172(1) of the Constitution empowers a Court when deciding a constitutional matter to make "any order that is just and equitable". Section 172(1) does not, however, empower it to suspend the provisions of an Act of Parliament or a Proclamation which have not been the subject of a proper challenge before it, and it is open to doubt whether a court has the power to do so. But even if such a power exists (and I express no opinion on that issue) it would have to be exercised most sparingly and only in the most exceptional circumstances.

[40] High Court judgment, above n 3 at paras 9-10.

[41] See section 172(1)(b) of the Constitution, quoted at n 19 above.

[69] In *President of the RSA and Others v United Democratic Movement and Others*[42] this Court held:

> "Having regard to the importance of the legislature in a democracy and the deference to which it is entitled from the other branches of government, it would not be in the interests of justice for a court to interfere with its will unless it is absolutely necessary to avoid likely irreparable harm and then only in the least intrusive manner possible with due regard to the interests of others who might be affected by the impugned legislation."

In the present case, Parliament had discarded the old regime and introduced in its place a new form of immigration control. To direct that the old regime must remain in force after the Act introducing the new regime had come into operation constituted an unjustifiable interference with the will of Parliament.

[70] If there was indeed a concern at that time that the declaration of invalidity might lead to a chaotic situation, it was not "absolutely necessary" to address that situation by suspending the operation of the Act, the validity of which had not been challenged, nor was it the least intrusive manner possible of dealing with the situation.

[71] There was no challenge to the substance of the Act or the regulations and nothing to suggest that the new immigration regime that they introduced would result in any harm or be more invasive of rights than the old regime. An obvious and less intrusive remedy lay in suspending the order that had been made, which the Court was empowered to do under section 172(1) of the Constitution. If necessary, conditions

[42] 2002 (11) BCLR 1164 (CC) at para 31.

could have been attached to the suspension to address any prejudice that might result from such an order.[43]

Costs

[72] Courts should scrutinise carefully litigation initiated by attorneys in their own name and not on behalf of clients to secure rulings on issues that do not affect them personally. Such practice is open to abuse. In the present case, however, the application was directed to an issue that affected the respondent itself, and to an alleged infringement of its constitutional rights. It quite properly did not seek to recover any costs for its own legal services. Although it is unusual for an attorney to become personally involved in litigation of this nature, there is no reason to treat the respondent differently to any other litigant seeking to assert a constitutional right.

[73] The bringing into force of the Act approximately a year after it had been promulgated in circumstances in which the Minister was required to make regulations without first engaging the public and the Board, was unfortunate and precipitated the challenge to the validity of the regulations. The issues raised by the respondent in these proceedings were complex and not lacking in substance. In the circumstances, I consider that it would be appropriate for each party to pay its own costs in the High Court and in this Court.

[74] The following order is made:

[43] See *Dawood and Another v Minister of Home Affairs and Others* above n 23 at paras 66-8.

1. The application for leave to appeal is granted

2. The appeal is upheld.

3. The order made by the High Court is set aside and in its place the following is substituted:

   (a) The application is dismissed.

   (b) No order is made as to costs.

4. No order is made in respect of the costs of the appeal.

Langa DCJ, Goldstone J, Madala J, Mokgoro J, Moseneke J, Ngcobo J, O'Regan J and Yacoob J concur in the judgment of Chaskalson CJ.

For the Applicant: N.B. Tuchten SC, D.N. Unterhalter SC and A. Annandale instructed by Larson Falconer Inc, Durban.

For the Respondent: A. Katz and J. De Waal instructed by Eisenberg & Associates, Cape Town.