

---

Explanatory Note

---

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

The respondent, Dominique Liebenberg, married a Senegalese national. When her husband lost his Senegalese passport, she applied on his behalf for a temporary residence permit at the Johannesburg regional office Department of Home Affairs (the Department). The Department rejected the application and allegedly informed Liebenberg that in order for her husband to remain lawfully in South Africa he would have to replace his passport and pay fees totalling R1970 for certain permits. These fees are prescribed by regulation in the Seventh Amendment of the Aliens Control Regulations (Fees) of 2000 published in terms of the Aliens Control Act 96 of 1991 (the Act).

Liebenberg, dissatisfied with the Department's response, launched urgent application proceedings in the Witwatersrand High Court, challenging the constitutionality of the regulations prescribing the fees. She had no legal representation and her papers were not well drafted. Nonetheless her formulation of the order sought was agreed to by the Minister of Home Affairs (the Minister) and was made an order of the High Court, despite its being very unclear. The High Court order appears to declare two things: first, that the regulations are unconstitutional, at least in so far as they apply to spouses of South African citizens and other persons mentioned in s 25(5) of the Act; and second, that the requirement that spouses married to South African citizens have to pay fees for certain permits is inconsistent with various constitutionally enshrined rights and unconstitutional and ordering the Minister and Parliament to correct this inconsistency. The Minister applied to this Court for an order confirming the High Court order, arguing that this was necessary in terms of s 172 of the Constitution.

Acting Justice Skweyiya, writing on behalf of a unanimous Court, held as follows: firstly that it was clear from previous judgments of the Court that High Court decisions declaring regulations invalid did not fall within the ambit of s 172 and could not accordingly be confirmed. Sections 167(5) and 172(2) of the Constitution require the Court to confirm orders made by the High Court declaring "an Act of Parliament, a provincial Act or any conduct of the President" unconstitutional. Regulations are made by Ministers in terms of subordinate, delegated authority from Parliament and are not "Acts of Parliament"; and secondly, that the order was not a declaration of constitutional invalidity that could be confirmed under s 172, even if it were assumed that the order was one declaring unconstitutional the requirement that alien spouses are to pay fees for permits. The Court stressed that any declaration of invalidity made in terms of s 172 should indicate clearly and precisely which provisions of an Act of Parliament are being declared invalid.