

**Before the Supreme Court in Jerusalem  
Sitting as the High Court of Justice**

In the matter of:

1. Adalah – the Legal Center for Arab Minority Rights in Israel
2. Ranit Tbilah, ID no. 026177259
3. Hatem Tbilah, ID no. 318104429
4. Asala Tbilah (minor aged 5.5), ID no. 322628413
5. Dima Tbilah (minor aged 4), ID no. 213772106
6. Mahmud Sabihat, ID no. 029217403
7. Ola Sabihat, ID no. 907526495
8. Ahmad Sabihat (minor aged 6), ID no. 212022974
9. Muhammad Sabihat (minor aged 6), ID no. 212022453

**Petitioners**

- v. -

1. The Minister of the Interior
2. The Legal Advisor to the Government

**Respondents**

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**REPORT ON SOUTH AFRICAN LAW:  
ADVOCATE ANTON FARREL KATZ**

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**ANTON FARREL KATZ**

Suite 618

Keerom Street Chambers

56 Keerom Street

Cape Town, South Africa

## **EXPERTISE**

### **General**

1. I am an adult male South African citizen. I am an advocate of the High Court of South Africa (the equivalent of a Barrister in the United Kingdom), practising as such as a member of the Bar in Cape Town. I am also a member of the New York Bar, and have been since 1992.
2. I graduated from the University of Cape Town with B.Sc (1981) and LL.B (1988) degrees, and received a Masters in Law (International Law) from the Columbia University School of Law in New York in 1994.
3. I commenced practice at the Cape Bar in 1990 and save for periods of study at Columbia University and lecturing international law, I have practised as such to date. Although I am in fulltime practice, I have lectured at the Universities of Cape Town, Stellenbosch and the Western Cape on an *ad hoc* basis on international, immigration and refugee law. My practice is predominantly in the areas of international and constitutional law with specialities in immigration, asylum and extradition law.
4. I have sat as both a Regional Magistrate in the Magistrates' Court and as an acting judge in the Cape High Court in criminal appeals.

### **Relevant cases**

5. I have appeared in the Constitutional Court of South Africa (the highest court in constitutional matters in South Africa) on more than 20 occasions. I have appeared in most, if not all, significant nationality, immigration and refugee cases in the Constitutional Court and High Courts of South Africa since the adoption of the Constitution of the Republic of South African, 1996.

6. Cases in which I have appeared, and which are particularly relevant insofar as they pertain to immigration matters, the right to family life, or ancillary matters, include the following:

6.1 **Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs.**<sup>1</sup> In this matter, the constitutionality of certain provisions of the Aliens Control Act<sup>2</sup> relating to the temporary residence of foreign spouses of South African citizens and permanent residents, were successfully challenged.

6.2 **Booyesen and Others v Minister of Home Affairs and Another.**<sup>3</sup> This was an application for confirmation of the declaration of constitutional invalidity of two sections of the Aliens Control Act, which dealt with applications for work permits by foreign spouses of South African citizens or permanent residents.

6.3 **Makinana and Others v Minister of Home Affairs and Another; Keelty and Another v Minister of Home Affairs and Another.**<sup>4</sup> This matter involved a challenge to the constitutionality of certain provisions of the Aliens Control Act which affected the rights of foreign spouses of South African citizens and permanent residents to work in South Africa.

6.4 **Gory v Kolver NO and Others (Starke and Others Intervening).**<sup>5</sup> This matter dealt with the constitutionality of the Intestate Succession Act<sup>6</sup> to the extent that it conferred rights of intestate succession on heterosexual spouses but not on permanent same-sex life partners.

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<sup>1</sup> 2000 (1) SA 997 (C) and 2000 (3) SA 936 (CC).

<sup>2</sup> Act 96 of 1991 (South Africa).

<sup>3</sup> 2001 (4) SA 485 (CC).

<sup>4</sup> 2001 (6) BCLR 581 (C).

<sup>5</sup> 2007 (4) SA 97 (CC).

<sup>6</sup> 81 of 1987 (South Africa).

6.5 **Volks NO v Robinson and Others.**<sup>7</sup> This case concerned an application for the confirmation of a successful constitutional challenge to the differentiation between surviving spouses and surviving partners of life partnerships in relation to the provision of maintenance in terms of the Maintenance of Surviving Spouses Act.<sup>8</sup>

### **Relevant publications**

7. Amongst other publications, I authored the chapter on refugee law in Dugard, **International Law – a South African Perspective** (2<sup>nd</sup> & 3<sup>rd</sup> eds.) and also **Butterworths Forms & Precedents (Citizenship), (30 July 1998) Aliens and Migration Citizenship.**
8. I also wrote a chapter called “Immigration and the Courts” in **Beyond Control - Immigration and Human Rights in A Democratic South Africa** (ed J Crush) (1998) and “Immigration and the Courts: From *Xu* to *Ruyobeza*” in Du Plessis and Pete, **Constitutional Democracy in South Africa 1994 – 2004** (2004).
9. I co-authored two chapters, “Citizenship” and “Freedom of Movement”, in Currie and De Waal, **The Bill of Rights Handbook** (5<sup>th</sup> ed.) 2005.
10. I have presented a number of papers at conferences on nationality, immigration and refugee law.

### **Professional experience outside of the Bar**

11. I served on the Immigrants Selection Board (Western Cape Region) for the period 1997 – 1998 and was the Bar Council representative on the Association of Immigration Practitioners, a statutory body established in

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<sup>7</sup> 2005 (5) BCLR 446 (CC).

<sup>8</sup> Act 27 of 1990 (South Africa).

terms of the Regulations adopted by the Minister of Home Affairs in terms of the Immigration Act.<sup>9</sup>

12. I was legal consultant to the African Union on a plan of action for the implementation of the African Union Convention on the Preventing and Combating of Terrorism (Algiers, 1999) – in Addis Ababa, Ethiopia and in Algiers, Algeria during 2002. I advised on whether a protocol to the AU Terrorism Convention should be drafted in light of the events in New York and Washington DC of 9/11.
13. I have made a number of expert reports concerning South Africa's immigration and refugee law and practice for purposes of tribunals in the United Kingdom and the United States.
14. I acted as an expert in the United States Department of Justice Executive Office of Immigration Review in a matter of Application for Asylum and Withholding of Deportation of **Siyad, Abdullah Liban**, No A77-007- 618 (11 July 2000), and in the removal proceedings of **Belbel Cherif**, Case No. A77 634 744 United States Department of Justice, Executive Office for Immigration Review, United States Immigration Court, York, Pennsylvania (5 April 2004).
15. I also submitted reports in the application for judicial review in the Administrative Court in 2003 in the matter between the Queen o.b.o. Moses Ntanga and the Secretary of State for the Home Department, to the Immigration Appellate Authority under Appeal number OC/00004/2004 in the matter between Mucheri Moyo and the Secretary of State for the Home Department held at Birmingham on 13 December 2004 and in the review of the failed asylum application of Innocent Nkomo (28 April 2005).

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<sup>9</sup> 13 of 2002 (South Africa).

## **THE PETITION**

16. In this Petition, the petitioners seek an *Order Nisi* directing the respondents to give cause:
  - 16.1 why the provisions of the ***Citizenship and Entry into Israel Law (Temporary Order) (Amendment No.2)*** – 2006, should not be declared null and void;
  - 16.2 why the gradual process of naturalisation of spouses of Israeli citizens practiced in Israel is not applied to Petitioners 2 to 9 pursuant to Article 7 of the Nationality Law (1952).
17. I am informed that the basis of the petitioners' challenge to the constitutionality of the Law, as set out in the Petition, is that:
  - 17.1 it denies entry to persons with an actual and legitimate affinity to some of the State's citizens based on their ethnic affiliation, thereby infringing upon the constitutional right to dignity of both these persons and of the citizens who have an actual and legitimate affinity to them;
  - 17.2 it violates Arab citizens' constitutional right to equality;
  - 17.3 it violates Arab citizens' constitutional right to family life based on their spouse's ethnic identity; and
  - 17.4 it violates the liberty and personal autonomy of a citizen to live with the spouse of his or her choice and maintain family life without any arbitrary limitations of any kind.
18. The ***Citizenship and Entry into Israel Law (Temporary Order)***, which was enacted in 2003, limits the granting of citizenship to residents of the region (defined as including Judea, Samaria and the Gaza Strip), citizenship

pursuant to the Citizenship Law,<sup>10</sup> including by way of family unification, and/or limits the granting of residence permits into Israel to residents of the region pursuant to the Entry into Israel Law.<sup>11</sup>

19. The Law was enacted for a period of one year, but was extended several times. The Law was revised in 2005, and invoked until 2006, whereafter it was further extended.
20. The ***Citizenship and Entry into Israel Law (Temporary Order) (Amendment No.2)*** was enacted in 2007 for a period of one year, up until 3 July 2008.
21. The Amendment, *inter alia*, expands the applicability of the Law to citizens or residents of Iran, Iraq, Lebanon and Syria. It also includes humanitarian relieves to be taken into consideration when applying the law, but specifies that the fact that the family member of the applicant legally residing in Israel is the applicant's spouse, or that the couple have children, will not be considered a special humanitarian reason.<sup>12</sup>

## **SOUTH AFRICAN LAW**

22. For the purposes of producing this report, I have considered the South African law relating to family unification, and more particularly the constitutional and statutory provisions relating thereto. I have also read and analysed all South African judicial decisions concerning the relevant issues.
23. The Constitution of the Republic of South Africa, 1996 (*“the Constitution”*) is the supreme law in South Africa by virtue of the provisions of section 2, which provides:

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<sup>10</sup> Books of Laws 5712 [1952], p. 146.

<sup>11</sup> Books of Laws 5712 [1952], p. 354.

<sup>12</sup> However if the person making application is a resident of Syria and his or her spouse is a member of the Druze community who is legally residing in Israel and lives in the Golan Heights area, this may be viewed as a “special humanitarian reason”.

***“This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”***

24. The Constitution was adopted by the Constitutional Assembly. The Constitution was required to be certified by the Constitutional Court, the highest court in constitutional matters, prior to its adoption.<sup>13</sup>
25. The Constitution contains no express provision protecting the right to family life or the right of spouses to cohabit.
26. In the certification process an objection to the certification of the Constitution on the ground that it did not expressly protect “the right to marriage and to family life”, was advanced.<sup>14</sup>
27. In response to the objection the Constitutional Court pointed out that “from a survey of international instruments, it is clear that, in general, States have a duty, in terms of international human rights law, to protect the rights of persons freely to marry and to raise a family.”<sup>15</sup>
28. The Constitutional Court commented that the international obligations to protect the rights of persons freely to marry and raise a family are achieved in a great variety of ways in different human rights instruments.
29. The case of ***Dawood v Minister of Home Affairs***<sup>16</sup> involved three applications (all heard together) concerning the circumstances in which foreign spouses of South African residents (that is citizens and permanent

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<sup>13</sup> For a brief discussion on the certification process, see Currie and De Waal, **The Bill of Rights Handbook** (5<sup>th</sup> ed.) (2005) at 1.2 (b).

<sup>14</sup> See **Ex Parte Chairperson of the Constitutional Assembly, In re certification of the Constitution of the Republic of South Africa**, 1996 (4) SA 744 (CC) at para 97.

<sup>15</sup> Id at para 97.

<sup>16</sup> 2000 (1) SA 997 (C).



residents) are permitted to reside temporarily in South Africa pending the outcome of their applications for immigration permits (permanent residence).

30. In summary, the challenge related to three violations of South African permanent residents', and their non-resident foreign spouses' rights:

30.1 first, the onerous fees in relation to applications for immigration permits by alien spouses of a person permanently and lawfully resident in South Africa;

30.2 secondly, section 56 (1) (f) of the Aliens Control Act was challenged to the extent that it empowered the relevant Board appointed under the Act to authorise the issue of immigration permits to alien spouses of South African permanent residents *only* if the alien spouse 'has been permitted under s26 (1) to temporarily sojourn in the Republic'; and

30.3 thirdly, the constitutionality of Regulation 14 (2) of the Aliens Control Regulations was brought into question, to the extent that it precluded an application for an immigration permit being 'made' by the foreign spouse of a South African permanent resident while the applicant concerned was physically present *in* South Africa but had not yet 'been permitted under s26 (1) (which set out the basis on which certain categories of temporary residence permits were granted) to temporarily sojourn in the Republic'.

31. The challenges were based on the fact that the provisions constituted an infringement of the following constitutional rights of South African residents and/or their non-resident spouses: the right to human dignity (section 10 of the Constitution); the right of the South African citizens affected to 'enter, to remain in and to reside anywhere in, the Republic' (section 21 (3) of the Constitution); and the right to equality (section 9 of the Constitution).

32. Insofar as the provisions impacted on children born in South Africa and/or to South African permanent residents married to alien non-resident spouses, the

provisions were impugned on the basis that they infringed the following rights of the children: human dignity (section 10 of the Constitution); their right 'to remain in and to reside anywhere in the Republic' (section 21(3) of the Constitution); their right to 'family care' or 'parental care' (section 28(1)(b) of the Constitution); and also the constitutional injunction that '[a] child's best interests are of paramount importance in every matter concerning the child' (section 28(2) of the Constitution).

33. In considering international law authorities, the court expressed the view that, if possible, the South African Bill of Rights must be interpreted so as to afford protection to, at the very least, one of the 'core elements' of 'the institution of marriage and family life', namely the right (and duty) of spouses 'to live together as spouses in community of life'.<sup>17</sup>
34. The Cape High Court held that the right to human dignity had to be interpreted to afford protection to institutions of marriage and family life:

***“In the light of the approach followed by the Constitutional Court in the first certification judgment to 'the rights to marriage and to family...the 'most obvious home' for the protection of the above-mentioned 'core element' of the right to family life is s 10 of the Constitution, in terms of which...(e)veryone has inherent dignity and the right to have their dignity respected and protected'.”***<sup>18</sup>

35. Section 10 of the Constitution states:

***“Everyone has inherent dignity and the right to have their dignity respected and protected”*** (own emphasis).

36. The Court emphasised the importance of the right to human dignity:

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<sup>17</sup> Id at p. 1035G.

<sup>18</sup> Id at p. 1035J.

***“The Constitutional Court has described the right to human dignity, in the South African context, as one of the two most important rights in the Bill of Rights and has expressly recognised that this right is inexplicably linked with other human rights:***

***‘The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in [the Bill of Rights]’.***<sup>19</sup>

37. In addition, the following sections of the Constitution emphasise the importance of the right to human dignity:

37.1 Section 1 of the Constitution proclaims that:

***“(t)he Republic of South Africa is one, sovereign, democratic State founded on the following values:***

***(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms...*** (own emphasis).

37.2 Section 7 (1) states that:

***“(t)his Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom”*** (own emphasis).

37.3 Section 36 (1) provides that:

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<sup>19</sup> Id at p. 1037D, citing O’Regan J in the case of ***S v Makwanyane and Another*** 1995 (3) SA 391 (CC) at para 328.

***“(t)he rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”*** (own emphasis).

37.4 Section 39 (1) (a) requires a court, when interpreting the Bill of Rights, to:

***“promote the values that underlie an open and democratic society based on human dignity, equality and freedom”*** (own emphasis).

38. The court held that the impugned provisions fell foul of the right to human dignity, and granted a declaratory order of constitutional invalidity, together with certain ancillary orders.
39. In considering the matter on appeal, the Constitutional Court confirmed the judgment of the Cape High Court.<sup>20</sup> The Constitutional Court reiterated that:

***“Marriage and the family are social institutions of vital importance. Entering into and sustaining a marriage is a matter of intense private significance to the parties to that marriage for they make a promise to one another to establish and maintain an intimate relationship for the rest of their lives which they acknowledge obliges them to support one another, to live together and to be faithful to one another. Such relationships are of profound significance to the individuals concerned. But such relationships have more than personal significance, at least in part because human beings are social beings whose humanity is expressed through their relationships with others.***

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<sup>20</sup> 2000 (3) SA 936 (CC).

***Entering into marriage therefore is to enter into a relationship that has public significance as well.***<sup>21</sup>

40. The Constitutional Court went on to state that:

***“In terms of [South African] common law, marriage creates a physical, moral and spiritual community of life. This community of life includes reciprocal obligations of cohabitation, fidelity and sexual intercourse, though these obligations are for the most part not enforceable between the spouses. Importantly, the community of life establishes a reciprocal and enforceable duty of financial support between the spouses and a joint responsibility for the guardianship and custody of children born of the marriage.”***<sup>22</sup>

41. As had been done in the Cape High Court, the Constitutional Court emphasised the importance of the right to human dignity as a fundamental value of the Constitution.<sup>23</sup>

42. In considering the applicants’ challenge to the relevant provisions in terms of right to freedom of movement, and the right of citizens to reside in South Africa, the court found that the primary right implicated is the right to human dignity.<sup>24</sup>

43. The Constitutional Court went on to hold:

***“The decision to enter into a marriage relationship and to sustain such a relationship is a matter of defining significance for many, if not most, people and to prohibit the establishment of such a relationship impairs the ability of the individual to achieve personal fulfilment in an aspect of life that is of central significance. In my view, such***

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<sup>21</sup> Id at p. 959H.

<sup>22</sup> Id at p. 960F.

<sup>23</sup> Id at p. 961.

<sup>24</sup> Id at p. 962E.

**legislation would clearly constitute an infringement of the right to dignity. It is not only legislation that prohibits the right to form a marriage relationship that will constitute an infringement of the right to dignity, but any legislation that significantly impairs the ability of spouses to honour their obligations to one another would also limit that right. A central aspect of marriage is cohabitation, the right (and duty) to live together, and legislation that significantly impairs the ability of spouses to honour that obligation would also constitute a limitation of the right to dignity**<sup>25</sup> (own emphasis).

44. The court then proceeded to examine whether the violation of the right to dignity was justifiable in terms of section 36 of the Constitution.
45. The court noted that like all constitutional rights, the right to dignity is not absolute and may be limited in appropriate cases by a law of general application if it satisfies section 36 (1) of the Constitution.<sup>26</sup>
46. Section 36 of the Constitution provides:
  - (1) ***“The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-***
    - (a) ***the nature of the right;***
    - (b) ***the importance of the purpose of the limitation;***
    - (c) ***the nature and extent of the limitation;***
    - (d) ***the relation between the limitation and its purpose; and***
    - (e) ***less restrictive means to achieve the purpose.***

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<sup>25</sup> Id at p. at 963A.

<sup>26</sup> Id at p. 970E.

(2) ***Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.***

47. Ultimately the Constitutional Court found that the limitation was not justifiable, on, *inter alia*, the basis of arbitrariness which was inconsistent with the constitutional protection of the right to marry and establish a family, and upheld the declaration of constitutional invalidity.<sup>27</sup>
48. The case of **Booyesen and Others v Minister of Home Affairs and Another**<sup>28</sup> concerned a challenge to certain provisions of the Aliens Control Act which required work permits for foreign spouses of South African citizens to be issued *outside* of South Africa. The basis of the challenge was that the provisions seriously disrupted the applicants' family life and impeded the possibility of their living together and having marital support.
49. The Constitutional Court found that the provisions significantly impaired the ability of the spouses to honour their obligations to one another and constituted an unjustifiable limitation of the right to human dignity of both South Africans and their foreign spouses.<sup>29</sup>
50. The Constitutional Court in the **Booyesen** case was in substantial agreement with the Cape High Court's finding, which was based in part on the judgment in **Dawood**, that the relevant provisions unjustifiably limited the right to human dignity of South Africans and their foreign spouses.<sup>30</sup>
51. In **Makinana and Others v Minister of Home Affairs and Another; Keelty and Another v Minister of Home Affairs and Another**<sup>31</sup> a challenge was

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<sup>27</sup> Id at p. 970E-971B.

<sup>28</sup> 2001 (4) SA 485 (CC).

<sup>29</sup> Id at p. 487-488.

<sup>30</sup> Id at p. 488-489. The declaration of invalidity was confirmed, but the order varied.

<sup>31</sup> 2001 (6) BCLR 581 (C).

launched against certain provisions of the Aliens Control Act, including provisions which directly or effectively prohibited foreign spouses, or certain foreign spouses, the right to work in South Africa pending the finalisation of their applications for an immigration permit. The matter was challenged on the basis that the provisions constituted a violation of, *inter alia*, the right to human dignity and equality.

52. The matter was heard after the judgment in ***Dawood***. The Government accepted that provisions challenged did constitute an infringement of the right to human dignity of both South African permanent residents who are married to foreign non-resident spouses and of such foreign spouses. It was conceded that the limitation imposed upon the right to dignity of South African permanent residents and their foreign spouses by the impugned statutory provisions was not reasonable and justifiable in an open and democratic society in terms of section 36 (1) of the Constitution.<sup>32</sup>
53. The Cape High Court reiterated that the “core elements of the marriage relationship” include the reciprocal right and duty of spouses to live together, as also their reciprocal right and duty of financial support.<sup>33</sup>
54. The court found that in requiring a foreign spouse to leave South Africa and to remain outside the country until such time as the permit has been issued to him or her when applying for a work permit, his or her right and duty to live together with his or her South African spouse in “a community of life” would be violated (as will that of the South African spouse), unless the latter spouse is able to accompany the former. The court went on to hold:

***“This external application requirement can therefore certainly be regarded as “legislation that [at least potentially] significantly impairs the ability of the spouses to honour their obligations to one another”***

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<sup>32</sup> Id at p. 599.

<sup>33</sup> Id at p. 600.



**and hence constitutes a limitation of the spouses' right to dignity under section 10 of the Constitution**" (own emphasis).<sup>34</sup>

55. As had been done in Dawood, the court held once it had determined that the provisions constituted a violation of the right to dignity, it was unnecessary to examine the alternative bases for the challenge relied upon.
56. The court also considered the constitutionality of the applicable prescribed fee payable by foreign spouses of South African permanent residents, for applications for work permits or for the extension or alteration of work permits in terms of the Act, and found that that too fell foul of section 10 of the Constitution.<sup>35</sup>
57. Finally the court considered the provisions of the Act which precluded foreign spouses of South African permanent residents from working at all, or from working in a particular field, by virtue of the fact that there are a sufficient number of persons available in South Africa to carry out the occupation in respect of which the foreign spouse has applied for a work permit.
58. The court found that if the application of the provisions had the effect that the foreign spouse was unable to obtain a work permit pending the outcome of his or her application for an immigration permit, the foreign spouse would in probability be unable to fulfil his or her duty of support towards his or her South African spouse, and that this too limited the constitutionally entrenched right to human dignity of South African permanent residents who are married to foreign spouses, as also of such foreign spouses.<sup>36</sup>

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<sup>34</sup> Id at p. 602.

<sup>35</sup> Id at p. 603.

<sup>36</sup> Id at p. 605.

59. The court then proceeded to consider whether the limitation of the right was justifiable under section 36 of the Constitution. In finding that there was no, or no sufficient, justification for the limitation of the right to human dignity the court notably reiterated the importance of the right:

***“The Constitutional Court has repeatedly emphasised that the right to human dignity is of fundamental importance and goes to the core of our constitutional democracy...Thus, as this right has “been crucial to our constitutional project”, very compelling reasons would have to be advanced to justify its limitation”.<sup>37</sup>***

60. The court ultimately held that the provisions were inconsistent with the Constitution and accordingly declared them invalid.<sup>38</sup>

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<sup>37</sup> Id at p. 606.

<sup>38</sup> Id at p. 607.

## **CONCLUSION**

61. Based on an analysis of the applicable legal principles in South African law above, it is my view that the prohibitions contained in the ***Citizenship and Entry into Israel Law (Temporary Order)***, as amended by **Amendment No. 2**, amount to (at least) a violation of the right to human dignity enshrined in section 10 of the Constitution of South Africa. In particular, the following passage in ***Dawood***, bears emphasis:

***“It is not only legislation that prohibits the right to form a marriage relationship that will constitute an infringement of the right to dignity, but any legislation that significantly impairs the ability of spouses to honour their obligations to one another would also limit that right. A central aspect of marriage is cohabitation, the right (and duty) to live together, and legislation that significantly impairs the ability of spouses to honour that obligation would also constitute a limitation of the right to dignity”***.<sup>39</sup> (own emphasis).

62. It must be pointed out that under South African law, the onus would rest on the party seeking to uphold the provisions challenged to present evidence demonstrating that the limitation of the right is justifiable under section 36 of the Constitution. This may furthermore prove difficult when one has regard to the repeated emphasis by the Constitutional Court that the right to human dignity is of fundamental importance and goes to the core of South Africa’s constitutional democracy,<sup>40</sup> and that, as the right has ‘been crucial to our constitutional project’, very compelling reasons would have to be advanced to justify its limitation.<sup>41</sup>

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<sup>39</sup> Op cit note 20 at p. 963A.

<sup>40</sup> See, for example, ***National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*** 1999 (1) SA 6 (CC) at paras 28 and 120, ***National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*** 2000 (1) BCLR 39 (CC) at para 58, and the other authorities cited in these cases; see also Arthur Chaskalson “The Third Bram Fischer Lecture: Human Dignity as a Foundational Value of our Constitutional Order” (2000) 16 *SAJHR* 193.

<sup>41</sup> ***Dawood*** op cit note 20 at p. 1043.

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**ANTON FARREL KATZ**

I certify that:

1. the deponent acknowledged to me that:
  - 1.1 he knows and understands the contents of this declaration;
  - 1.2 he has no objection to taking the prescribed oath;
  - 1.3 he considers the prescribed oath to be binding on his conscience;
2. the deponent thereafter uttered the words, "I swear that the contents of this declaration are true, so help me God";
3. the deponent signed this declaration in my presence at the address set out hereunder on this                      day of SEPTEMBER 2008.

.....  
**COMMISSIONER OF OATHS**

Designation and Area

Full Names

Street Address