

DEFINITION OF “SPOUSE” AND RESIDENCY RIGHTS FOR FOREIGN “SPOUSES”

Our immigration and family laws are extremely progressive and must be welcomed as it has overcome many of the conservative sentiments surrounding same-sex relationships, customary marriages and civil partnerships.

From a family law perspective there have been some fundamental constitutional challenges none more significant than **Minister of Home Affairs versus Fourie (2005) ZACC 19**, which affirmed the constitutional rights to enter into same-sex marriages.

At the same time our immigration laws have also been liberally shaped by our courts in giving greater economic freedom to foreign spouses or partners of South African citizens or permanent residents who desire, as a couple, or family to immigrate to South Africa. Monogamous relationships are still a prerequisite in our immigration laws.

Apart from mainstream civil marriages, our immigration laws define a “spouse” to also include a “person who is party to a permanent homosexual or heterosexual relationship” subject to certain administrative requirements and goes as far as recognising relationships between two foreign partners in a permanent relationship who desire to immigrate to South Africa as a couple

Moreover, our immigration laws have finally taken cognisance of African customary law in terms of the Recognition of African Customary Marriage 120 of 1998, which allows a partner to enjoy recognition as a “spouse” both civilly and in terms of the Immigration Act.

Similarly, marriages that are formalised abroad will also have legal significance in South Africa as long as it is legally authenticated in the country where concluded.

Now that it is apparent that there is a very wide interpretation of a “spouse” to a marriage or permanent relationship, it begs the question as to the rights of such foreign “spouse” upon accompanying his or her South African partner to South Africa.

Under the previous immigration dispensation a foreign “spouse” was required to successfully apply for a permit abroad and had to fulfill all the standard requirements, which were cumbersome and potentially prohibitive despite being a “spouse” of a South Africa citizen or permanent resident.

In the unreported judgment handed down on the 8th of February 2001 by the Cape High Court in the landmark case of **Makinana versus the Director-General of Home Affairs Case No 339/2000** our immigration laws have now finally overturned the previous regime as it was held that it impacted on a foreign spouse’s constitutional right to be with his or her South African partner in South Africa.

The judgment in **Makinana** went further by acknowledging that it impaired such foreigner’s right to dignity by making it too onerous to apply to work from abroad and to comply, in casu, with the standard work permit requirements when he or she may have to support a household as a ‘breadwinner’ whilst in South Africa.

The effect of this judgment is that it resulted in the amendment to our immigration laws by allowing a foreign spouse to validly enter South Africa and whilst in South Africa to legally apply for a change in status and endorse such foreign spouse's section 11 visitor's permit to successfully work, study or conduct an own business without any of the typical onerous standard requirements that apply to normal foreign applicants.

For example, such foreign spouse would now no longer have to prove that a particular job was advertised in the national media and no local job seeker could fill such position or the need to supply a benchmarking certificate to prove industry sector remuneration structures and norms.

Moreover, if the foreign spouse wished to start an own business he or she can do so without having to satisfy the Department by investing the requisite capital contribution of R2,5 million into the business as part of the book value.

We would suggest that if you find yourself in a similar situation you contact us with a view to assisting you in your immigration objectives in the most efficient and legally astute method.